

**Written Statement of the Government of the
United States of America**

BEFORE THE
INTERNATIONAL COURT OF JUSTICE

The Hague

The Netherlands

Request by the
World Health Organization for an Advisory Opinion on the
Question of the Legality Under International Law
and the World Health Organization Constitution of the
Use of Nuclear Weapons by a State in
War or Other Armed-Conflict

WRITTEN STATEMENT

OF THE

GOVERNMENT OF THE UNITED STATES OF AMERICA

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I. INTRODUCTION AND SUMMARY

By resolution WHA 46.40 of May 14, 1993, the World Health Organization ("WHO") has requested an advisory opinion from the International Court of Justice 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?

Upon receiving the request, the Court decided that the WHO and its Member States are likely to be able to furnish information on the question and by order of September 13, 1993, fixed June 10, 1994 as the time limit within which written statements relating to the question may be submitted by the WHO and Member States in accordance with Article 66, paragraph 2 of the Statute of the Court. The United States hereby submits its statement of views on this request.¹ This statement examines the jurisdiction and discretion of the Court to provide the requested opinion, and provides views of the United States regarding the legal question presented to the Court. The legal question addresses issues relating to the use of nuclear weapons by a State in war or other armed conflict.

In the view of the United States, the Court lacks jurisdiction to provide the requested opinion because the WHO has not been authorized to request an opinion on the legal question presented by the request. Were the Court to determine that it has jurisdiction to provide the requested opinion, the United States believes that the Court, in the exercise of the discretion provided by Article 65, paragraph 1, of its Statute, should decline to provide an opinion.

The legal question presented by the request does not address the functions and responsibilities of the WHO. Rather, the question presented is vague and abstract, addressing complex issues which are the subject of consideration among interested States and within other bodies of the United Nations which have an express mandate to address these

¹The United States is a Member of the WHO and, as an original Member of the United Nations, is a party to the Statute of the Court by virtue of Article 93 of the United Nations Charter.

... matters. Under the circumstances, a decision by the Court in regard to the question cannot provide any practical guidance to the WHO in the performance of its functions. Such a decision, however, has the potential of undermining progress already made or being made on this sensitive subject as a result of efforts in other fora and, therefore, is contrary to the interests of the United Nations Organization.

For these reasons, the United States urges the Court to decline the request by the WHO to provide an opinion. In view of the possibility that the Court may decide to provide an opinion, this statement also addresses the legal question presented by the request.

... There is no general prohibition in conventional or customary international law on the use of nuclear weapons. On the contrary, numerous agreements regulating the possession or use of nuclear weapons and other state practice demonstrate that their use is not deemed to be generally unlawful. Moreover, nothing in the body of international humanitarian law of armed conflict indicates that nuclear weapons are prohibited per se. Finally, there is no basis for concluding that the use of nuclear weapons would violate the obligations of Member States under the WHO Constitution.

In view of the importance of the legal question presented, the United States requests the opportunity to provide further comments or observations relating to that question should the Court determine to respond to the request.

II. THE WHO IS NOT COMPETENT TO REQUEST AN OPINION ON THE LEGALITY OF THE USE OF NUCLEAR WEAPONS.

A. The Authority of the WHO to Request Opinions is Limited.

Article 65, paragraph 1, of the Statute of the Court authorizes the Court to give an advisory opinion:

...on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

Article 96, paragraph 1, of the United Nations Charter provides that the General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal questions. Article 96, paragraph 2, provides that other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities. As the Court has recognized, it has jurisdiction to provide an advisory opinion to a specialized agency only to the extent authorized by the General Assembly.²

In 1947, the WHO was authorized by the General Assembly to request advisory opinions of the Court on legal questions arising within the scope of its activities, in accordance with Article 96, paragraph 2, of the Charter, Article 76 of the Constitution of the WHO and Article X, paragraph 2, of the Agreement between the United Nations and the WHO.³

²Interpretation of Peace Treaties With Bulgaria, Hungary and Romania, Advisory Opinion, I.C.J. Reports 1950, p. 70; see also S. Rosenne, The Law and Practice of the International Court, (2d ed. 1985), pp. 660-61, 714, 726.

³G.A. Res. 124(II), (15 November 1947), U.N. GAOR, 2nd Sess., at 28, U.N. Doc. A/519.

Article 76 of the Constitution of the WHO provides:

Upon authorization by the General Assembly of the United Nations or upon authorization in accordance with any agreement between the Organization and the United Nations, the Organization may request the International Court of Justice for an advisory opinion on any legal question arising within the competence of the Organization.⁴

Article X, paragraph 2, of the Agreement between the WHO and the United Nations provides:

The General Assembly authorizes the World Health Organization 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 Organization and the United Nations or other specialized agencies.⁵

In accordance with the Charter, the Statute of the Court and the authorization of the General Assembly, the WHO may not request an opinion on any legal question it chooses. The legal question must arise within the scope of its competence,⁶ and must not concern the

⁴Constitution of the World Health Organization, 22 July 1946, 14 U.N.T.S. 185.

⁵Agreement Between the United Nations and the World Health Organization, 12 November 1948, 19 U.N.T.S. 193. The Agreement was adopted by the First World Health Assembly on July 10, 1948.

⁶Because the Agreement between the WHO and the United Nations authorizes requests for advisory opinions on legal questions arising "within the scope of its competence" while Article 96 of the United Nations Charter authorizes such requests in regard to questions arising "within the scope of the activities" of the specialized agency, the legal question that is the subject of a request must arise both within the scope of the legal activities of the WHO and within the scope of its competence.

mutual relationships of the WHO with the United Nations or other specialized agencies.⁷

The WHO invoked this authority to request an advisory opinion of the Court on one earlier occasion. In 1980, it requested an advisory opinion concerning the interpretation of a 1951 agreement between the WHO and Egypt.⁸ That request dealt with a legal question within the competence of the WHO, since it involved the interpretation and application of an agreement concluded by the WHO and a Member State relating to the establishment of the WHO Regional Office for the Eastern Mediterranean. No question arose regarding the competence of the WHO to request an opinion on that question.

B. The WHO Lacks Competence to Request the Opinion.

The question presented by the WHO addresses the right of States, under international law and the WHO Constitution, to use nuclear weapons in war or other armed conflict. The WHO has no authority under its Constitution to address this question.

1. The Mandate of the WHO is to Assist States in Enhancing the Provision of Health Services. The WHO is one of a number of specialized agencies brought within the United Nations system in accordance with the United Nations Charter.⁹ As recognized in the Charter, these agencies have wide international responsibilities defined in their basic instruments in economic, social, cultural, educational, health, and related fields.¹⁰ In this regard, their technical functions and mandates differ markedly from the political functions and mandates of the General Assembly and Security Council.

The mandate of the WHO is set out in its Constitution, which describes the objective

⁷The legal question presented by this request does not concern the mutual relationships of the WHO with the United Nations or other specialized agencies.

⁸Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, p. 73.

⁹U.N. CHARTER, Arts. 57, 63.

¹⁰Id., Art. 57.

of the Organization and the functions through which it is to achieve that objective. The objective of the WHO is the "attainment by all peoples of the highest possible levels of health."¹¹ Under the Constitution, this objective is to be achieved through the promotion and development of technical programs directed at enhancing the provision of health services to the populations of Member States. For example, the WHO is: "to assist in strengthening health services" (2(c)); "to establish and maintain such administrative and technical services as may be required, including epidemiological and statistical services" (2(f)); "to promote, in co-operation with other specialized agencies where necessary, the improvement of nutrition, housing, sanitation, recreation, economic or working conditions and other aspects of environmental hygiene" (2(i)); "to promote improved standards of teaching and training in the health, medical and related professions" (2(o)); and "to develop, establish and promote international standards with respect to food, biological, pharmaceutical and similar products" (2(u)).

Nothing in the objective or described functions of the WHO suggests that the Organization has responsibility or authority in regard to the use of nuclear weapons. As the Legal Counsel for the WHO stated in 1992 in explaining why the General Committee of the Forty-Fifth World Health Assembly rejected a proposal for an agenda item that would seek an advisory opinion from the Court on the legality of the use of nuclear weapons:

Whether the use of nuclear weapons is legal or illegal is a question which does not so readily fit the 22 constitutional functions of WHO under Article 2 or the 13 Health Assembly functions under Article 18.¹²

Moreover, the WHO has not identified any other provision in the WHO Constitution that would provide a basis for a request to the Court for an opinion concerning the legality of the use of such weapons.

¹¹WHO Constitution, *supra* note 4, Art. 1.

¹²WHA, Plenary Verbatim Records, Doc. WHA45/1992/REC/2, p. 223 (May 13, 1992).

2. The WHO Resolution Does Not Identify a Basis for Such a Request in the WHO Constitution. The resolution by which the WHO determined to request an opinion regarding the legality of the use of nuclear weapons contains nine preambular and two operative paragraphs. None of those provisions identifies a responsibility or authority of the WHO which would provide a basis for requesting an opinion on that question.

The second preambular paragraph notes the Report of the Director-General on health and environmental effects of nuclear weapons, referring to document A46/30.¹³ The paragraph, however, fails to identify what aspects of that report provide a basis for the request. The report, like earlier reports on this subject issued by the WHO,¹⁴ does not make any reference to the question of the legality of the use of nuclear weapons.

The third preambular paragraph recalls three previous WHO resolutions addressing the "effects of nuclear war on health and health services". None of these resolutions addresses the legality of the use of nuclear weapons.¹⁵ The fifth preambular paragraph recalls other WHO resolutions addressing sustainable development¹⁶ and environmental degradation.¹⁷ Those resolutions do not purport to address the subject of nuclear weapons. Nonetheless, they are included in the WHO Resolution to introduce a statement referring to

¹³WHO Doc. A46/30, Report by the Director-General, Health and Environmental Effects of Nuclear Weapons, (April 26, 1993).

¹⁴Effects of Nuclear War on Health and Health Services, (Geneva, World Health Organization, 1984); WHO Doc. A38/INF. Doc./5, Effects of Nuclear War on Health and Health Services, (April 10, 1985); Effects of Nuclear War on Health and Health Services, (Geneva, World Health Organization, 2d ed. 1987); WHO Doc. A44/INF. Doc./5, Effects of Nuclear War on Health and Health Services, (April 25, 1991).

¹⁵World Health Assembly ("WHA") Res. 34.38 (1981); WHA Res. 36.28 (1993); WHA Res. 40.24 (1987).

¹⁶WHA Res. 42.26 (1989) addresses the sustainable and equitable use of global resources in the context of health and socioeconomic development.

¹⁷WHA Res. 45.31 (1992) concerns an environmental health strategy which includes disease prevention and risk assessment programs as well as the development of global data bases on environmental health hazards.

the short and long term environmental consequences of the use of nuclear weapons.

The preambular paragraphs refer specifically to the WHO Constitution in two instances. The first preambular paragraph makes a passing reference to "principles laid down in the WHO Constitution", without specifying which ones may have a bearing on its authority to make this request. The United States is unaware of any such principles.¹⁸ The eighth preambular paragraph refers to specific provisions of the Constitution setting out some of the functions of the Organization. The specific provisions identified address the role of the WHO to act as the directing and coordinating authority on international health work (Article 2(a)); to propose conventions, agreements and regulations (Article 2(k))¹⁹; to report on administrative and social techniques affecting public health from preventive and curative points of view (Art. 2(p)); and to take all necessary action to attain the objectives of the Organization (Art. 2(v)). These functions, similar to the ones discussed above, describe activities that serve to assist the WHO in the promotion and development generally of technical programs to enhance the provision of health services.

The remainder of the preambular paragraphs reiterate the longstanding concerns of the WHO in regard to the effects that the use of nuclear weapons would have on health and the environment. The fourth preambular paragraph states that no health service in the world can alleviate in any significant way a situation resulting from the use of even one single nuclear weapon. The sixth and seventh preambular paragraphs state that primary prevention is the only appropriate means to deal with the health and environmental effects of the use of such

¹⁸The WHO Constitution sets out ten principles relating generally to the promotion and protection of health. None of these mentions nuclear or any other weapons. The only reference that even remotely bears on the subject of war or armed conflict is the declaration that "The health of all people is fundamental to the attainment of peace and security and is dependent upon the fullest cooperation of individuals and states." WHO Constitution, third principle, supra note 4.

¹⁹The mandate to propose conventions must be read in conjunction with Article 19 of the WHO Constitution, which expressly confines this authority to matters within the competence of the Organization. See also Article 23, which contains similar limitations relating to the authority of the Assembly to make recommendations. The mandate to adopt regulations must be read in conjunction with Article 21, which confines that authority to a discrete list of technical health matters.

weapons and note the concerns of the world health community about the threat to health and the environment from such weapons. The ninth preambular paragraph states that primary prevention of the health hazards of nuclear weapons requires clarity about the status in international law of their use.

While these provisions serve to emphasize the concerns of the WHO for the health effects of the use of nuclear weapons, they do not identify any basis for the WHO to address the legality of the use of such weapons. The emphasis that the WHO places on the health and environmental effects in the question presented to the Court, when read in the context of the preambular paragraphs, however, suggests that the effects of the use of nuclear weapons are relied upon to provide the basis for the request. The United States cannot agree that the WHO Constitution can be construed to provide the WHO with competence to address the legality of any activity that could effect the health of Member States' populations.

While the WHO has authority to seek opinions on legal questions that arise within the scope of its competence, it must base its request upon some provision of its Constitution that establishes its responsibility or authority in regard to the matter that is the subject of the question. It is not sufficient that such activity produce effects that concern the Organization or which the Organization may be required to address. There are few activities in which States are engaged today that could not arguably come within the authority of the WHO under such a construction of its Constitution.

The Legal Counsel of the WHO rejected the argument that the Constitution of the WHO can be construed to provide competence to request an opinion on the legality of the use of nuclear weapons based on the health and environmental effects of such activities. During the discussion within the World Health Assembly in 1993 of the proposal to make the present request for an advisory opinion and in response to questions put to him, the Legal Counsel for the WHO advised Member States on two occasions that the present request was not within the competence of the World Health Assembly:

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 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.²⁰

3. The WHO Request Runs Counter to the Practice of the WHO and the International Community. The WHO has, to our knowledge, never attempted to regulate the use of nuclear weapons, for the obvious reason that it has no competence or capability to do so. While concern in the international community about the possible use of nuclear weapons has been widespread since 1945, the WHO did not begin to address this subject until the 1960's. At that time, and until it determined in 1993 to seek the requested opinion, it confined its actions to the effects of such weapons on health and health services.

Beginning in 1961 and continuing off and on through the following years, the WHO focused on the health risks associated with testing and use of nuclear weapons, adopting a number of resolutions²¹ and issuing a number of reports²² on this subject. None of these resolutions or reports made any reference to the question of the legality of the use of nuclear weapons in war or other armed conflict.

At the World Health Assembly meeting in 1992, a number of States proposed a draft resolution under an agenda item entitled "Health and Environmental Effects of Nuclear Weapons" which 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 Court on

²⁰WHA Verbatim Records A/46/1993/REC/2, p. 278 (May 14, 1993); see also similar statement in Committee B, WHA Summary Records A/46/1993/REC/3, p.265 (May 12, 1993) and statement in 1992 to the plenary of the 45th WHA, supra note 12, pp. 223-224.

²¹WHA Res. 14.56 (1961); WHA Res. 19.39 (1966); WHA Res. 26.57 (1973); WHA Res. 34.38 (1981); WHA Res. 36.28 (1983); WHA Res. 39.19 (1986); WHA Res. 40.24 (1987).

²²Supra note 14.

the status of nuclear weapons in view of their effects on health and the environment.²³ The Assembly took no action on the draft resolution.²⁴ However, the same item was included on the provisional agenda for the 1993 meeting.²⁵ In preparation for that meeting, the WHO Director-General prepared a report on the subject reviewing the previous WHO work on the matter and summarizing the conclusions of that work.²⁶ That report, like earlier reports, did not make any reference to the legality of the use of nuclear weapons.

In fact, questions relating to the use of nuclear weapons in time of war or other armed conflicts are reserved for States or other bodies within the United Nations system. The United States has been actively engaged in bilateral and multilateral consultations with other States to address issues relating to the possession and use of nuclear weapons. Within the United Nations system, the subject of nuclear weapons is within the mandate of the Conference on Disarmament, the Security Council and the General Assembly. These bodies not only have the mandate to address the highly complex and sensitive issues relating to nuclear weapons but also the necessary technical and political expertise. The Legal Counsel of the WHO, in explaining why the General Committee at the Forty-Fifth World Health Assembly rejected a proposal for an agenda item that would seek an advisory opinion on the legality of the use of nuclear weapons, noted:

We must respect the original mandates of the other bodies in the United Nations system. This is a matter that has been stressed by both the Director-General of WHO and the Secretary-General of the United Nations. Consequently, it might be considered better if the matter of the legal status of the use of nuclear

²³WHO Doc. A/45/A/Conf.Paper No.2 (May 9, 1992); see also, supra notes 12 and 20, with accompanying text.

²⁴WHA45/1992/REC/3, p.5. The General Committee voted 6 to 3, with 9 abstentions, not to include this draft resolution on the agenda.

²⁵WHO Doc. A46/30, supra note 13.

²⁶Id.

weapons were handled in such a way that the question was raised through forums of the United Nations.²⁷

Progress has been made on both bilateral and multilateral levels culminating in successful contributions to international security and stability.

The resulting contributions include a long list of historic arms control agreements which are described in Chapter IV of this statement.²⁸ The recently concluded START II Treaty will reduce even further the number of nuclear weapons held by the leading nuclear-weapon states and contribute significantly to increased stability. Negotiations in the Geneva Conference on Disarmament on a comprehensive test ban treaty are a priority task, and efforts to achieve the indefinite extension of the Non-Proliferation Treaty are well underway. Finally, technical, legal and policy experts regularly meet within the numerous compliance and implementation bodies established by various treaties to work out detailed implementation issues, contributing to the successful operation of established regimes. In sum, concerned States have for decades successfully marshalled their resources -- in terms of technical capability, political will and national resolve -- to address the problems of proliferation and control of nuclear weapons, but these efforts have uniformly been conducted in channels possessing the necessary technical ability and political authority to address such matters.

While the WHO might concern itself with measures to protect human health from the effects of some hypothetical future use of nuclear weapons, this would not turn in any way on the Court's view of the legality of such use. Rather, the request for an advisory opinion is an attempt to pursue political objectives with respect to nuclear weapons that contributes nothing to the fulfillment by the WHO of its functions under its Constitution. Accordingly, the question presented by the request for an advisory opinion is not one within the competence of the WHO.

²⁷45th WHA Plenary, supra note 12, p. 223.

²⁸Infra, pp. 16-31.

III. IN THE EXERCISE OF ITS DISCRETION, THE COURT SHOULD DECLINE TO ISSUE AN OPINION

It is well established that pursuant to Article 65 of its Statute, the Court has discretion whether to provide an advisory opinion where it otherwise has jurisdiction to entertain the request.²⁹ Where the proposed opinion would serve to assist another organ of the United Nations in understanding and carrying out its responsibilities, the Court should be reluctant to refuse such a request. Thus, in the cases where this question has arisen, the Court has often indicated that in principle it should not refuse to provide an opinion when requested by another organ of the United Nations or a specialized agency.³⁰

²⁹Interpretation of Peace Treaties With Bulgaria, Hungary and Romania, Advisory Opinion, I.C.J. Reports 1950, p. 65 at p. 72; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 19; S. Rosenne, supra note 2, pp. 652, 658, 698.

³⁰Judgments of the Administrative Tribunal of the International Labour Organization Upon Complaints Made Against the United Nations Educational Scientific and Cultural Organization, Advisory Opinion, I.C.J. Reports 1956, p. 86; Interpretation of Peace Treaties With Bulgaria, Hungary and Romania, I.C.J. Reports 1950, pp.71-72; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951, p. 19; Rosenne, supra note 2, p. 709. In other instances, the Court has indicated that only for compelling reasons should the Court decline to provide an opinion where it otherwise has jurisdiction. Judgments of the Administrative Tribunal of the I.L.O., Advisory Opinion, I.C.J. Reports 1956, p. 86. The Court, after satisfying itself that the procedures adopted ensure the application of the principle of equality of parties, concluded that:

Notwithstanding the permissive character of Article 65 of the Statute in the matter of advisory opinions, only compelling reasons could cause the Court to adopt in this matter a negative attitude which would imperil the working of the regime established by the Statute of the Administrative Tribunal for the judicial protection of officials.

Subsequently, the Court has reiterated the view that an opinion should be provided unless there are "compelling reasons to the contrary" without specifying the harm that a refusal to grant the request for the opinion would have to the UN system. Applicability of Article VI,

However, in no case has the Court been asked to provide an opinion on an abstract question, the answer to which could not reasonably be expected to provide practical guidance to the fulfillment of the functions of the requesting body. Unlike other requests for advisory opinions, the present request does not present a dispute or situation upon which specific legal advice can usefully be given. Rather, the request presents a very general and vague question that would of necessity involve complex legal, technical, political and practical considerations. These matters cannot usefully be addressed in the abstract without reference to the specific circumstances under which any use of nuclear weapons would be contemplated. The Court should not, on a matter of such fundamental importance, engage in speculation about unknown future situations.

Where the issuance of an opinion will not provide any practical guidance to the requesting body, there is little reason for the Court to grant the request. Moreover, where providing an opinion might create difficulties for another part of the United Nations Organization in carrying out its responsibilities, the Court may appropriately determine that the Organization is better served by the Court's declining a request.³¹

An opinion on this complex and sensitive matter could serve to complicate the work of States or other United Nations bodies, perhaps undermining the progress already made in this area. As the WHO Assembly noted in its resolution making the request for this opinion, "marked differences of opinion have been expressed by Member States about the lawfulness

Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989, p. 191.

³¹In exercising its discretion in this matter, the United States believes that it is appropriate for the Court to take into account the significant number of States that did not express support for this request. At the 1993 WHA meeting, a draft resolution providing for this request to the Court was tabled. It first was acted upon in Committee B, where, after considerable debate, it was approved on May 12 by a vote of 73 of the 187 Members of the WHO. Thirty-one Members opposed (including the United States), 6 abstained, and 77 States did not participate. The resolution was then introduced in plenary session, where, after further debate, on May 14 it was formally adopted by a vote of 73 of the 187 Members. On this occasion, however, 40 Members opposed (including the United States), 10 abstained, and 64 States did not participate.

of the use of nuclear weapons.³² The substantial progress made to date in controlling the possession and use of nuclear weapons has been possible because States have set aside their differences and concentrated on agreeing upon practical measures to reduce the danger of nuclear conflict. Pronouncements by the Court on the abstract question of the legality of the use of nuclear weapons could well undermine this progress and compel States to turn to a fruitless debate about the legal implications of the Court's pronouncements.

For these reasons, the United States believes the Court should, in the exercise of its discretion under Article 65 of its Statute, decline to provide a response to the request.

³²WHA Res. 46.40 (1993), ninth preambular.

IV. THE SUBSTANCE OF THE QUESTION POSED

A. Introduction

As described below, some States have by agreement undertaken not to possess or use nuclear weapons under any circumstances and others have undertaken not to use such weapons in certain defined areas. Apart from this, there is no prohibition in conventional or customary international law on the use of nuclear weapons. On the contrary, international law is replete with agreements that regulate the possession or use of nuclear weapons, providing strong evidence that their use is not deemed to be generally unlawful. The practice of States, including the Permanent Members of the Security Council, all of whom maintain significant stocks of nuclear weapons, further proves this point.

Further, nothing in the body of the international humanitarian law of armed conflict indicates that nuclear weapons are prohibited per se. As in the case of other weapons, the legality of use depends on the conformity of the particular use with the rules applicable to such weapons. This would, in turn, depend on factors that can only be guessed at, including the characteristics of the particular weapon used and its effects, the military requirement for the destruction of the target in question and the magnitude of the risk to civilians. Judicial speculation on a matter of such fundamental importance would be inappropriate.

Finally, there is no basis whatsoever for concluding that the use of nuclear weapons would violate the WHO Constitution. Nothing in the Constitution can be construed as establishing such a prohibition. Indeed, as previously indicated in this submission, the question of the legality of the use of nuclear weapons is not within the competence of the WHO.

B. There is No General Prohibition on the Use of Nuclear Weapons.

It is a fundamental principle of international law that restrictions on States cannot be presumed but must be found in conventional law specifically accepted by them or in customary law generally accepted by the community of nations. There is no general

prohibition on the use of nuclear weapons in any international agreement. There is likewise no such prohibition in customary international law. Such a customary prohibition could only result from a general and consistent practice of States followed by them from a sense of legal obligation. We submit, based on the following analysis of the agreements, conduct and expressed views of States, that there is no such practice.

1. Customary Law. Customary international law is created by a general and consistent practice of States followed by them from a sense of legal obligation.³³ Evidence of a customary norm requires indication of "extensive and virtually uniform" State practice, including States whose interests are "specially affected."³⁴ Among the actions of States that contribute to the development of customary international law are international agreements concluded by them, governmental acts, and official statements of what the law is considered to be. (However, mere hortatory declarations or acts not based on a perception of legal obligation would not suffice.)³⁵

With respect to the use of nuclear weapons, customary law could not be created over the objection of the nuclear-weapon States, which are the States whose interests are most specially affected. Nor could customary law be created by abstaining from the use of nuclear weapons for humanitarian, political or military reasons, rather than from a belief that such abstention is required by law. Among the more important indicators of State practice in this area are the international agreements that regulate but do not prohibit nuclear weapons, the acquisition and deployment of nuclear weapons by the major military powers, and the official views expressed by States on this question.

2. International Agreements. We are aware of no international agreement -- and certainly none to which the United States is a Party -- that contains a general prohibition on

³³See Restatement of the Foreign Relations Law of the United States, Vol. 1, Section 102: Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta) ICJ Reports, 1985, pp. 29-30.

³⁴North Continental Shelf Cases (Federal Republic of Germany v. Denmark), 1969 I.C.J. Reports p. 43.

³⁵See 7 Encyclopedia of Public International Law, pp. 62-63 (1984).

the use of nuclear weapons. On the contrary, it is evident that existing agreements proceed from the assumption that there is no such general prohibition.

a. Use of other weapons. There are a number of prohibitions in international agreements on the use of other specific categories of weapons. These include: biological and chemical weapons (the 1925 Geneva Protocol);³⁶ the use of environmental modification techniques as weapons (the 1977 Environmental Modification Convention);³⁷ exploding bullets (the 1868 Declaration of St. Petersburg);³⁸ and weapons with non-detectable fragments (the 1981 Convention on Specific Conventional Weapons).³⁹ This pattern implies that there is no such general prohibition on the use of nuclear weapons, which would otherwise have found expression in a similar international agreement.

b. Agreements Regulating Use of Nuclear Weapons. A few international agreements regulate the use of nuclear weapons, doing so in a way that indicates there is no general prohibition on the use of such weapons. For example, there are agreements that prohibit the use of nuclear weapons in particular regions: Antarctica (the Antarctic Treaty);⁴⁰ Latin America (the 1967 Treaty of Tlatelolco);⁴¹ and the South Pacific (the South Pacific

³⁶Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 17 June 1925, 94 U.N.T.S. 65.

³⁷Convention on the Prohibition of Military and any other Hostile Use of Environmental Modification Techniques, 18 May 1977, 1125 U.N.T.S. 3.

³⁸Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, 11 December 1868, in Roberts & Guelff, Documents on the Laws of War (1989).

³⁹Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 April 1981, in Roberts & Guelff, Documents on the Laws of War (1989).

⁴⁰Antarctic Treaty, 1 December 1959, 402 U.N.T.S. 71.

⁴¹Treaty for the Prohibition of Nuclear Weapons in Latin America, 14 February 1967, 634 U.N.T.S. 281.

Nuclear Free Zone Treaty).⁴²

The Antarctic Treaty prohibits all nuclear explosions on the Antarctic continent. The Treaty of Tlatelolco prohibits the Latin American Parties from using nuclear weapons under any circumstances; at the same time, two separate Additional Protocols, to which nuclear-weapon States are invited to adhere, obligate them to observe the same prohibition within a defined area in the Western Hemisphere. Similarly, Protocol 2 to the South Pacific Nuclear Free Zone Treaty (to which nuclear-weapon States are invited to adhere) prohibits Protocol Parties from using nuclear weapons against any Treaty Party. These provisions would make no sense if there were already a general prohibition on the use of nuclear weapons.

c. Agreements regulating manufacture, testing or possession. A number of international arms control agreements prohibit or regulate the manufacture, testing or possession of nuclear weapons or systems for their delivery. These include the 1963 Limited Test Ban Treaty,⁴³ the 1967 Outer Space Treaty,⁴⁴ the 1968 Non-Proliferation Treaty,⁴⁵ the 1971 Seabed Arms Control Treaty,⁴⁶ the 1972 Anti-Ballistic Missile (ABM) Treaty,⁴⁷ the

⁴²South Pacific Nuclear Free Zone Treaty, 6 August 1985.

⁴³Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water, 5 August 1963, 480 U.N.T.S. 43.

⁴⁴Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, 27 January 1967, 610 U.N.T.S. 205.

⁴⁵Treaty on the Non-proliferation of Nuclear Weapons, 1 July 1968, 729 U.N.T.S. 161.

⁴⁶Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, 11 February 1971, 955 U.N.T.S. 115.

⁴⁷Treaty on the Limitation of Anti-Ballistic Missile Systems, 26 May 1972, 944 U.N.T.S.13.

1974 Threshold Test Ban Treaty,⁴⁸ the 1987 Intermediate-Range Nuclear Forces (INF) Treaty⁴⁹ and the 1991 Treaty on the Reduction and Limitation of Strategic Offensive Arms (START).⁵⁰ These treaties would be unnecessary if there were already a generally-accepted prohibition on the use of nuclear weapons.

Further, the terms of these treaties implicitly acknowledge in many ways that the continued possession and use of such weapons (within the confines of treaty limitations) are not prohibited. For example, the Limited Test Ban Treaty (to which there are well over one hundred parties) permits underground nuclear weapons testing, while prohibiting testing elsewhere. This is a clear acknowledgement that the possession of such weapons by the nuclear-weapon States is lawful and implies that use in at least some circumstances would also be lawful, since possession and testing of such weapons would otherwise be purposeless. Likewise, the Non-Proliferation Treaty accepts the lawfulness of the development and possession of nuclear weapons by the nuclear-weapon States designated in the Treaty, which would make no sense if all uses of such weapons were unlawful.

The ABM and START Treaties go even further in that they sanction the need for deterrent nuclear-weapon forces, prohibit the creation of destabilizing defenses against them, and prohibit or restrict offensive forces that could destroy them. Furthermore, the START Treaty accepts the legality and propriety of limited deployments of nuclear-weapon systems that are deemed to contribute to a stable nuclear deterrent posture. This entire structure of obligations would make no sense if the use of nuclear weapons was considered to be unlawful under all circumstances.

⁴⁸Treaty on the Limitation of Underground Nuclear Weapon Tests, 3 July 1974, U.S. Senate Executive N (94th Cong., 2d Sess.), 13 ILM (1974) 906.

⁴⁹Treaty on the Elimination of Intermediate-range and Shorter-range Missiles, 8 December 1987, U.S. Senate Treaty Doc. 100-11 (100th Cong., 2d Sess.), 27 ILM (1988) 84.

⁵⁰Treaty on the Reduction and Limitation of Strategic Arms, 3 January 1993, U.S. Senate Treaty Doc. 103-1 (103d Cong., 1st Sess.), UN Disarmament Yearbook, Vol. 16 (1991), App. II, p. 450.

d. Agreements dealing with accidental or unauthorized use. Several international arms control agreements have been concluded that attempt in various ways to minimize the chance of accidental or unauthorized use of nuclear weapons. They include the 1963 "Hot Line" Agreement,⁵¹ the 1971 Accidents Measures Agreement,⁵² the 1973 Prevention of Nuclear War Agreement⁵³ and the 1987 Nuclear Risk Reduction Agreement.⁵⁴ In addressing the need for arrangements to minimize the risk of unintended use of nuclear weapons, these agreements are additional evidence of the acceptance by States that the possession and use of such weapons are not generally prohibited.

3. Conduct of States. It is well known that the Permanent Members of the Security Council (and perhaps other States) possess nuclear weapons and have developed and deployed systems for their use in armed conflict.⁵⁵ These States would not have borne the expense and effort of acquiring and maintaining these weapons and delivery systems if they believed that the use of nuclear weapons was generally prohibited. On the contrary, the possible use of these weapons is an important factor in the structure of their military establishments, the development of their military doctrines and strategy, and their efforts to prevent aggression and provide an essential element of the exercise of their right of self-defense. (These deployments and doctrines are described in detail in the 1990 Report of the Secretary-General

⁵¹Memorandum of Understanding regarding the Establishment of a Direct Communications ("Hot-Line") Link, 20 June 1963, 472 U.N.T.S. 163.

⁵²Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War, 30 September 1971, 807 U.N.T.S. 57.

⁵³Agreement on the Prevention of Nuclear War, 22 June 1973, 24 U.S.T. 1478.

⁵⁴Agreement on the Establishment of Nuclear Risk Reduction Centers, 15 September 1987.

⁵⁵See Report of the U.N. Secretary-General on Nuclear Weapons, A/45/373, 18 September 1990, pp. 19-24.

on nuclear weapons.)⁵⁶ This pattern of conduct is inconsistent with the existence of any general legal prohibition on the use of nuclear weapons.

The fact that such weapons have actually been used in only one armed conflict does not suggest the contrary. Certainly nuclear-weapon States have preserved the option to use nuclear weapons if necessary, and (as is explained below) have not refrained from further use of these weapons because they believed such use to be unlawful – which is an essential element in the development of customary international law.

4. Expressed Views of States. Various States have taken differing views on the legality of the use of nuclear weapons. As the United Nations Secretary-General has recently concluded, "no uniform view has emerged as yet on the legal aspects of the possession of nuclear weapons and their use as a means of warfare."⁵⁷ This is confirmed by the WHO resolution that requested an advisory opinion, which refers to the fact that "marked differences of opinion have been expressed by Member States about the lawfulness of the use of nuclear weapons."⁵⁸ The variety and disparity of views expressed by States demonstrates that there is no generally-accepted prohibition on the use of nuclear weapons. Under these circumstances, customary international law does not include such a general prohibition.

The position of the nuclear-weapon States is best illustrated by their official statements on nuclear-weapons use in connection with the Non-Proliferation Treaty and the Treaty of Tlatelolco. In 1978, U.S. President Carter declared that:

The United States will not use nuclear weapons against any non-nuclear-weapon State party to the NPT or any comparable internationally binding commitment not to acquire nuclear explosive devices, except in the case of an attack on the United States, its territories or armed forces, or its allies, by such a State allied to a nuclear-weapon State or associated with a

⁵⁶Id., pp. 61-71.

⁵⁷Id., p. 130.

⁵⁸WHA 46.40 (1993) preambular para. 9.

nuclear-weapon State in carrying out or sustaining the attack.⁵⁹

Similar statements were made by the United Kingdom and France.⁶⁰ China stated that:

As is known to all, the Chinese Government has long declared on its own initiative and unilaterally that at no time and under no circumstances will China be the first to use nuclear weapons, and that it undertakes unconditionally not to use or threaten to use nuclear weapons against non-nuclear countries and nuclear-free zones.⁶¹

The Russian Federation stated in 1993 that:

The Russian Federation 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.⁶²

Although these statements differ in some respects, they have certain important common features. First, none acknowledges any general prohibition on the use of nuclear weapons; on the contrary, each clearly reserves the right to use nuclear weapons in some circumstances. Second, limits on the use of nuclear weapons are stated as a matter of

⁵⁹UN Disarmament Yearbook, Vol. 14 (1989), p. 180.

⁶⁰*Id.*, p. 179-80.

⁶¹*Id.*, p. 179.

⁶²Presidential Decree No. 1833 (2 November 1993).

national policy, not legal obligation. Third, limits are offered only with respect to States that have accepted the obligations of the Non-Proliferation Treaty (or similar obligations), thus indicating that there are no comparable constraints on the use of nuclear weapons against States generally.

Likewise, at the time of its ratification of Additional Protocols I and II to the Tlatelolco Treaty, the United States made a formal statement of understandings and declarations, including a statement that effectively reserved its right to use nuclear weapons against one of the Contracting Parties in the event of "an armed attack by a Contracting Party, in which it was assisted by a nuclear-weapon State" ⁶³ Similar statements were made by the United Kingdom and the Soviet Union. ⁶⁴ France stated that nothing in the Protocol could present an obstacle to "the full exercise of the right of self-defense confirmed by Article 51 of the United Nations Charter." ⁶⁵

Additional statements of nuclear-weapon States on the use of nuclear weapons are contained in Appendix I to the Secretary-General's 1990 Report. ⁶⁶ In each case, the government in question stated its resolve to act in such a manner as to avoid the necessity for the use of nuclear weapons, but in no case is there a recognition of any general prohibition on the use of nuclear weapons.

Beginning with Resolution 16/1653 in 1961, the U.N. General Assembly has adopted a series of resolutions declaring that the use of nuclear weapons is contrary to the U.N. Charter and international law generally. ⁶⁷ These General Assembly resolutions, however, do

⁶³28 ILM 1423.

⁶⁴Id. at 1418, 1422.

⁶⁵Id. at 1415.

⁶⁶Report of the U.N. Secretary-General on Nuclear Weapons, A/45/373, 18 September 1990, pp. 61-75. See also the statement of U.S. Defense Secretary Schlesinger in 1975 Digest of U.S. Practice in International Law, pp. 800-01.

⁶⁷E.g., UNGA Res. 33/71 B (1978), 35/152 D (1980), 36/92 I (1981), 46/37 D (1991), 47/53 C (1992).

not create legal obligations and could only be declarative of the existence of principles of customary international law to the extent that such principles had been recognized by the international community, including the States most directly affected. In fact, there were a significant number of U.N. Member States that did not accept these resolutions; in particular these resolutions were not accepted by the majority of the nuclear-weapon States.

For example, Resolution 1653 was adopted by a vote of 55 to 20, with 26 abstentions, and each of the others attracted at least 16 negative votes and a number of absentions. In each case, the United States, the United Kingdom and France voted against the resolution. The representative of the United Kingdom, in explaining his Government's vote on Resolution 1653, stated that "so long as States possess nuclear weapons, they will use them in self-defense."⁶⁸ The representative of the United States stated that:

. . . it is simply untrue to say that the use of nuclear weapons is contrary to the Charter and to international law Indeed, the very provisions of the Charter approve, and demand, the exercise of self-defense against armed attack. It is very clear that the Charter says nothing whatever about any particular weapon or method which may be used for self-defense.⁶⁹

During the 1980's, the General Assembly adopted a series of resolutions urging the nuclear-weapon States to adopt a policy of refraining from the first use of nuclear weapons and to begin negotiations on a legally binding regime including the obligation not to be the first to use nuclear weapons.⁷⁰ Like the resolutions cited above, these resolutions on first use were not accepted by a significant number of U.N. Member States and in particular were not

⁶⁸16 U.N. GAOR (1063rd mtg.) at 803, U.N. Doc. A/PV .1063 (1961).

⁶⁹*Id.* at 798.

⁷⁰UNGA Res. 36/100 (1981), 37/78J (1982), 38/183 B (1983), 39/148 D (1984), 40/152 A (1985), 41/86 B (1986), 42/42 A (1987), 43/78 B (1988), 44/119 B (1989).

accepted by most nuclear-weapon States.⁷¹ Further, the adoption of these resolutions implicitly indicates a general understanding that there is no existing prohibition on all uses of nuclear weapons, since there would be no need for first-use resolutions and agreements if all uses were already prohibited.

Taken together, these various expressions of the views of States demonstrate that there is no consensus on the question of the legality of the use of nuclear weapons. In particular, there is nothing approaching the degree of acceptance by States, and of acceptance by the States most specifically affected, that would be required to create obligations under customary international law.

C. The Law of Armed Conflict Does Not Prohibit the Use of Nuclear Weapons.

The United States has long taken the position that various principles of the international law of armed conflict would apply to the use of nuclear weapons as well as to other means and methods of warfare.⁷² However, this in no way means that the use of nuclear weapons is precluded by the law of war. As the following will demonstrate, the legality of their use depends on the precise circumstances involved in any particular use of such a weapon. Those circumstances cannot be known in advance and it would be inappropriate for the Court to speculate about what those circumstances might be.

1. Making Civilians the Object of Attack. Subject to the right of reprisal (see below), it is unlawful to make civilians or civilian objects the object of attack as such.⁷³ This rule would not be violated by the use of nuclear weapons to attack targets that constitute legitimate military objectives.

⁷¹In each case, the United States, the United Kingdom and France voted against and each resolution attracted at least 17 negative votes and a number of abstentions.

⁷²See Resolution No. XXVIII of the XXth International Red Cross Conference (1965).

⁷³See Article 51(2) of Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 12 December 1977, 1125 U.N.T.S. 3.

2. Indiscriminate Attacks. It is unlawful to conduct any indiscriminate attack, including those employing weapons that are not or cannot be directed at a military objective.⁷⁴ (Of course, this does not mean that attacks are prohibited simply because they may cause collateral civilian damage or injury -- as is often the case in armed conflict.) Nuclear weapons can be directed at a military target and thus can be used in a discriminate manner.

3. Proportionality. It is unlawful to carry out any attack that may reasonably be expected to cause collateral damage or injury to civilians or civilian objects that would be excessive in relation to the military advantage anticipated from the attack.⁷⁵ Whether an attack with nuclear weapons would be disproportionate depends entirely on the circumstances, including the importance of destroying the objective, the character, size and likely effects of the device, and the magnitude of the risk to civilians.

4. Poison Weapons. The 1907 Hague Convention includes a prohibition on the use of poison weapons.⁷⁶ This prohibition was established with particular reference to projectiles that carry poison into the body of the victim. It was not intended to apply, and has not been applied, to weapons that are designed to injure or cause destruction by other means, even though they also may create toxic byproducts. For example, the prohibition on poison weapons does not prohibit conventional explosives or incendiaries, even though they may produce dangerous fumes. By the same token, it does not prohibit nuclear weapons, which are designed to injure or cause destruction by means other than poisoning of the victim, even though nuclear explosions may also create toxic radioactive byproducts.

5. 1925 Geneva Protocol. The 1925 Geneva Protocol prohibits the use in war of

⁷⁴See id., Article 51(4).

⁷⁵See id., Article 51(5)(b).

⁷⁶Hague Convention IV Respecting the Laws and Customs of War on Land, 18 October 1907, 1 Bevans 631, Annex, Art. 23(a).

asphyxiating, poisonous or other gases and analogous liquids, materials and devices.⁷⁷ This prohibition was intended to apply to weapons that are designed to kill or injure by the inhalation or other absorption into the body of poisonous gases or analogous substances. It was not intended to apply, and has not been applied, to weapons that are designed to kill or injure by other means, even though they may create asphyxiating or poisonous byproducts. Once again, the Protocol does not prohibit conventional explosives or incendiary weapons, even though they may produce asphyxiating or poisonous byproducts, and it likewise does not prohibit nuclear weapons.⁷⁸

6. 1977 Protocol I. Additional Protocol I to the 1949 Geneva Conventions contains a number of new rules on means and methods of warfare, which of course apply only to States that ratify the Protocol. It is, however, clear from the negotiating and ratification record of the Protocol that the new rules contained in the Protocol were not intended to apply to nuclear weapons.

At the outset of the negotiations that led to the Protocol, the International Committee of the Red Cross (ICRC) stated that:

Problems relating to atomic, bacteriological and chemical warfare are subjects of international agreements or negotiations by governments, and in submitting these draft Additional Protocols the ICRC does not intend to broach these problems.⁷⁹

Explicit statements to the same effect were made during the negotiations by the United States

⁷⁷Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, 17 June 1925, U.N.T.S. 65.

⁷⁸See Kalshoven, "Arms, Armaments and International Law", 191 Rec. de Cours (1985 - II), pp. 283-84.

⁷⁹International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, p. xxxii (1987).

and others.⁸⁰ The ICRC Commentary on the Protocols stated that there was "no doubt that during the four sessions of the Conference agreement was reached not to discuss nuclear weapons."⁸¹

At the time of its signature of the Protocol, the United States formally stated that:

It is the understanding of the United States of America that the rules established by this protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons.⁸²

The United Kingdom made a similar statement⁸³ and these statements were not contradicted by other signatories. Formal statements to the same effect have been made by a number of States in ratifying the Protocol and these statements have not been objected to or contradicted by other Parties.⁸⁴ It is apparent that none of these prohibitions was negotiated with nuclear weapons in mind and would not have been adopted had they been thought to be applicable to nuclear weapons.

7. Unnecessary Suffering. It is unlawful to use weapons that are of such a nature as to cause superfluous injury or unnecessary suffering.⁸⁵ This prohibition was intended to preclude weapons designed to increase the injury or suffering of the persons attacked beyond

⁸⁰See, e.g., Official Records of the Diplomatic Conference of Geneva, Vol. V, p. 134; Vol. VII, pp. 193, 295.

⁸¹Supra note 79, p. 593; see also Kalshoven, supra note 78, pp. 281-83.

⁸²Roberts & Guelff, Documents on the Laws of War (1989), p. 468.

⁸³Id., p. 467-68.

⁸⁴Id., p. 462-68.

⁸⁵See Article 23(e) of the 1907 Hague Regulations on the Laws and Customs of War on Land, supra note 76; Article 35(2) of 1977 Additional Protocol I to the 1949 Geneva Conventions, supra note 73.

that necessary to accomplish the military objective.⁸⁶ It does not prohibit weapons that may cause great injury or suffering if the use of the weapon is necessary to accomplish the military mission. For example, it does not prohibit the use of anti-tank munitions which must penetrate armor by kinetic-energy or incendiary effects, even though this may well cause severe and painful burn injuries to the tank crew. By the same token, it does not prohibit the use of nuclear weapons, even though such weapons can produce severe and painful injuries, if those weapons are required to accomplish a legitimate military mission.

8. Environmental Effects. Article I of the 1977 Environmental Modification Convention⁸⁷ prohibits "military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party." Article II defines the term "environmental modification techniques" as "any techniques for changing -- through the deliberate manipulation of natural processes -- the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space." Although one might imagine a hypothetical use of nuclear weapons to create an environmental modification technique (for example, to cause an earthquake or tidal wave), the Convention does not prohibit other uses of nuclear weapons (or any other weapon), even if they cause serious damage to the environment. Only the "deliberate manipulation" of environmental forces to cause destruction is covered.

Articles 35(3) and 55 of Additional Protocol I to the 1949 Geneva Conventions⁸⁸ prohibit the use 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." This is one of the new rules established by the Protocol that, as explained above, do not apply to nuclear

⁸⁶The prohibition has been applied, for example, to lances with barbed tips and bullets that are irregularly-shaped, scored, or coated with a substance that would unnecessarily inflame a wound. U.S. Army Field Manual 27-10, The Law of Land Warfare (1956) p. 18, para. 34.

⁸⁷Supra note 37.

⁸⁸Supra note 73.

weapons.

9. Reprisals. For the purpose of the law of armed conflict, reprisals are lawful acts of retaliation in the form of conduct that would otherwise be unlawful, resorted to by one belligerent in response to violations of the law of war by another belligerent.⁸⁹ Various provisions of Additional Protocol I contain prohibitions on reprisals against specific types of persons or objects, including the civilian population or individual civilians (Article 51(6)), civilian objects (Article 52(1)), cultural objects and places of worship (Article 53(c)), objects indispensable to the survival of the civilian population (Article 54(4)), the natural-environment (Article 55(2)), and works and installations containing dangerous forces (Article 56(4)). These are among the new rules established by the Protocol that, as explained above, do not apply to nuclear weapons.

D. The WHO Constitution Does Not Prohibit the Use of Nuclear Weapons.

As previously demonstrated, there is no provision in the WHO Constitution that provides a basis for a request to the Court for an opinion concerning the legality of the use of nuclear weapons. Neither the objective of the Organization nor its described functions, as set out in the Constitution, suggest that the Organization has responsibility or authority in regard to the use of such weapons.⁹⁰ Nor do other provisions of the Constitution. Under the circumstances, there can be no basis for concluding that the use of nuclear weapons would violate any obligation of Members of the Organization under the WHO Constitution.

This conclusion is confirmed by a review of the provisions of the Constitution that establish obligations on the Members. No provision of the Constitution addresses the obligations of Member States regarding the use of nuclear weapons, nor does anything in the

⁸⁹Under the customary law of armed conflict, reprisals may only be taken for the purpose of enforcing future compliance with that law, and must comply with certain rules limiting their scope and effect. U.S. Army Field Manual 27-10, The Law of Land Warfare (1956) p. 177, para. 497.

⁹⁰Supra pp. 5-10.

Constitution oblige Member States to refrain from the use of any weapons even when they may cause damage to human health or the natural environment. Some of these provisions refer to matters relating to the establishment and operation of the Organization, such as the obligation of Members to confer the appropriate legal status, privileges and immunities on the Organization and its personnel.⁹¹ Others refer to administrative matters, such as the obligations on Members in respect to the qualifications of delegates⁹² or submission of reports or other information to the Organization.⁹³ Yet others refer to the obligations of Members in respect of conventions, agreements or regulations adopted by the Organization.⁹⁴ No conventions, agreements or regulations adopted by the Organization deal with the legality of the use of nuclear weapons, or indeed any other type of weapons.

In addition, the United States is unaware of anything in the history of the Convention or the practice of the Organization since its inception that suggests that the use of nuclear weapons is within the competence of the Organization, much less that the Constitution creates any obligation in regard to such matters. As previously noted, the Organization only began to address the health effects of the testing and use of nuclear weapons in the 1960's and had limited its actions to those effects until its controversial decision in 1993 to make this request for an opinion.⁹⁵

E. Conclusion

General International Law. There is no general prohibition in international law on the use of nuclear weapons. On the contrary, many international agreements regulate the

⁹¹WHO Constitution, supra note 4, Arts. 37, 66, 67.

⁹²Id., Arts. 11, 24.

⁹³Id., Arts. 61-65.

⁹⁴Id., Arts. 20, 22.

⁹⁵See supra note 31.

possession or use of nuclear weapons, thereby providing strong evidence that their use was not deemed to be unlawful per se. The practice of States, including the Permanent Members of the Security Council, further proves this point. There is also considerable variety and disparity in the expressed views of States on this issue. Consequently, it cannot be the case that the use of such weapons is already prohibited by customary international law.

The United States has long taken the position that fundamental principles of the international humanitarian law of armed conflict would apply to the use of nuclear weapons as well as other means and methods of warfare. Whether a particular use of nuclear weapons would violate these principles would depend in each instance on the specific circumstances of the situation.

The Court cannot anticipate the manner in which these principles would affect various uses of nuclear weapons, which would, in turn, depend on a number of factors about which one could only guess. The Court need not and should not engage in speculation on a matter of such fundamental importance.

The United States has been a strong supporter of international negotiations aimed at controlling the development, possession, acquisition, testing and use of nuclear weapons. However, this does not alter the fact that current international law does not impose any general prohibition on the use of nuclear weapons.

The WHO Constitution. There is no basis for concluding that the use of nuclear weapons violates the WHO Constitution. Any such conclusion would fly in the face not only of the terms of the Constitution, but also its history and the practice of the Organization. In becoming a Party to the WHO Constitution, the United States did not understand, and no State had any reason to believe, that it was thereby abandoning its right to have recourse to the use of any weapon needed for its defense.

V. CONCLUSION

The WHO has been authorized to request opinions only in regard to questions arising within the scope of its competence. The question of the legality of the use of nuclear weapons is not within the competence of the WHO, and therefore, the Court lacks jurisdiction to provide the requested opinion. If the Court nonetheless determines that it has jurisdiction to provide the requested opinion, the Court should, in the exercise of the discretion provided by Article 65, paragraph 1, of its Statute, decline to provide an opinion.