

Written Statement of the Government of Finland

MINISTRY FOR FOREIGN AFFAIRS
OF FINLAND

In response to the letter of 14 September 1993 from the Deputy Registrar of the International Court of Justice to the Minister of Foreign Affairs of Finland regarding the request for an advisory opinion made by the World Health Assembly (WHA), the Government of Finland has the honour to state the following:

1. The request made by the WHA seeks to attain an in abstracto determination of the legality, or otherwise, of the use of nuclear arms in war or other armed conflict. It ignores the complexity of the technical, strategic and moral aspects of the problem posed by the existence of nuclear weapons. It fails to recognize the fact that effective security arrangements can only be attained through agreements which take into account all relevant circumstances including the specific security interests of each State. During the years, Finland has actively promoted the conclusion of such agreements and will do so in the future.

2. It would thus be improper for the Court to give the opinion requested by the World Health Assembly in the precise sense that the Court's long-standing practice in the matter of advisory opinions indicates. Such impropriety would seem to be constituted

of three different but related factors:

1. The request falls outside the competence of the requesting organ (World Health Assembly);
2. Considering the request the Court could not remain faithful to the requirements of its judicial character;
3. No reply to the substance of the request would constitute a useful service to the United Nations of which the Court is the principal judicial organ.

As a preliminary point, it may be convenient to emphasize that whether or not the Court should provide an opinion requested from it is a matter up to the Court's discretion under Article 65 of its statute. The provision, as the Court has observed:

"...gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request."
(I.C.J. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Reports 1950 p.72).

Apart from the provision that the Court is only competent to provide opinions on legal questions (Article 96 (1) of the UN Charter), there seem to be no formal criteria indicating when circumstances might be such that a request should be turned down. In practice, the Court has, however, given general indication of when providing a response would be excluded. This would, for example, be the case (1) if the request related to a subject-matter which would fall outside the competence of the requesting organ; (2) if the Court, by replying, could not remain faithful to its character as a judicial organ; and (3) if the Court, by replying, could not be able to "discharge its functions as the 'principal judicial organ of the United Nations'" (I.C.J. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Reports 1971 p. 27).

The criterion of "impropriety" has not been understood as a strictly defined set of legal requirements but as a label for a general sense of the judicial appropriateness or usefulness for the United Nations of providing the requested opinion. In the following it will be submitted that providing a reply in this case would fail to meet those conditions. In a threefold sense, providing the response requested would be improper.

2.1. The requesting organ lacked the necessary competence.

The question posed to the Court is as follows:

"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?"

As the Court has noted:

"[i]t is however a precondition of the Court's competence that...the question should be one arising within the scope of the activities of the requesting organ." (Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, I.C.J. Reports 1982 p. 333-4).

This same principle is also expressed in Article 76 of the Constitution of the World Health Organization:

"...the Organization may request the International Court of Justice for an advisory opinion on any legal question arising within the competence of the Organization (emphasis added)."

The functions of the World Health Assembly are listed in Article 18 of the WHO Constitution. In a general manner they refer to the functions of the Organization itself. Moreover, in paragraph (m) of Article 18 the Assembly is mandated "to take any other appropriate action to further the objective of the Organization". The competence of the Assembly cannot, therefore, be detached from the competence of the WHO.

The objective of the World Health Organization is "the attainment by all peoples of the highest possible level of health" (Article 1 of the WHO Constitution). The problem of the competence of the requesting organ may in this case thus be paraphrased as follows: "is the lawfulness under international law of the use of nuclear weapons in war or other armed conflict a matter having to do with 'the attainment by all peoples of the highest level of health?'"

It is submitted that this is not the case. Though war and armed conflict, as well as the use of nuclear weapons in such conflict, are obviously detrimental to human health, their legal status cannot be determined simply by reference to their health effects. The permissibility or illegality of any resort to force, including the use of nuclear weapons, is dependent on an evaluation of a much wider set of circumstances.

To answer the relevant question would require an examination of such circumstances, including (but not limited to) the purpose of such use, the various kinds of (real or imagined) threats to national security involved or invoked, the types of nuclear weapon being employed, the manner and consequences of their employment and those of any alternative course of action. These aspects are not of marginal importance in the assessment of the legal issue but central to it. But, of course, the relevant political, security-related, strategic and technical questions are beyond the competence of the World Health Organization.

To allow the requesting organ to receive a legal determination regarding a form of action of which its competence covers only a limited aspect would be to enlarge the organ's authority well beyond its constituting instrument. Whether one sees this as a matter of the formal competence of the Court or of the propriety of providing an opinion, the consequence would be judicially inadmissible.

2.2. The Court could not remain faithful to its character as a judicial organ by answering the request.

Another, related reason for the impropriety of providing the requested opinion has to do with the hypothetical, future-oriented character of the request itself. As the Court has pointed out:

"...the Court has always been guided by the principle that, as a judicial body, it is bound to remain faithful to the requirements of its judicial character even in giving advisory opinions" (I.C.J. Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Reports 1973 p. 175 (para 24)).

However, if it is the case that the legality of the use of nuclear weapons can only be determined in respect of the circumstances of the case, then it follows that in the absence of a concrete factual situation, the Court would itself be required to entertain various hypotheses about situations in which nuclear arms might conceivably be used. That is to say, the Court would be required to speculate with a very large number of potential situations, including, for example, situations of first use and counter-use, various types of limited use and practices of targeting. The Court would be required to analyze different types of nuclear weapon and entertain hypotheses about the factual consequences of their use. All this would require analyzing extremely complex and controversial pieces of technical, strategic and scientific information. The counter-factual character of such speculation would make any hypothesis uncertain. In short, entering such speculation the Court would not be able to "remain faithful to the requirements of its judicial character".

2.3. No reply to the substance of the request would constitute a useful service to the United Nations of which the Court is the principal judicial organ.

The Court has viewed its advisory capacity in a functional light: the provision of opinions by the Court "represents its participation in the activities of the Organization" (I.C.J. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Reports 1950 p. 71). The object of providing an opinion "is to guide the United Nations in respect of its own action" (I.C.J. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Reports 1951 p. 19). The assumption seems to have been that opinions should play a constructive role in the activities of UN organs.

As pointed out above, the request by the World Health Assembly relates to a problem which involves, in addition to an undeniable legal component, also political, moral and technical issues which cannot be usefully dealt with in abstraction from each other. A number of States base their national security on nuclear weapons and there clearly is no international agreement on the legal status of such weapons. This is why diplomatic negotiations have been and are being conducted on various bilateral and multilateral fora to limit and reduce the threat posed by nuclear weapons. The matter is on the agenda of the UN General Assembly and of the Conference on Disarmament (CD), reporting also annually to the UN General Assembly.

A statement in abstracto on the legal status of the use of nuclear weapons would intervene in those negotiations, in the United Nations and elsewhere, in an unforeseen fashion. It would create blanket support for one or another disputed position and fail to respect the comprehensive give-and-take character of any negotiation on nuclear disarmament with a potential for success. An ex cathedra statement confirming the complete legality or illegality of the use of such weapons might even seem to make such negotiations altogether superfluous. During recent years, a number of important agreements on the limitation and control of specific types of armaments have been attained, among them the 1993 Convention on Chemical Weapons. To undermine such negotiations by a judicial fiat would not constitute a useful service by the Court to the efforts of the United Nations in this field.

3. The Court has summarized its practice in the granting of advisory opinions as follows:

"The Court has repeatedly stated that a reply to a request for an advisory opinion should not, in principle, be refused and that only compelling reasons would justify such a refusal" (I.C.J. Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Reports 1973 p.183 (para 40)).

In the view of the Government of Finland, such "compelling reasons" do exist in this case. These reasons have to do with the fact (1) that the World Health Assembly does not have the competence to obtain a determination on a substantive problem essentially belonging to the field of disarmament; (2) that speculating about the circumstances relevant for the determination of the lawfulness of the use of nuclear weapons the Court could not remain faithful to its judicial character; and (3) that no substantive reply would constitute a useful service for the efforts by the United Nations or the international community at large to limit and reduce the threat posed by nuclear weapons.