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**Reflections ten years after the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons**

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*Introduction*

In July this year it was 10 years since the International Court of Justice rendered its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*. This is also the year of another anniversary in the efforts to rid the world of nuclear weapons. It was 60 years ago that the General Assembly declared its determination to physically **eliminate “atomic weapons”** and other weapons of mass destruction. While that declared determination has resulted in two comprehensive conventions outlawing biological and chemical weapons, it has not borne fruit as regards nuclear weapons. Many would question whether any nuclear weapon states – except South Africa – have yet seriously pursued the idea.

I do not propose to examine the many important legal questions which the Advisory Opinion examines. Others are doing this with admirable scholarship. Having spent much time in operational and diplomatic work on arms control and disarmament I think it may be more interesting for me to comment on the current political and legal landscape in the field of non-use of force, arms control, nuclear disarmament and non-proliferation of nuclear weapons against the background of positions taken by the Court.

My discussion will focus on four matters:

- The **context of international relations** in which the opinion was given;
- The UN Charter restrictions on the **threat or use of force**;
- The **fragmented approach** that has been taken and continues to be taken by the world community to eliminate nuclear weapons; and
- The deficit in **implementation of article VI** of the Non-Proliferation Treaty (NPT), requiring negotiations toward nuclear disarmament.

During the last three years I have had the honour to chair an Independent International Commission on Weapons of Mass Destruction and on 1 June this year the fourteen member commission presented a unanimously adopted report with the title “**Weapons of Terror: Freeing the World of Nuclear Biological and Chemical Arms**”. It contains 60 recommendations, 30 of them having regard to nuclear weapons. I shall try to relate some of the report’s thoughts on the reduction of the threats posed by nuclear weapons to the findings of the Court.

### *The Advisory Opinion of the ICJ*

In 1994 the General Assembly of the United Nations asked the ICJ:

*“Is the threat or use of nuclear weapons in any circumstances permitted under international law?”*

In its advisory opinion the Court unanimously held that:

*“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.”*

And:

*“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.”*

Further, in a part of the Opinion, which was adopted through the President’s casting vote, the Court declared that while the threat or use of nuclear weapons would **generally** be contrary to the rules of international law, it was **not possible to reach a definite conclusion** regarding the legality, or illegality of the use of nuclear weapons by a state *“in an extreme circumstance of self-defence, in which its very survival would be at stake.”*

Obviously this conclusion, although leaving only an **uncertain and narrow window** for a possible legal use of a nuclear weapon went against the argument that the cumulated effect of a number of existing rules of international law, such as those prohibiting indiscriminate weapons or weapons causing unnecessary

suffering, would be a categorical ban on the use of nuclear weapons. As had been argued by *inter alia* the UK in a written statement presented to the Court, a low yield nuclear weapon could conceivably be used “against warships on the High Seas or troops in sparsely populated areas”, in which case the civilian casualties would be as limited as when conventional weapons are used.

The language chosen by the majority of the Court in this part can be, and has been, criticised. It may seem, as Judge Schwebel points out in his Dissenting Opinion, that the legal conclusion to be drawn from the reasoning is that the use of nuclear weapons is permitted, unless the action is rendered illegal under international law in the specific circumstances under which the weapon is used.

Nevertheless, although the Court did not find any absolute prohibition in international conventional or customary law against the threat or use of nuclear weapons, it **wanted and did convey the sense** that in most circumstances the use of a nuclear weapon would collide with some rule of international law. I do not see that anything has happened since 1996 that would encourage a bolder view of the legal situation.

This brings me to the **first of the four matters** which I referred to – **the temporary context in which the Opinion was delivered**.

### *The temporary context of the opinion – and the situation today*

Ten years ago, multilateral efforts towards nuclear disarmament, compared to those made today, were relatively successful:

- A nuclear weapons program **in Iraq** had been uprooted,
- Activities **in North Korea** to produce **plutonium** through reprocessing had been stopped, following an understanding reached with the United States;
- **Chemical weapons** had been completely outlawed through a convention, after decades of negotiation;
- A treaty comprehensively prohibiting nuclear weapons tests had been concluded;
- The **Non-Proliferation Treaty** had just been **extended** indefinitely; and
- The **nuclear weapon states parties** to the treaty had made significant and specific **commitments in** fulfilment of their obligations under article VI of the NPT.

Throughout the reasoning in the Advisory Opinion of the Court there is – understandably against this background of progress – an innuendo of a categorical ban around the corner. The Court refers to an “**increasing concern**” about nuclear weapons in the international community, and that this could be

seen as a *“foreshadowing of a future general prohibition of the use of such weapons”*.

If the idea of a general prohibition of use was ever on the minds of nuclear weapon states, it must have faded fast and is certainly not there today. The horror vision of the nuclear weapons also **faded in the public mind**.

It may seem paradoxical that the international community, after the end of the Cold War, in an era with no major ideological differences between great powers, was unable to agree on new measures to address the threats posed by weapons of mass destruction (WMD). Sadly, we must note, however, that the world's governments missed the opportunity to move to disarmament.

Despite some valuable progress in arms control and disarmament during the 1990s – inter alia bringing the number of nuclear weapons down from over 50.000 to some 27.000 through elimination of excess – we are actually in a phase of **rearmament**. Last year the world spent about one trillion dollars on military expenses and we do not discuss this much.

The **commitments** to further arms control disarmament measures made by the nuclear weapon states in 1995, when the non-nuclear weapon states accepted to extend the treaty and their pledges indefinitely, are being **ignored**. For instance, the Comprehensive Test Ban Treaty, which was concluded in 1996 after decades of negotiations, has been left in limbo – and will remain so unless the US and China and some other states ratify it.

The **2005 Review Conference** of the Non Proliferation Treaty ended in bitterness with many non-nuclear weapon states feeling cheated. The **World Summit** at the UN in September 2005 was unable to agree on a single line regarding arms control, disarmament or non-proliferation, and the **Geneva Conference on Disarmament** has been unable for about a decade to agree on a work program.

**Today**, the world's attention is **focused on North Korea's missiles and testing** of a plutonium bomb and the development by **Iran of a uranium enrichment** capability, which **could** be used at some future date to produce highly enriched uranium for bombs. We also hear concerns that **terrorists** might acquire nuclear weapons or at least 'dirty bombs' – i.e. bombs containing radioactive material.

All this focusing on non-proliferation and terrorism is justified. It should not, however, lead us to ignore some **unwelcome realities**. It is true that nuclear weapons may be particularly dangerous in some hands, but they are dangerous in anybody's hands. There are still some 27.000 nuclear weapons in the world –

most of them in US and Russia. Large numbers of these weapons are on **hair trigger alert** and we hear again and again from Washington that “all options are on the table”.

Sadly, the general prohibition of use of nuclear weapons foreshadowed by the ICJ has not materialized. Rather we have been witnessing **not only a stagnation** in the sphere of arms control and disarmament and some rearmament but also an **attribution of greater importance to nuclear weapons** and interest in their development:

- Several nuclear weapon states no longer give pledges against a **first use** of nuclear weapons;
- The development of a **missile shield** in the US is perceived by China and Russia as a step potentially allowing the US to threaten them with nuclear weapons while creating immunity for the US; they are taking steps to meet this perceived threat;
- The **development and testing of new types** of nuclear weapons is urged by influential groups in the US; **in the UK** many expect a government decision about a renewal of the nuclear weapons program, stretching it far beyond 2020;
- The stationing of **weapons in space** is considered in the US; if it were to occur, other states might follow and threats may arise to the world’s peaceful uses of space and the enormous investments made in them.

Not surprisingly against this background the **central message** in the Report of the Weapons of Mass Destruction Commission is that the **arms control and disarmament** process **must be revived** and pursued in parallel with non-proliferation efforts aimed at preventing the spread of WMD to further states and to terrorist movements.

I now come to the **second matter** on which I want to focus:

***The general prohibition of the threat or use of force as a means of eliminating the threat of nuclear weapons***

The Court rejected various conventions on the protection of the environment, the Genocide Convention of 1949, and human rights instruments **as grounds for a general** and absolute **prohibition** of the use of nuclear weapons. The **central provisions** were seen rather to be the **restrictions on the threat or use of force in article 2:4** of the UN Charter, the two exceptions to this norm, and the norms and principles of international humanitarian law.

The two exceptions to the prohibition of the threat or use of force in article 2:4 of the UN Charter are found in

- Article 51, which preserves a right to individual and collective **self-defence**, when an **armed attack** occurs, until the Security Council has taken the necessary measures; and
- Article 42, which allows the Security Council to intervene under Chapter VII – if need be by authorizing military force – to stop “**threats to the peace, breaches of the peace or acts of aggression**”.

The Court did not find it necessary, on the basis of the statements presented before it, to address questions that might arise from the application of Chapter VII. Did it consider it out of question that the Council might authorize a use of nuclear weapons?

In declaring that it is not possible to conclude that the use of nuclear weapons would be illegal in all possible cases, the Court relies on the reserved right to exercise **individual or collective self-defence**.

In this context, the Court cites its own judgement in the *Nicaragua Case (1986)*, declaring that **self-defence** must be carried out in a manner respecting the dual principles of “**necessity**” and “**proportionality**”. The Court **also** highlights the requirement that all acts of war to be consistent with applicable norms of **International Humanitarian Law**.

The Court notes that in most instances the use of nuclear weapons would not fulfil all of these requirements, but it does not go into a detailed discussion on smaller tactical nuclear weapons with more limited effects, or on specific circumstances under which the use of nuclear weapons would be permitted in the exercise of self-defence. Instead the Court simply states:

*“[I]t suffices for the Court to note that the very nature of all nuclear weapons and the profound risks associated therewith are further considerations to be borne in mind by States believing they can exercise a nuclear response in **self-defence** in accordance with the requirements of proportionality.”*

The statement holds great significance at a time when **nuclear weapons have regained a central position** in the defence strategies and doctrines of the nuclear weapon states and when **article 51** of the Charter may be **ignored** by various states through the application of a doctrine of preventive and pre-emptive self-defence.

## *Pre-emptive and preventive use of force*

In **2003 the war in Iraq** was launched by a number of states without the authorization of the Security Council. Indeed, they were perfectly aware that that their action **would not** obtain an authorization of the Council.

The US did not officially argue that the war was justified as a preventive or **pre-emptive action** against an Iraqi threat of attack, but there is no doubt that this view was held. A US **National Security Strategy** had been published in September 2002. It stated flatly that a limitation of the right unilaterally to use armed force in self-defence to cases where “**armed attacks**” were occurring or were “imminent” would be **insufficient** in the era of missiles and terrorists. That was tantamount to saying that UN Charter Article 51 might be ignored.

The position taken in 2002 by the US was confirmed in the National Security Strategy of 2006 and many statements by the US President and other officials threatening armed action against any “growing threat” and declaring in the cases of Iran and North Korea that “all options are on the table”.

One must conclude that the current US administration **asserts the freedom** – at least for itself -- **to use force, with the weapons it chooses**, without any authorization by the Security Council, **even if there is no armed attack**, ongoing or imminent.

A statement by the **current US ambassador** to the UN confirms that in his view **restrictions** in the UN Charter on the use of force are **simply not relevant** to the US. He said:

*“Our actions, taken consistently with Constitutional principles, require no separate, external validation to make them legitimate...” (2003)*

While the overwhelming majority of states reject the US claims to such a wide license on the use of armed force, there may be a risk that these US policies and doctrines, the development of smaller nuclear weapons and a trend towards the “conventionalization” of such weapons **could, one day, lead to the use of nuclear weapons**. The WMDC urges a return to **respect for the UN Charter provisions on the use of force**.

I come to the third matter on which I want to focus:

### *The fragmented approach which governments have taken to restrict the deployment and prohibit or restricting the use of nuclear weapons*

The **most effective** way to prevent the use of nuclear weapons would be to eliminate the weapons themselves. The physical elimination of nuclear weapons would give greater confidence about non use than a mere prohibition of use. If there are no weapons there will be no use. Such elimination could be achieved through a comprehensive – and verified – ban on production, acquisition and stockpiling.

While the Commission pleads for the goal of a **convention** “outlawing” nuclear weapons in a way similar to what has been done regarding biological and chemical weapons it also realizes the short and medium term obstacles to attaining such a convention. It notes, as the Court does, that governments have taken **a fragmentary approach** to the elimination of use and production of nuclear weapons. Thus, they have taken steps

- to ban the deployment of nuclear weapons in various environments (the **Antarctic, the sea-bed and outer space**);
- to impede a **qualitative development** of the nuclear weapons by treaty bans on **testing**;
- to limit the possession of the weapons through commitments under treaties establishing **nuclear weapon free zones**; all countries in the Southern hemisphere is covered by such zones;
- to limit the possession of nuclear weapons through **commitments under the NPT**; and
- to oblige the **nuclear weapon states parties** to the NPT to pursue negotiations in good faith on **nuclear disarmament**;
- to commit the nuclear weapon states – on various conditions and with various reservations -- not to use nuclear weapons against non-nuclear weapon states;

### *Implementation of Article 6 of the NPT relating to negotiations toward nuclear disarmament*

The fourth and last matter I want to focus on in relation to the Advisory Opinion has regard to the concern expressed by the Court about the lack of implementation of article VII of the NPT. While this matter did not form a part of the question put before the Court by the General Assembly, it can hardly be ignored.

The NPT is seen as a double bargain aiming at a world free of nuclear weapons:

- the non-nuclear weapons states parties commit themselves in Article II not to acquire the weapons; and
- the nuclear weapons states parties commit themselves in Article VI to negotiate toward nuclear disarmament.

We often hear warnings that this double bargain risks to collapse because of violations by some states which have joined as non-nuclear. While readily recognizing that the treaty is **under strain** the WMD Commission notes that the world is **not full of would-be violators** and that the overwhelming commitment to the treaty remains of tremendous value.

Without the NPT nuclear weapons might have spread to many more than the eight or nine states, which now have them. However, the treaty and the fundamental bargain are **under strain** today. Iraq, Libya and North Korea ignored their non-proliferation pledges under Article II, Iran is under suspicion to do the same; and the five nuclear weapon states parties are not living up to their pledges under Article VI to move to nuclear disarmament.

Among non-nuclear weapon states parties there is a strong feeling of frustration, even of being **cheated** by the nuclear weapon states parties, for instance, when the have-states are in the process of deciding the development of **new types of weapons rather than** examining how they could manage their defense needs with other weapons than nuclear.

**The negotiations with the DPRK and Iran** would not be easy under any circumstance, but they might be somewhat less difficult, if the nuclear weapon states participating could show that they, themselves, were **actively striving for** and leading the world toward nuclear disarmament. Such action would respond to the ICJ's demand for the pursuit in good faith negotiations – not for the mere sake of negotiations but -- to **achieve** precise results.

The WMDC therefore submits – in its very first recommendation – that all parties to the treaty need “**revert to the fundamental and balanced non-proliferation and disarmament commitments that were made under the treaty and confirmed in 1995 when the treaty was extended indefinitely**”.

Let me now conclude by noting some of the specific recommendations of the WMDC, starting with some important organizational items:

- **Given the setbacks** in arms control and disarmament, notably at the UN summit in 2005 and the continued stalemate, there is a need to give new impetus. The Commission suggests that the **General Assembly should convene a World Summit on disarmament**, non-proliferation and

terrorist use of WMD. Thorough preparations would be necessary and planning should start as soon as possible. (Recommendation 59)

- The **Conference on Disarmament in Geneva**, the principal international forum for negotiation on WMD related issues, has been unable to adopt a **program of work** for almost a decade. The WMDC suggests that the CD should be able to adopt a program of work, by a **qualified majority** of two thirds. (Recommendation 58).
- The WMDC report suggests that the Security Council should establish a **small subsidiary unit** that could provide professional technical information and advice on matters relating to weapons of mass destruction. (Recommendation 56) Such independent advice would have been of interest on the question of the nature of the test explosion in North Korea.
- The NPT should be given a **standing secretariat**. (Recommendation 4).

I continue with a **number of the substantive measures that the Commission recommends:**

- No measure could be more urgent, important in substance and as a signal that arms control and disarmament are again on the world agenda than signature and ratification of the **Comprehensive Nuclear-Test-Ban Treaty** by states, which have not yet done so. (Recommendation 28). If the treaty were seen to lapse, there would be an increased risk that some state might restart weapons tests. Demanding in negotiations with **North Korea** that the country should deposit its ratification of the treaty – which is necessary for the treaty to enter into force – would be easier if all the states participating in the six power talks had, themselves, ratified the treaty.
- Negotiating without further delay a treaty **prohibiting the production of fissile material for weapons (FMCT)** is the next most urgent issue to tackle. (Recommendation 26). The combination of a continued reduction in the number of existing nuclear weapons and a verified closing of the tap for more weapons fissile material would gradually reduce the world inventory of bombs. A draft of a cut-off treaty has been presented in Geneva. It has important weaknesses but should be discussed.
- The WMDC is of the view that such an FMCT, to be meaningful, must provide for effective **international verification of** all enrichment and reprocessing activities. Independent international verification is already carried out by EURATOM in enrichment plants in two nuclear weapon states -- France and the UK. Enrichment plants in Brazil and Japan are subject to IAEA safeguards verification. If there is no effective international verification, any controversy about respect for the treaty would have to be discussed on the basis of evidence coming only from

national means of verification. We know from the case of Iraq that this would not be satisfactory. Moreover, without independent verification suspicions about violations might arise and lead to a race between some countries in the production of fissile material.

- **Further steps**, by all nuclear weapon states, towards **reducing strategic nuclear arsenals** would be significant. The WMDC recommends that the US and Russia, which have the most weapons, should **take the lead**. With increasing cooperation between Russia and EU, Russian nuclear weapons should be withdrawn from forward deployment to central storage and US nuclear weapons should be **withdrawn** to US territory. (Recommendations 20, 21 and 22).
- In the view of the WMDC all states that have nuclear weapons should commit themselves categorically to a policy of **no first use** (Recommendation 15) and the US and Russia should reciprocally take their nuclear weapons **off hair trigger alert**. (Recommendation 17).
- As the reliance on nuclear power is expected to go up, the need for a **greater production of low enriched uranium fuel** and for the disposal of spent fuel can be anticipated. This must occur in a manner that does not increase the risk of diversion of material and the risk of proliferation. The **IAEA should be the forum** for such exploration. (Recommendation 8).
- **Regional approaches** should also be further developed, especially in sensitive areas. It would, for example, be desirable to obtain commitments from the states on the Korean peninsula and in the Middle East (including Iran and Israel) that they would accept a **verified suspension** for a prolonged period of time of any **production of enriched uranium and plutonium** while obtaining international assurances of the supply of fuel for any civilian nuclear power. (Recommendation 12)
- Lastly, you will not be surprised to hear me submit that **international professional inspection**, such as it has been practiced under the UN, the IAEA and the Chemical Weapons Convention, is an important and economic **tool for verification**. Such inspection does not stand in any contradiction to national means of verification. Rather these two means of fact-finding **supplement** each other. Many states have no national means that they can use and should not have to be dependent upon the intelligence of other states. States which operate intelligence may, in one-way traffic arrangements, provide information to the international verification systems. (Recommendation 55).
- The safeguards system of the IAEA needs to be strengthened through a universal acceptance of the **additional protocol**. (Recommendation 3). The effective operation of the safeguards system should never have to suffer for **financial** reasons. It is paradoxical for the world community to spend billions on inspections to ensure that no material or equipment of

nuclear relevance is transported in containers or baggage in air travel and to deny the safeguards system the fullest support.

These are some of the suggestions put forward by the WMDC. Even though the world might not within the next ten years attain a comprehensive convention against the use, production or acquisition of nuclear weapons, acting upon the recommendations would be important to take us in the direction of a nuclear weapon free world.