To the Editor:

In "Dismantling the Concept of 'Weapons of Mass Destruction" (April 1998), Wolfgang Panofsky makes the following inaccurate statements regarding the legality of the use or threatened use of nuclear weapons and, in particular, the July 1996 International Court of Justice (ICJ) advisory opinion on this question. (See ACT, July 1996.)

1. "[P]ossession and some uses of nuclear weapons by the five nuclear-weapon states remain legal...."

The ICJ ruled that the use or threatened use of nuclear weapons was generally illegal, but could not determine whether there would be an exception to this general finding in the extreme circumstance of self-defense, when the very survival of a state was at stake. Some commentators have erroneously assumed that this indecision over the exceptional circumstance is the same as a declaration of legality in such circumstance. The court, however, clearly refuted this when it did not support the view of certain nuclear-weapon states that the use of "clean," low-yield tactical nuclear weapons accurately targeted on military targets would be legal in such extreme circumstance. (ICJ Opinion, paragraph 94).

Then-ICJ President Mohammed Bedjaoui said the court's inability to determine absolute illegality in the extreme circumstance "can in no manner be interpreted to mean that it is leaving the door ajar to recognition of the legality of the threat or use of nuclear weapons." Bedjaoui noted that this opinion differed considerably from the often cited Lotus case, which held that what was not expressly prohibited by international law was therefore permitted. "The Court, in this opinion is showing much more circumspection than its predecessor in the Lotus case in asserting today that what is not expressly prohibited by international law is not therefore authorized," he said.

2. "[T]he ICJ ruled (11-3) that [existing] specific injunctions [against the threat or use of nuclear weapons] did not constitute 'comprehensive and universal prohibition' of the threat or use of nuclear weapons."

Mr. Panofsky here reverses the order of the ICJ findings, thus changing their meaning. The court declared firstly that there was no comprehensive and universal prohibition on the use or threatened use of nuclear weapons as such, but then followed this by concluding (unanimously) that specific laws of peace and war, including Articles 2 and 51 of the UN Charter and international humanitarian law, apply to nuclear weapons, and that the threat or use of nuclear weapons would thus be generally illegal.

3. "However, neither the nuclear-weapon states nor the 'threshold' states have formally accepted the jurisdiction of the ICJ in this matter."

Mr. Panofsky confuses contentious cases (disputes between states, for example), in which acceptance of ICJ jurisdiction is necessary, with advisory opinions, in which acceptance of ICJ jurisdiction by states is not necessary. The July 1996 ruling was an advisory opinion, not a contentious case. Even so, Britain, a nuclear-weapon state, and India, a "threshold" state, have
accepted jurisdiction of the ICJ in contentious cases.

Finally, Mr. Panofsky makes no mention of the most important decision of the ICJ, which was adopted unanimously and does impact on possession of nuclear weapons: "There exists an obligation [in international law] to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control." By refusing to implement this obligation, the nuclear-weapon states are setting a bad example of non-compliance with international law, which will continue to stimulate other states to develop or acquire nuclear weapons.

Alyn Ware
Executive Director, Lawyers' Committee on Nuclear Policy

The author responds

The references in my article were intended to document that the ICJ's advisory opinion did not establish a broad international norm prohibiting nuclear weapons, comparable to the norms established by the international conventions on chemical and biological weapons.

With regard to my first statement, Mr. Ware does not challenge it as it applies to "possession," and agrees that in respect to "uses" the ICJ could not determine whether there would be an exception (to illegality) in the extreme circumstance of self-defense, when the very survival of a state is at stake. As a layman, this signals to me that the court agrees that possession and some uses of nuclear weapons remain legal. Mr. Ware's formulation is not in conflict with my statement.

On the second point, I stated that the specific injunctions in certain international treaties against the use or threatened use of nuclear weapons "did not constitute a comprehensive and universal prohibition of the threat of use of nuclear weapons." Mr. Ware agrees with my citation of the ICJ opinion, but then proceeds to list a series of specific laws of war under which use of nuclear weapons would be illegal. To a layperson, our differences seem to be analogous to the distinction between a glass being half empty or half full.

My third statement—that the nuclear-weapon states had not "formally accepted the jurisdiction of the ICJ" on the issue of nuclear weapons policy—is correct. In fact, the United States, Britain and France opposed the ICJ taking jurisdiction in this matter, arguing that the case was not appropriate for an advisory opinion.

Finally, Mr. Ware accuses me of a sin of omission by not explicitly citing the portion of the ICJ advisory opinion that there exists an obligation to pursue in good faith steps leading to nuclear disarmament. Indeed, that obligation is codified in the nuclear Non-Proliferation Treaty and was reaffirmed during the treaty's indefinite extension in 1995. Thus, this part of the ICJ opinion is hardly novel. Needless to say, I fully share the concern that the pace of nuclear disarmament is woefully slow.

I suggest that little good is served to signal differences in opinion when, in fact, such differences are insignificant and a common goal is shared. Wolfgang K. H. Panofsky