

International Court of Justice — Advisory jurisdiction — Requests by specialized agencies of the United Nations—Jurisdictional requirements—Requirement that agency be duly authorized—Requirement that question posed be a legal question — Definition of legal question — Political aspects do not necessarily preclude characterization of question as legal in nature—Political motives and implications irrelevant—Requirement that question arise within the scope of activities of the requesting agency—Role of the Court in considering request for an advisory opinion—Interpretation of question—Article 65 of the Statute of the International Court of Justice—Article 96(2) of the United Nations Charter—Agreement between United Nations and the World Health Organization (“WHO”)—WHO Constitution

International organizations—Specialized agencies of the United Nations—WHO—Competence to request advisory opinion regarding legality of using nuclear weapons—Whether question arising within the scope of the activities of WHO—Constitution of WHO—Interpretation—Approach to interpretation of constituent treaties — Nature of specialized agency—United Nations and specialized agencies as a coherent system—Position of WHO within the United Nations system—Principle of speciality

Treaties — Interpretation — Constitution of international organization—Approach to interpretation—Emphasis upon object and purpose of treaty—Subsequent practice

War and armed conflict—Nuclear weapons—Whether use of nuclear weapons prohibited by international humanitarian law—Protection of health and the environment in war and armed conflict

LEGALITY OF THE USE BY A STATE OF NUCLEAR WEAPONS IN
 ARMED CONFLICT (REQUEST BY THE WORLD HEALTH ORGANIZATION
 FOR AN ADVISORY OPINION)¹

International Court of Justice. 8 July 1996

¹ The Advisory Opinion given by the Court in response to a request by the United Nations General Assembly, which concerned the legality of the use and threat of use of nuclear weapons, is reported at p. 163 below.

(Bedjaoui, *President*; Schwebel, *Vice-President*; Oda, Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo and Higgins, *Judges*)

SUMMARY: *The facts:*—The World Health Organization (“WHO”), a specialized agency of the United Nations, 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?

The request was made pursuant to Resolution WHA 46.40 adopted by the World Health Assembly on 14 May 1993.² In 1994 the United Nations General Assembly adopted Resolution 49/75 K, which welcomed the earlier WHO request and made a separate request for an advisory opinion regarding the legality of the use, or threat of use, of nuclear weapons.³ The Court invited written statements from the WHO and the Member States of WHO regarding the WHO request. Thirty-five States submitted written statements in response. In November 1995 the Court heard oral statements from the WHO, concerning the WHO request, and from twenty States, regarding both the WHO and General Assembly requests. A number of the States which made written and oral statements challenged the jurisdiction of the Court to give the advisory opinion requested on the ground that the question posed in Resolution WHA 46.40 was a question which did not arise within the scope of the activities of the WHO and which was, in any event, of a political, rather than legal, character.

Held (by eleven votes to three, Judges Shahabuddeen, Weeramantry and Koroma dissenting):—The Court was not able to give the advisory opinion requested of it under World Health Assembly Resolution WHA 46.40.

(1) In accordance with Article 65(1) of the Statute of the International Court of Justice⁴ and Article 96(2) of the United Nations Charter,⁵ three conditions had to be satisfied in order to found the jurisdiction of the Court when a request for an advisory opinion was submitted to it by a specialized agency. First, the agency requesting the opinion had to be duly authorized, under the Charter, to request opinions from the Court. Secondly, the opinion requested had to be on a legal question. Thirdly, the question had to be one arising within the scope of the activities of the requesting agency (p. 11).

(2) There was no doubt that the first requirement was satisfied. Article 76 of the WHO Constitution⁶ provided that, once authorized by the United Nations General Assembly, the WHO might request an opinion from the Court on “any legal question arising within the competence of the Organization”. Article X(2) of the Agreement of 10 July 1948 between the

² See p. 7 below.

³ See p. 163 below.

⁴ Article 65(1) is set out at p. 11 below.

⁵ Article 96(2) is set out at p. 11 below.

⁶ Article 76 is set out at p. 12 below.

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United Nations and the WHO⁷ gave the required authorization from the General Assembly (p. 12).

(3) The second requirement was also satisfied. The question posed required the Court to identify the obligations of States under the rules of law invoked and to assess whether the behaviour in question conformed to those obligations. It was therefore a legal question. The fact that the question also had political aspects did not deprive it of its character as a legal question. Moreover, in situations where political considerations were prominent, it might be particularly necessary for an international organization to obtain an advisory opinion regarding the legal issues involved. The political motives which may have inspired the request and the political implications which an opinion might have were irrelevant in determining whether or not the Court possessed jurisdiction (pp. 13-14).

(4) The WHO request did not, however, relate to a legal question which arose within the scope of the activities of the WHO.

(a) The constituent instruments of international organizations were treaties whose object was to create new subjects of international law endowed with a certain autonomy, to which the parties entrusted the task of realizing common goals. As such, they were subject to the well-established rules of treaty interpretation but could raise specific problems of interpretation, owing to their character. Of particular relevance in resolving such problems was the subsequent practice of the parties in the application of the treaty concerned (pp. 14-15).

(b) The functions of the WHO were listed in Article 2 of its Constitution. Interpreted in accordance with their ordinary meaning, in their context, and in the light of the object and purpose of the WHO Constitution, as well as of the practice followed by the WHO, the terms of Article 2 could be read as authorizing the WHO to deal with the effects on health of the use of nuclear weapons, or of any other hazardous activity, and to take preventive measures aimed at protecting the health of populations in the event of such weapons being used or such activities being engaged in. The question posed, however, related not to the effects of the use of nuclear weapons on health, but to the legality of the use of such weapons in view of their health and environmental effects. The competence of the WHO to deal with those effects was not dependent on the legality of the acts which caused them. The question whether those acts were lawful was not, therefore, one arising within the scope of the activities of the WHO (pp. 15-18).

(c) International organizations were subjects of international law which, unlike States, did not possess general competence but were governed by the principle of speciality. They were invested by the States which created them with powers, the limits of which were a function of the common interests whose promotion those States entrusted to them. Although organizations possessed certain implied powers, to ascribe to the WHO the competence to address the legality of the use of nuclear weapons would be tantamount to disregarding the principle of speciality, for such competence could not be deemed a necessary implication of the WHO Constitution in the light of the purposes assigned to the WHO by its Member States (pp. 18-19).

(d) Moreover, as a specialized agency, the WHO had to work within the framework of the United Nations. The Charter of the United Nations laid the

⁷ Article X(2) is set out at p. 12 below.

basis of a system designed to organize international cooperation in a coherent fashion. The WHO Constitution had, therefore, to be interpreted in the light of the overall logic of the United Nations system, under which responsibility for questions concerning the use of force and regulation of armaments were allocated elsewhere (pp. 19-21).

(e) The practice of the WHO confirmed these conclusions. The WHO had not dealt with the legality of the use of nuclear weapons prior to the adoption of Resolution WHA 46.40. That the WHO at times referred to or applied rules of international law regarding the legality of using certain weapons did not mean that it had received a mandate itself to address the legality of the use of those weapons (pp. 21-2).

(5) The jurisdiction of the Court to give the opinion requested by Resolution WHA 46.40 could not be made good simply by reference to the presumption that Resolution WHA 46.40 had been validly adopted. The question whether a resolution had been validly adopted from the procedural point of view and the question whether that resolution was *intra vires* were two separate issues. Although it was for the WHO, in the first instance, to determine its own competence, it was for the Court to determine whether the conditions for the establishment of its own jurisdiction had been satisfied. Nor did the fact that the United Nations General Assembly, in Resolution 49/75 K, expressly welcomed Resolution WHA 46.40 enlarge the competence of the WHO to request an advisory opinion (pp. 22-4).

Declaration of Judge Ranjeva: The structure of the question posed did not permit the Court to exercise the jurisdiction which it had (p. 25).

Declaration of Judge Ferrari Bravo: The right of specialized agencies, as opposed to that of organs of the United Nations, to seize the Court with a request for an advisory opinion needed to be carefully restricted if a correct division between the competences of different bodies was to be maintained (p. 26).

Separate Opinion of Judge Oda: The question whether the use of nuclear weapons was contrary to the WHO Constitution was separate from that of whether such use was contrary to general international law and had not been considered in the Advisory Opinion. The WHO lacked competence to request an advisory opinion on the question posed in Resolution WHA 46.40 and this lack of competence had been pointed out by the Legal Counsel to the WHO (as well as by several States) at the time that the resolution was adopted. The resolution had been initiated by some non-governmental organizations, not because an opinion was necessary for the work of the WHO (pp. 27-35).

Dissenting Opinion of Judge Shahabuddeen: The question posed by the WHO did not relate to the legality of the use of nuclear weapons under general international law but only under international law in connection with the obligations of States under the WHO Constitution. If the use of nuclear weapons would constitute a breach of the obligations of States under the WHO Constitution, the WHO could take appropriate remedial action. The WHO was, therefore, competent to ask the question posed. The implication

of the Court's Opinion was that States did not have an obligation under the WHO Constitution to refrain from the use of nuclear weapons. That was an answer, on the merits, to the question, not a reason for refusing to answer, and should have been identified as such (pp. 36-9).

Dissenting Opinion of Judge Weeramantry: (1) The question was concerned not with the legality or illegality of the use of nuclear weapons in general but with the obligations of States in relation to health, the environment and the WHO Constitution. It was therefore materially different from the question posed by the United Nations General Assembly.⁶ The Court should have examined these specific aspects of the WHO question. The WHO had clear responsibilities regarding health and the environment (pp. 43-53).

(2) The effects on health of the use of nuclear weapons were well documented and would be catastrophic. Any institution concerned with public health needed to know whether the use of such weapons stood within the international legal system or not (pp. 54-66).

(3) Only nine of the 189 Member States of WHO had questioned its competence to make the present request. That request sought the Court's opinion on matters which were of direct concern to WHO and thus arose within the scope of its activities (pp. 66-77).

(4) The Court should have taken the opportunity presented by the request to consider the obligations of States regarding the environment. International environmental law had undergone extensive development and the obligations of States in this regard would be significantly affected by any use of nuclear weapons. Similarly, States had obligations in respect of health which would be violated by the use of nuclear weapons (pp. 78-86).

(5) A literal interpretation was inappropriate in considering the obligations of States under the WHO Constitution, which had to be interpreted in the light of its object and purpose. The principle of speciality did not mean that there could be no overlap between the activities of the WHO and those of other organs and agencies of the United Nations (pp. 86-90).

(6) WHO's prior efforts in relation to peace, the use of weapons and the threat of nuclear war confirmed that the question posed by the WHO arose within the scope of its activities (pp. 90-2).

(7) The objections raised by a minority of States to jurisdiction and admissibility should have been rejected. The Court had a duty to act as a judicial institution and as a principal organ of the United Nations (pp. 92-107).

(8) The Court should have declared that the use of nuclear weapons would violate the obligations of States under international law in relation to health and the environment and the obligations of Member States under the WHO Constitution (pp. 108-110).

Dissenting Opinion of Judge Koroma: (1) The decision that the Court lacked jurisdiction to respond to the request for an advisory opinion was unprecedented and contrary to the jurisprudence of the Court. The effects on health and the environment and the socio-economic effects of any use of nuclear weapons were matters of the utmost importance to the WHO, in view

⁶ See p. 178 below.

of the objects and purposes of that organization. It was therefore unreal to say that the question posed by the WHO did not arise within the scope of its activities (pp. 111-19).

(2) In the present case, the Court had taken an unduly narrow and restrictive view of its advisory jurisdiction. It should have paid far more attention to the broad objectives of the WHO. Seen in the light of those objectives, the question posed by the WHO clearly arose within the scope of its activities and thus fell within the jurisdiction of the Court. The previous case law of the Court had always indicated a liberal approach to jurisdictional questions in connection with requests for advisory opinions (pp. 119-21 and 126-54).

(3) The WHO's question was not about the illegality of the use of nuclear weapons *per se* but about whether their use would be contrary to the obligations of States with regard to health and the environment and under the WHO Constitution. That Constitution, properly interpreted, and the practice of the WHO demonstrated the competence of the WHO in relation to this question and its concern with it (pp. 121-6).

(4) International humanitarian law imposed specific obligations regarding the conduct of hostilities and the use of weapons which would be violated by the use of nuclear weapons. The use of nuclear weapons would also violate the obligations of States regarding the protection of the environment in time of war or armed conflict and the obligations of Member States under the WHO Constitution. Had the Court taken this opportunity to make this clear, its opinion could have assisted the WHO in preventive work (pp. 121-6 and 154-63).

The Opinion of the Court and the Declarations, Separate Opinion and Dissenting Opinions of Judges are set out as follows:

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The following is the text of the Advisory Opinion of the Court:

1. By a letter dated 27 August 1993, filed in the Registry on 3 September [66] 1993, the Director-General of the World Health Organization (hereinafter called "the WHO") officially communicated to the Registrar a decision taken by the World Health Assembly to submit a question to the Court for an advi-

[67] sory opinion. The question is set forth in resolution WHA46.40 adopted by the Assembly on 14 May 1993. That resolution, certified copies of the English and French texts of which were enclosed with the said letter, reads as follows:

“The Forty-sixth World Health Assembly,
 Bearing in mind the principles laid down in the WHO Constitution;

Noting the report of the Director-General on health and environmental effects of nuclear weapons¹;

Recalling resolutions WHA34.38, WHA36.28 and WHA40.24 on the effects of nuclear war on health and health services;

Recognizing that it has been established that no health service in the world can alleviate in any significant way a situation resulting from the use of even one single nuclear weapon²;

Recalling resolutions WHA42.26 on WHO’s contribution to the international efforts towards sustainable development and WHA45.31 which draws attention to the effects on health of environmental degradation and recognizing the short- and long-term environmental consequences of the use of nuclear weapons that would affect human health for generations;

Recalling that primary prevention is the only appropriate means to deal with the health and environmental effects of the use of nuclear weapons²;

Noting the concern of the world health community about the continued threat to health and the environment from nuclear weapons;

Mindful of the role of WHO as defined in its Constitution to act as the directing and coordinating authority on international health work (Article 2 (a)); to propose conventions, agreements and regulations (Article 2 (k)); to report on administrative and social techniques affecting public health from preventive and curative points of view (Article 2 (p)); and to take all necessary action to attain the objectives of the Organization (Article 2 (v));

Realizing that primary prevention of the health hazards of nuclear weapons requires clarity about the status in international law of their use, and that over the last 48 years marked differences of opinion have been expressed by Member States about the lawfulness of the use of nuclear weapons;

1. *Decides*, in accordance with Article 96 (2) of the Charter of the United Nations, Article 76 of the Constitution of the World Health Organization and Article X of the Agreement between the United Nations and the World Health Organization approved by the General Assembly of the United Nations on 15 November 1947 in its resolution 124 (II), to

¹ Document A46/30.

² See *Effects of Nuclear War on Health and Health Services* (2nd ed.), Geneva, WHO, 1987.

request the International Court of Justice to give an advisory opinion on the following question: [68]

‘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?’

2. *Requests* the Director-General to transmit this resolution to the International Court of Justice, accompanied by all documents likely to throw light upon the question, in accordance with Article 65 of the Statute of the Court.”

2. Pursuant to Article 65, paragraph 2, of the Statute, the Director-General of the WHO communicated to the Court a dossier of documents likely to throw light upon the question: the dossier reached the Registry in several instalments.

3. By letters dated 14 and 20 September 1993, the Deputy-Registrar, pursuant to Article 66, paragraph 1, of the Statute of the Court, gave notice of the request for an advisory opinion to all States entitled to appear before the Court.

4. By an Order dated 13 September 1993 the Court decided that the WHO and the member States of that Organization entitled to appear before the Court were likely to be able to furnish information on the question, in accordance with Article 66, paragraph 2, of the Statute; and, by the same Order, the Court fixed 10 June 1994 as the time-limit for the submission to it of written statements on the question. The special and direct communication provided for in Article 66, paragraph 2, of the Statute was included in the aforementioned letters of 14 and 20 September 1993 addressed to the States concerned. A similar communication was transmitted to the WHO by the Deputy-Registrar on 14 September 1993.

5. By an Order dated 20 June 1994, the President of the Court, upon the request of several States, extended to 20 September 1994 the time-limit for the submission of written statements. By the same Order, the President fixed 20 June 1995 as the time-limit within which States and organizations having presented written statements might submit written comments on the other written statements, in accordance with Article 66, paragraph 4, of the Statute.

6. Written statements were filed by the following States: Australia, Azerbaijan, Colombia, Costa Rica, Democratic People’s Republic of Korea, Finland, France, Germany, India, Ireland, Islamic Republic of Iran, Italy, Japan, Kazakhstan, Lithuania, Malaysia, Mexico, Nauru, Netherlands, New Zealand, Norway, Papua New Guinea, Philippines, Republic of Moldova, Russian Federation, Rwanda, Samoa, Saudi Arabia, Solomon Islands, Sri Lanka, Sweden, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, and United States of America. In addition, written comments on those written statements were submitted by the following States: Costa Rica, France, India, Malaysia, Nauru, Russian Federation, Solomon Islands, United Kingdom of Great Britain and Northern Ireland, and United States of America. Upon receipt of those statements and comments, the Registrar communicated the text to all States having taken part in the written proceedings.

7. The Court decided to hold public sittings, opening on 30 October 1995, at which oral statements might be submitted to the Court by any State or organization which had been considered likely to be able to furnish information on the question before the Court. By letters dated 23 June 1995, the Registrar

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[69] requested the WHO and its member States entitled to appear before the Court to inform him whether they intended to take part in the oral proceedings; it was indicated, in those letters, that the Court had decided to hear, during the same public sittings, oral statements relating to the request for an advisory opinion from the WHO as well as oral statements concerning the request for an advisory opinion meanwhile laid before the Court by the General Assembly of the United Nations on the question of the *Legality of the Threat or Use of Nuclear Weapons*, on the understanding that the WHO would be entitled to speak only in regard to the request it had itself submitted; and it was further specified therein that the participants in the oral proceedings which had not taken part in the written proceedings would receive the text of the statements and comments produced in the course of the latter.

8. Pursuant to Article 106 of the Rules of Court, the Court decided to make the written statements and comments submitted to the Court accessible to the public, with effect from the opening of the oral proceedings.

9. In the course of public sittings held from 30 October 1995 to 15 November 1995, the Court heard oral statements in the following order by:

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| <i>for the WHO:</i> | Mr. Claude-Henri Vignes, Legal Counsel; |
| <i>for the Commonwealth of Australia:</i> | Mr. Gavan Griffith, Q.C., Solicitor-General of Australia, Counsel,
The Honourable Gareth Evans, Q.C., Senator, Minister for Foreign Affairs, Counsel; |
| <i>for the Arab Republic of Egypt:</i> | Mr. Georges Abi-Saab, Professor of International Law, Graduate Institute of International Studies, Geneva, Member of the Institute of International Law; |
| <i>for the French Republic:</i> | Mr. Marc Perrin de Brichambaut, Director of Legal Affairs, Ministry of Foreign Affairs,

Mr. Alain Pellet, Professor of International Law, University of Paris X and Institute of Political Studies, Paris; |
| <i>for the Federal Republic of Germany:</i> | Mr. Hartmut Hillgenberg, Director-General of Legal Affairs, Ministry of Foreign Affairs; |
| <i>for Indonesia:</i> | H.E. Mr. Johannes Berchmans Soedarmanto Kadarisman, Ambassador of Indonesia to the Netherlands; |
| <i>for Mexico:</i> | H.E. Mr. Sergio González Gálvez, Ambassador, Under-Secretary of Foreign Relations; |
| <i>for the Islamic Republic of Iran:</i> | H.E. Mr. Mohammad J. Zarif, Deputy Minister, Legal and International Affairs, Ministry of Foreign Affairs; |
| <i>for Italy:</i> | Mr. Umberto Leanza, Professor of International Law at the Faculty of Law at the University of Rome "Tor Vergata", Head of the Diplomatic Legal Service at the Ministry of Foreign Affairs; |

- for Japan:* H.E. Mr. Takekazu Kawamura, Ambassador, [70]
 Director General for Arms Control and Scientific Affairs, Ministry of Foreign Affairs,
 Mr. Takashi Hiraoka, Mayor of Hiroshima,
 Mr. Iccho Itoh, Mayor of Nagasaki;
- for Malaysia:* H.E. Mr. Tan Sri Razali Ismail, Ambassador, Permanent Representative of Malaysia to the United Nations,
 Dato' Mohtar Abdullah, Attorney-General;
- for New Zealand:* The Honourable Paul East, Q.C., Attorney-General of New Zealand,
 Mr. Allan Bracegirdle, Deputy Director of Legal Division of the New Zealand Ministry of Foreign Affairs and Trade;
- for the Philippines:* H.E. Mr. Rodolfo S. Sanchez, Ambassador of the Philippines to the Netherlands,
 Professor Merlin M. Magallona, Dean, College of Law, University of the Philippines;
- for the Russian Federation:* Mr. A. G. Khodakov, Director, Legal Department, Ministry of Foreign Affairs;
- for Samoa:* H.E. Mr. Neroni Slade, Ambassador and Permanent Representative of Samoa to the United Nations,
 Miss Laurence Boisson de Chazournes, Assistant Professor, Graduate Institute of International Studies, Geneva,
 Mr. Roger S. Clark, Distinguished Professor of Law, Rutgers University School of Law, Camden, New Jersey;
- for the Marshall Islands:* The Honourable Theodore G. Kronmiller, Legal Counsel, Embassy of the Marshall Islands to the United States of America,
 Mrs. Lijon Eknilang, Council Member, Rongelap Atoll Local Government;
- for Solomon Islands:* The Honourable Victor Ngele, Minister of Police and National Security,
 Mr. Jean Salmon, Professor of Law, Université libre de Bruxelles,
 Mr. Eric David, Professor of Law, Université libre de Bruxelles,
 Mr. Philippe Sands, Lecturer in Law, School of Oriental and African Studies, London University, and Legal Director, Foundation for International Environmental Law and Development,