

SEPARATE OPINION OF JUDGE ODA

1. I am in general agreement with the Court's decision that the request for advisory opinion made by the WHO should be dismissed as well as with the reasoning leading to that decision.

2. I would like, however, to make one point in connection with the question put to the Court by the World Health Assembly. Although that question was whether "the use of nuclear weapons by a State . . . [would] be a breach of its obligations under international law *including* the WHO Constitution" (emphasis added), the matter of whether "the use of nuclear weapons by a State . . . [would] be a breach of its obligations under international law" is quite distinct from the separate issue of whether "[that use] [would] . . . be a breach of its obligations under . . . the WHO Constitution". Certainly the question itself is made very ambiguous by the use of the word "including". My interpretation is, however, that the Court is asked to render an opinion on the question of whether such a use would be a breach of the States' obligations not only under international law but also under the WHO Constitution. The words, "including the WHO Constitution" seem to have been added to the question put to the Court in the hope that if the question concerning the use of nuclear weapons under international law were to be rejected by the Court as not arising within the scope of the activities of the Organization, then the question of whether such a use would be a breach of the States' obligations under the WHO Constitution might possibly elicit a different response.

When the Court, in its reasoning, uses the terms "the legal or illegal character of [the] causes", "the legality or illegality of the use of nuclear weapons" or "nuclear weapons . . . used legally or illegally", it can be seen to deal with the first question only and, on that basis, reaches the conclusion that the question posed by the World Health Assembly does not arise within "the scope of the Organization's activities" (Advisory Opinion, para. 22). I hold the view, however, that the question put to the Court relates to the interpretation of the WHO Constitution and may be said to have arisen "within the scope of [its] activities". It does not seem to be proper for the Court to dispose of the question in the request only from the standpoint of the "legality or illegality [under international law] of the use of nuclear weapons", while paying scant attention to the question of whether the use of nuclear weapons would be a breach of a member State's obligations under the WHO Constitution.

In its final analysis the Court stated that "the WHO is not empowered to seek an opinion on the interpretation of its Constitution in relation to

matters outside the scope of its functions” (Advisory Opinion, para. 28), but I hesitate to comment on the Court’s Opinion and do not intend to go into this aspect in any detail because of my view that the Court should, in any event, have refrained from rendering an opinion on this question.

3. My particular reason for writing this opinion is that I am personally very much afraid that if encouragement is given or invitations are extended for a greater use of the advisory function of the Court — as has recently been advocated on more than one occasion by some authorities — it may well be seized of more requests for advisory opinions which may in essence be unnecessary and over-simplistic. I firmly believe that the International Court of Justice should primarily function as a judicial institution to provide solutions to inter-State disputes of a contentious nature and should neither be expected to act as a legislature (although new developments in international law may well be crystallized through the jurisprudence of the Court) nor to function as an organ giving legal advice (except that the Court may give opinions on legal questions which arise within the scope of activities of the authorized international organizations) in circumstances in which there is no conflict or dispute concerning legal questions between States or between States and international organizations.

Requests for advisory opinion should, before they are brought to the Court, be more prudently considered by the international organizations authorized under Article 96 of the Charter to submit such requests to the Court, and the Court should in general give the most careful consideration to the way in which it exercises its advisory function.

4. During the 50-year history of the International Court of Justice, the Court’s opinion has been requested on only three occasions by specialized agencies, i.e., in the cases concerning: (a) *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco* (I.C.J. Reports 1956, p. 77), (b) *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (I.C.J. Reports 1960, p. 150), and (c) *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (I.C.J. Reports 1980, p. 73).

In the *Unesco* case, the Court was asked to render opinions concerning the competence of the ILO Administrative Tribunal to hear complaints introduced against Unesco by certain staff members of the organization whose appointments had not been renewed; the IMCO case was related to the interpretation of the Convention for the Establishment of the IMCO and the matter of whether the Maritime Safety Committee had been constituted in accordance with the Convention, and the WHO case was concerned with the application of the 1951 Regional Headquarters Agreement in a concrete dispute between the WHO and Egypt (where the regional headquarters of the WHO was located), and related to the proposed transfer of the headquarters away from Egypt against that country’s wishes.

In each of these three cases each specialized agency, that is, Unesco,

IMCO and the WHO, needed the opinion of the Court in order to solve one or more legal questions arising within the scope of its activities. These cases brought by requests from specialized agencies in the past history of the International Court of Justice cannot be considered as precedents for the present request from the WHO which does not relate to a question "arising within the scope of its activities".

* * *

5. The fact that the WHO made its request on the understanding that it was competent to do so on the basis of the resolution validly passed by the World Health Assembly does not preclude the Court from taking another position, as is properly explained in the Court's Opinion (cf. para. 29).

I would merely like to point out in this opinion that the limited function of the WHO, as one of the specialized agencies, was obviously well known to the Organization and it may be seen from the records of the World Health Assembly that the competence of the WHO to put the question to the Court as set forth in resolution WHA46.40 was vigorously contested not only by a number of States but also questioned by the Secretariat of the Organization itself.

*

6. It is only since 1992 that some member States of the WHO have become interested in the legal aspect of nuclear weapons — those same nuclear weapons which have been in existence for nearly 50 years, ever since the Organization was created. At the General Committee of the Forty-fifth Assembly (3rd meeting) on 12 May 1992, the Chairman of the Committee drew attention to a draft resolution proposed by the delegations of Belarus, Colombia, Costa Rica, El Salvador, Honduras, Kenya, Namibia, Nicaragua, Nigeria, Panama, Senegal, Swaziland, Tonga and Zimbabwe,

"[r]equest[ing] the Director-General:

(1) to refer the matter to the Executive Board to study and formulate a request for an advisory opinion from the International Court of Justice on the status in international law of the use of nuclear weapons in view of their serious effects on health and environment;

(2) to report back to the Forty-sixth World Health Assembly" (A45/A/Conf. Paper No. 2; 9 May 1992).

The General Committee decided, however, not to include "this item" on the agenda (WHA45/1992/REC/3: Forty-fifth World Health Assembly, 1992, *Summary Records and Reports of Committees*, pp. 4-5). The

reason for this was clearly explained by Mr. Piel, Legal Counsel, in a statement made in the 12th plenary meeting on the following day, 13 May 1992, which was worded as follows:

“The reasoning . . . had to do with a number of factors, including some serious concerns about the mandate of WHO . . . Whether the use of nuclear weapons is legal or illegal is a question that does not so readily fit the 22 constitutional functions of WHO under Article 2 or the 13 Health Assembly functions under Article 18.

[I]n order to obtain an advisory opinion, the problem must be real, i.e., related to genuine potential controversy and not mere speculation or intellectual interest.

As Legal Counsel . . . I have to share with you my grave concerns about this question of mandate and competence of WHO. My considered opinion is that the matter is too complicated, and risks serious embarrassment and overlap within the United Nations system for the Health Assembly to decide on the matter this year. Therefore, I would suggest that you consider not adding this supplementary item to the agenda of your Health Assembly at this time.” (WHA45/1992/REC/2: Forty-fifth World Health Assembly, 1992, *Verbatim Records of Plenary Meetings*, p. 223.)

*

7. The inclusion of item 32 on “Health and environmental effects of nuclear weapons” on the agenda of the following Forty-sixth World Health Assembly in 1993, as proposed by Nicaragua, Panama and Vanuatu (EB91/36), met with an objection at the Executive Board meeting on 29 January 1993. The Legal Counsel stated that

“he had received a letter on 22 December 1992 from the Office of the Under-Secretary-General in charge of Legal Affairs of the United Nations, agreeing that the United Nations itself was more suited to dealing with the question of the illegality of nuclear weapons”,

and he repeated his advice that “the illegality aspect should be referred to the United Nations” (EB91/1993/REC/2: Executive Board, Ninety-first Session, *Summary Records*, p. 247). The Executive Board seems to have paid insufficient attention to the views of the Legal Counsel.

8. At the Forty-sixth Assembly in May 1993 the General Committee (1st meeting), upon the suggestion of the Executive Board, approved the inclusion of “Health and environmental effects of nuclear weapons” as agenda item 33 (WHA46/1993/REC/3: Forty-sixth World Health Assem-

bly, 1993, *Summary Records and Reports of Committees*, p. xiii and p. 2).

Committee B had in hand, under this agenda item and together with the Director-General's report on "Health and environmental effects of nuclear weapons" (A46/30: 26 April 1993), a draft resolution sponsored by the delegations of 21 States, i.e., Bahrain, Belarus, Bolivia, Colombia, Comoros, Cook Islands, Cuba, Kazakhstan, Kenya, Kiribati, Lithuania, Mexico, Namibia, Papua New Guinea, Republic of Moldova, Swaziland, Tonga, Uganda, Vanuatu, Zambia and Zimbabwe (WHA46/1993/REC/3: Forty-sixth World Health Assembly, 1993, *Summary Records and Reports of Committees*, p. 257) — a text worded in exactly the same way as the eventual WHA46.40.

When addressing the Committee at its 8th meeting on 11 May 1993, the Legal Counsel presented a negative view, just as he had done in the previous year. He suggested that "the task of deciding whether an advisory opinion on the 'illegality' issue was needed [should] be that of the United Nations General Assembly, rather than the Health Assembly". In his view,

"[m]ore urgently needed were further disarmament negotiations, culminating in a truly international convention covering all nuclear weapons, which would, of course, extend beyond the health mandate of WHO" (*ibid.*, p. 258).

The delegates of Zambia, Mexico, Tonga, Vanuatu, Swaziland, Colombia, Zimbabwe and Namibia — which had themselves sponsored the draft resolution — together with the delegate of Barbados, all spoke in support of it (*ibid.*, pp. 259-261).

On the other hand, the United States proposed that the draft resolution should be determined not to be within the competence of the WHO (*ibid.*, p. 260) and this United States proposal was then supported by Denmark, speaking on behalf of the Member States of the European Community (*ibid.*, p. 260), and by Austria and Senegal (*ibid.*, p. 261).

9. The support given to the draft resolution was echoed by the delegates of certain non-governmental organizations who took part in the Assembly as observers. The International Physicians for the Prevention of Nuclear War believed that "WHO would be right to seek an opinion on the matter from the International Court of Justice and that [WHO] had the competence to do so". In its opinion, "[WHO's] request to the Court might be the only opportunity the world health community would have to seek a solution to its greatest health problem" (*ibid.*, p. 262). The World Federation of Public Health Associations informed the World Health Assembly at the 9th meeting that

"it had [itself] unanimously adopted a resolution on nuclear weapons and public health which, *inter alia*, urged the . . . World Health

Assembly to request an advisory opinion from the International Court of Justice on the legal status of the use of nuclear weapons, so as to remove the cloud of legal doubt under which the nuclear powers continued their involvement with such weapons, as well as to provide the legal basis for the gradual creation of a nuclear-free world” (WHA46/1993/REC/3: Forty-sixth World Health Assembly, 1993, *Summary Records and Reports of Committees*, p. 263).

10. The motion of the United States to propose that “the draft resolution should be determined not to be within the competence of WHO” was, as a result of a secret ballot, rejected by 62 votes to 38 with 3 abstentions (*ibid.*, p. 264).

A negative attitude towards the draft resolution was once again voiced by the Legal Counsel at the 10th meeting when he asserted that

“[s]ince the question of the illegality of nuclear weapons did fall squarely within the mandate of the United Nations . . . it clearly fell within the mandate of the General Assembly to refer the question of illegality to the International Court for an advisory opinion”.

He stressed that “[f]rom a strictly legal point of view . . . it was not within the normal mandate of WHO to refer the ‘illegality’ issue to the Court” (*ibid.*, p. 265). The Director-General himself also stated that “the content of the draft resolution posed some difficult problems” and recognized that “WHO should continue to study what was undoubtedly a major issue, but [that] collaboration was essential within the United Nations system in that regard” (*ibid.*, p. 266).

11. The further amendment suggested by the United States “to maintain WHO’s commitment to keeping the issue under review, while avoiding the difficulties to which referral to the International Court would inevitably give rise” (*ibid.*, p. 266) met with objections from the delegate of Vanuatu, speaking as a sponsor of the draft resolution, and the delegates of Mexico, Zambia, Papua New Guinea, Tonga, Libya and Uganda but was supported by Finland (*ibid.*, pp. 266-268). Senegal maintained a somewhat reserved position on the draft resolution (*ibid.*, p. 267).

It is noted with particular interest that, with regard to the financial cost which might be incurred in bringing a request to the Court, the delegate from an NGO, the International Physicians for the Prevention of Nuclear War, said that

“[the organization itself] as well as a number of other organizations with worldwide membership, would assist WHO in its initiative by raising extrabudgetary funds, should the Committee adopt the resolution before it” (*ibid.*, p. 268).

The United States amendment was rejected by 60 votes to 33, with 5 abstentions.

The further appeal by the United States that a decision on the amendment should be reached by a two-thirds majority was also rejected by 64 votes in favour to 31 against, with 2 abstentions (WHA46/1993/REC/3: Forty-sixth World Health Assembly, 1993, *Summary Records and Reports of Committees*, p. 268).

The original text of the draft resolution tabled before Committee B was approved by 73 votes in favour to 31 against, with 6 abstentions (54 States were absent) (*ibid.*, p. 268). Australia, New Zealand and Sweden indicated that they had abstained from voting on account of the WHO's lack of competence to take such an action (*ibid.*, p. 269).

12. It is extremely important to note that at the Committee level the discussions between the sponsoring States and the opposing States were exclusively focused upon the issue of whether the proposal for requesting the Court's opinion should be adopted, as being within the competence of the WHO. The questions of substance to be put to the Court — which naturally had legal or political implications — were not, however, subjected to any discussion by the delegates and were not elaborated upon.

*

13. At the 13th plenary meeting on the following and closing day of the Forty-sixth Session of the Assembly, that is, on 14 May 1993, and taking up the report of Committee B, the plenary dealt with the resolution entitled "Health and environmental effects of nuclear weapons". The United States delegate expressed his dismay that many speakers had chosen to disregard the advice of the Legal Counsel of the WHO and he called for the plenary session to overrule the decision of Committee B (WHA46/1993/REC/2: Forty-sixth World Health Assembly, 1993, *Verbatim Records of Plenary Meetings*, p. 273).

The United Kingdom gave support to the United States, saying that

"[w]e share the belief of WHO's own Legal Counsel . . . that this matter is not within the competence of WHO . . . A reference to the International Court of Justice is, in any case, a pointless and expensive, and a disruptive exercise." (*Ibid.*, p. 273.)

France expressed its intention of voting against the draft resolution and stated:

"the French Government considers that the World Health Assembly is not the appropriate forum to deal with such a subject, which has purely political connotations. My delegation deeply regrets that the work of the Assembly, which has such important implications for the health of the world's peoples, should have been disturbed and delayed by political considerations which were quite out of place." (*Ibid.*, p. 277.) [*Translation by the Registry.*]

On the other hand, the delegates of Mexico, Vanuatu, Zambia, Tonga and Colombia, which were the original sponsors of the draft resolution, took an opposite position (WHA46/1993/REC/2: Forty-sixth World Health Assembly, 1993, *Verbatim Records of Plenary Meetings*, pp. 274-277).

The Legal Counsel then spoke again, saying that "it is not within the normal competence or mandate of WHO to deal with the lawfulness or illegality of the use of nuclear weapons" (*ibid.*, p. 278). He stated that "the ultimate fundamental issue is one of mandate and competence" and considered that it was "not the legal mandate of WHO to deal with the lawfulness issue or refer it to the International Court of Justice" (*ibid.*). The Director-General implicitly expressed his reluctance by stating:

"We shall continue to operate within our mandate as a technical agency and a cooperative of Member States, mandated to act as the directing and coordinating authority on international health work." (*Ibid.*, p. 279.)

14. A vote on the matter of whether a secret ballot should be held was taken and the result was 75 votes in favour, 33 against, with 5 abstentions. The result of a vote on the draft resolution was 73 votes in favour, 40 against, with 10 abstentions (41 States were absent) (*ibid.*, p. 282). The draft resolution was thus adopted on 14 May 1993, obtaining only 73 votes from among 164 member States.

As the vote had been taken by secret ballot, the President did not allow any State to express its position on the voting beforehand; however Australia, New Zealand, Canada and the Netherlands repeated after the voting that the question of the legality of the use of nuclear weapons and the referral of this question to the International Court of Justice was clearly outside the mandate of the WHO (*ibid.*, pp. 282-283).

*

15. The adoption at the Forty-sixth World Health Assembly in 1993 of the resolution whereby the Court was asked to give an opinion was explained at the recent oral hearings (30 October 1995) before the Court by Mr. Vignes, who was re-appointed to the position of Legal Counsel after the Forty-sixth Assembly (after having previously served as Legal Counsel at the time of the earlier WHO advisory case in 1980), and who made the following statements:

"[T]his question is unprecedented. It is without precedent in dealing for the first time with an aspect never previously considered by the World Health Organization and not dealt with in any of the reports presented by the Director-General. The issue is now no longer simply one of the 'effects of the use of nuclear weapons', but

henceforth centres on ‘the lawfulness of the use of nuclear weapons’.

Why and how had this new aspect been raised? It is hard to say. But it would none the less seem, from a reading of the discussions, that besides the Governments which had asked for the item to be included in the agenda, and the co-authors of the draft resolution, at least two non-governmental organizations had been involved in its preparation . . . Furthermore, it would seem that the failure at that time — but this is obviously no longer the case — of attempts to get the . . . General Assembly to request an advisory opinion also played some part.” [*Translation by the Registry.*]

We cannot shut our eyes to interpretations given by the competent officials of the Organization.

* * *

16. Not only does the WHO lack the competence to submit a request for advisory opinion to the Court on the above-mentioned question, which appears not to arise “within the scope of [its] activities” as the Court found in its Opinion, but it also seems to be clear from the records of the Forty-fifth and Forty-sixth World Health Assemblies for 1992 and 1993, respectively, that resolution WHA46.40 was initiated by a few NGOs which had apparently failed in an earlier attempt to get the United Nations General Assembly to request an advisory opinion on the subject.

The Court should have fully noted the fact that, while resolution WHA46.40 was certainly adopted by the majority of the World Health Assembly, this was in spite of strong objections not only from a number of States but also from the Legal Counsel of the Organization, who was fully aware of and actually asserted the Organization’s lack of competence to request an advisory opinion of the Court.

(Signed) Shigeru ODA.