

LEGALITY OF THE USE BY A STATE OF NUCLEAR WEAPONS IN ARMED CONFLICT

Advisory Opinion of 8 July 1996

The Court found, by 11 votes to 3, that it was not able to give the advisory opinion requested by the World Health Organization on the question of the Legality of the Use by a State of Nuclear Weapons in Armed Conflict.

The Court considered that there are three conditions which must be satisfied in order to found the jurisdiction of the Court when a request for an advisory opinion is submitted to it by a specialized agency: the agency requesting the opinion must be duly authorized, under the Charter of the United Nations, to request opinions from the Court; the opinion requested must be on a legal question; and this question must be one arising within the scope of the activities of the requesting agency.

The first two conditions had been met. With regard to the third, however, the Court found that although according to its Constitution the World Health Organization (WHO) is authorized 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 engaged in, the question put to the Court in the present case relates *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*. And the Court pointed out that whatever those effects might be, the competence of WHO to deal with them is not dependent on the legality of the acts that caused them. The Court further pointed out that international organizations do not, unlike States, possess a general competence, but are governed by the "principle of speciality", that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them. Besides, the World Health Organization is an international organization of a particular kind—a "specialized agency" forming part of a system based in the Charter of the United Nations, which is designed to organize international cooperation in a coherent fashion by bringing the

United Nations, invested with powers of general scope, into relationship with various autonomous and complementary organizations, invested with sectorial powers. The Court therefore concluded that the responsibilities of WHO are necessarily restricted to the sphere of public "health" and cannot encroach on the responsibilities of other parts of the United Nations system, and that there is no doubt that questions concerning the use of force, the regulation of armaments and disarmament are within the competence of the United Nations and lie outside that of the specialized agencies. The request for an advisory opinion submitted by WHO thus does not relate to a question which arises "within the scope of [the] activities" of that Organization.

The Court was composed as follows: President Bedjaoui, Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo, Higgins; Registrar Valencia-Ospina.

*

* *

Judges Ranjeva and Ferrari Bravo appended declarations to the advisory opinion of the Court; Judge Oda appended a separate opinion; Judges Shahabuddeen, Weeramantry and Koroma appended dissenting opinions.

*

* *

Submission of the request and subsequent procedure (paras. 1-9)

The Court begins by recalling that by a letter dated 27 August 1993, filed in the Registry on 3 September 1993, the Director-General of the World Health Organization officially communicated to the Registrar a decision taken by the World Health Assembly to submit a question to the

Continued on next page

Court for an advisory opinion. The question set forth in resolution WHA46.40, adopted by the Assembly on 14 May 1993, reads 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?”

The Court then recapitulates the various stages of the proceedings.

Jurisdiction of the Court (paras. 10-31)

The Court begins by observing that, in view of Article 65, paragraph 1, of its Statute and of Article 96, paragraph 2, of the Charter, three conditions must be satisfied in order to found the jurisdiction of the Court when a request for an advisory opinion is submitted to it by a specialized agency: the agency requesting the opinion must be duly authorized, under the Charter, to request opinions from the Court; the opinion requested must be on a legal question; and this question must be one arising within the scope of the activities of the requesting agency.

Authorization of WHO to request advisory opinions (paras. 11-12)

Where WHO is concerned, the above-mentioned texts are reflected in article 76 of that Organization’s Constitution, and in paragraph 2 of article X of the agreement of 10 July 1948 between the United Nations and WHO, which the Court finds leave no doubt that WHO has been duly authorized, in accordance with Article 96, paragraph 2, of the Charter, to request advisory opinions of the Court.

“Legal question” (paras. 13-17)

The Court observes that it has already had occasion to indicate that questions

“framed in terms of law and rais[ing] problems of international law . . . are by their very nature susceptible of a reply based on law . . . [and] appear . . . to be questions of a legal character” (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, para. 15).

It finds that the question put to the Court by the World Health Assembly does in fact constitute a legal question, as in order to rule on the question submitted to it the Court must identify the obligations of States under the rules of law invoked, and assess whether the behaviour in question conforms to those obligations, thus giving an answer to the question posed based on law.

The fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a “legal question” and to “deprive the Court of a competence expressly conferred on it by its Statute”. Nor are the political nature of the motives which may be said to have inspired the request or the political implications that the opinion given might have of relevance in the establishment of the Court’s jurisdiction to give such an opinion.

Question arising “within the scope of the activities” of WHO (paras. 18-31)

The Court observes that in order to delineate the field of activity or the area of competence of an international organization, one must refer to the relevant rules of the organization and, in the first place, to its constitution. From a formal standpoint, the constituent instruments of international organizations are multilateral treaties, to which the well-established rules of treaty interpretation apply. But they are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders and the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.

According to the customary rule of interpretation as expressed in article 31 of the 1969 Vienna Convention on the Law of Treaties, the terms of a treaty must be interpreted “in their context and in the light of its object and purpose” and there shall be

“taken into account, together with the context:

...

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”.

The Court has had occasion to apply this rule of interpretation several times and will also apply it in this case.

Interpretation of the WHO Constitution (paras. 20-26)

The Court points out that the functions attributed to WHO are listed in 22 subparagraphs (subparagraphs (a) to (v)) in article 2 of its Constitution. None of these subparagraphs expressly refers to the legality of any activity hazardous to health; and none of the functions of WHO is dependent upon the legality of the situations upon which it must act. Moreover, it is stated in the introductory sentence of article 2 that the Organization discharges its functions “in order to achieve its objective”. The objective of the Organization is defined in article 1 as being “the attainment by all peoples of the highest possible level of health”.

Also referring to the preamble to the Constitution, the Court concludes that, 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 Organization, the provisions of its article 2 may be read as authorizing the Organization 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 engaged in.

It goes on to observe that the question put to the Court in the present case relates, however, *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 envi-*

ronmental effects. And the Court points out that, whatever those effects might be, the competence of WHO to deal with them is not dependent on the legality of the acts that caused them. Accordingly, it does not seem to the Court that the provisions of article 2 of the WHO Constitution, interpreted in accordance with the criteria referred to above, can be understood as conferring upon the Organization a competence to address the legality of the use of nuclear weapons, and thus in turn a competence to ask the Court about that.

In the view of the Court, none of the functions referred to in the resolution by which the Court has been seised of this request for an opinion has a sufficient connection with the question before it for that question to be capable of being considered as arising “within the scope of [the] activities” of WHO. The causes of the deterioration of human health are numerous and varied; and the legal or illegal character of these causes is essentially immaterial to the measures which WHO must in any case take in an attempt to remedy their effects. In particular, the legality or illegality of the use of nuclear weapons in no way determines the specific measures, regarding health or otherwise (studies, plans, procedures, etc.), which could be necessary in order to seek to prevent or cure some of their effects. The reference in the question put to the Court to the health and environmental effects, which according to WHO the use of a nuclear weapon will always occasion, does not make the question one that falls within WHO’s functions.

The Court goes on to point out that international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the “principle of speciality”, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.

The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments that govern their activities. It is generally accepted that international organizations can exercise such powers, known as “implied” powers.

The Court is of the opinion, however, that to ascribe to WHO the competence to address the legality of the use of nuclear weapons—even in view of their health and environmental effects—would be tantamount to disregarding the principle of speciality; for such competence could not be deemed a necessary implication of the Constitution of the Organization in the light of the purposes assigned to it by its member States.

WHO is, moreover, an international organization of a particular kind. As indicated in the preamble and confirmed by article 69 of its Constitution, “the Organization shall be brought into relation with the United Nations as one of the specialized agencies referred to in Article 57 of the Charter of the United Nations”. As its Articles 57, 58 and 63 demonstrate, the Charter laid the basis of a “system” designed to organize international cooperation in a coherent fashion by bringing the United Nations, invested with powers of general scope, into relationship with various autonomous and complementary organizations, invested with sectorial powers.

If, according to the rules on which that system is based, WHO has, by virtue of Article 57 of the Charter, “wide international responsibilities”, those responsibilities are necessarily restricted to the sphere of public “health” and cannot encroach on the responsibilities of other parts of the United Nations system. And there is no doubt that questions concerning the use of force, the regulation of armaments and disarmament are within the competence of the United Nations and lie outside that of the specialized agencies.

For all these reasons, the Court considers that the question raised in the request for an advisory opinion submitted to it by WHO does not arise “within the scope of [the] activities” of that Organization as defined by its Constitution.

WHO’s practice (para. 27)

A consideration of the practice of WHO bears out these conclusions. None of the reports and resolutions referred to in the preamble to World Health Assembly resolution WHA46.40, nor resolution WHA46.40 itself, could be taken to express, or to amount on its own to, a practice establishing an agreement between the members of the Organization to interpret its Constitution as empowering it to address the question of the legality of the use of nuclear weapons, nor can, in the view of the Court, such a practice be inferred from isolated passages of certain resolutions of the World Health Assembly cited during the present proceedings.

The Court further considers that the insertion of the words “including the WHO Constitution” in the question put to the Court does not change the fact that WHO is not empowered to seek an opinion on the interpretation of its Constitution in relation to matters outside the scope of its functions.

Other arguments (paras. 29-30)

The Court finally considered that other arguments put forward in the proceedings to found the jurisdiction of the Court—concerning the way in which World Health Assembly resolution WHA46.40 had been adopted and concerning the reference to that resolution in General Assembly resolution 49/75 K—did not affect the conclusions reached by the Court concerning the competence of WHO to request an opinion on the question raised.

Having arrived at the view that the request for an advisory opinion submitted by WHO does not relate to a question which arises “within the scope of [the] activities” of that Organization in accordance with Article 96, paragraph 2, of the Charter, the Court finds that an essential condition of founding its jurisdiction in the present case is absent and that it cannot, accordingly, give the opinion requested.

The final paragraph reads as follows:

“32. For these reasons,

THE COURT,

By eleven votes to three,

Finds that it is not able to give the advisory opinion which was requested of it under World Health Assembly resolution WHA46.40 dated 14 May 1993.

IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: Judges Shahabuddeen, Weeramantry, Koroma.”

Declaration of Judge Ranjeva

Judge Ranjeva voted in favour of the decision of the Court as he considers that it accords with the relevant law. He would none the less have preferred the Court to be more explicit with respect to the problem of its advisory jurisdiction, by stressing the fact that the structure of the question put by the World Health Assembly had not been such as to enable it to exercise the jurisdiction that it did, in any case, possess.

Declaration of Judge Ferrari Bravo

Judge Ferrari Bravo regrets that the Court should have arbitrarily divided into two categories the long line of General Assembly resolutions that deal with nuclear weapons. Those resolutions are fundamental. This is the case of resolution 1 (I) of 24 January 1946, which clearly points to the existence of a truly solemn *undertaking* to eliminate all forms of nuclear weapons, whose presence in military arsenals was declared unlawful. The cold war, which intervened shortly afterwards, prevented the *development* of this concept of illegality, while giving rise to the concept of nuclear deterrence which has *no legal value*. The theory of deterrence, while it has occasioned a practice of the nuclear-weapon States and their allies, has not been able to create a legal practice serving as a basis for the incipient creation of an international custom. It has, moreover, helped to widen the gap between Article 2, paragraph 4, of the Charter and Article 51.

The Court should have proceeded to a constructive analysis of the role of the General Assembly resolutions. These have, from the outset, contributed to the formation of a rule prohibiting nuclear weapons. The theory of deterrence has arrested the development of that rule and, while it has prevented the *implementation* of the prohibition of nuclear weapons, it is none the less still the case that that “bare” prohibition has remained unchanged and continues to produce its effects, at least with regard to the burden of proof, by making it more difficult for the nuclear Powers to vindicate their policies within the framework of the theory of deterrence.

Separate opinion of Judge Oda

Judge Oda, while being in agreement with the Court’s decision that the request should be dismissed as well as with the reasoning leading to that decision, nevertheless wishes to make clear his view that the Court should have taken more note of the fact that it was asked not only whether the use of nuclear weapons would be a breach of the obligations of States under international law but whether it would also be a breach of the obligations of States under the WHO Constitution.

Judge Oda is very concerned that the Court may be seised of more requests for advisory opinion which may in essence be unnecessary and oversimplistic. He stressed that the advisory function should only be used in cases of conflict or dispute and not merely to discuss general matters of international law.

He also pointed out that advisory opinions had been requested by specialized agencies in three previous cases in the history of the Court, but strictly in order to solve one or more legal questions arising within the scope of their activities. This precedent has not been followed in the present case.

Judge Oda points out that the request of WHO was drafted without there being any real agreement among the delegates in the World Health Assembly and, in particular, that it was brought to the Court contrary to the repeated admonitions of the Legal Counsel of WHO, who contended that the Organization was not competent to bring this matter to the Court under Article 96 (2) of the Charter of the United Nations.

Dissenting opinion of Judge Shahabuddeen

The main reason for Judge Shahabuddeen’s dissent is that, in his respectful view, the Court has mistaken the meaning of WHO’s question. Contrary to the Court’s impression, WHO is not asking whether the use of nuclear weapons by one of its members is lawful under international law as a general matter; a more reasonable interpretation of the question is that WHO is asking whether such use would be a breach of a member’s obligations under international law but only in so far as it would also be a breach of its obligations under the Constitution of WHO. WHO would have to deal with the health and environmental effects produced by the action of a member even if that action is in breach of the member’s obligations under that Constitution; but it nevertheless remains competent for WHO to concern itself with the question whether, in producing a situation demanding action by WHO, a member may have breached its obligations under that Constitution.

Dissenting opinion of Judge Weeramantry

Judge Weeramantry, in his dissenting opinion, stated that the question asked by the World Health Organization related to obligations in three particular areas:

- (a) State obligations in regard to health;
- (b) State obligations in regard to the environment; and
- (c) State obligations under the WHO Constitution.

The question asked by WHO was substantially different from the general question of legality of use or threat of use of nuclear weapons, asked by the General Assembly. However, the Court had treated it as a question of general illegality, and had not examined State obligations in the three areas mentioned.

Had the Court inquired into these three areas, it would have found that each of them was intimately linked with the legitimate concerns of WHO and that, in each of these areas, State obligations were violated by nuclear weapons. Judge Weeramantry, in his opinion, examines the health-related and environmentally related effects of nuclear weapons to show the diametrical contrast between those effects and the obligations of States, both as members of the international community, in general, and as subscribing parties to the WHO Constitution.

Judge Weeramantry strongly disagreed with the majority of the Court, who had held that WHO’s question was outside the scope of its legitimate sphere of interest. His view, on the other hand, was that the question asked by WHO was entirely within its legitimate and constitutional sphere of interest. WHO was in fact to be commended for having

given its attention to the question of the legality of the nuclear weapon, which was the greatest man-made threat to human health thus far devised.

WHO was the only health authority to which the world would have to turn for international assistance if a country were stricken with a nuclear attack, for its own health services would have collapsed. Moreover, even neutral countries not involved in the dispute, which would be affected by the radiation and other effects of nuclear weapons, would need to turn to WHO for assistance in such an eventuality. Global health was central to the question, just as global health was central to the concerns of WHO.

Planning and prevention were essential parts of the activities of all health authorities, and this general principle unquestionably applied to WHO, which needs the legal information requested, for precisely this purpose.

The Court's decision was based on restricted principles of treaty interpretation and should rather have interpreted WHO's Constitution in the light of its object and purpose—"to promote and protect the health of all peoples". Judge Weeramantry disagreed with the view that United Nations agencies conducted their affairs within a strictly compartmentalized scheme of division of functions. He disagreed with the Court's rigid application of the "principle of speciality" to WHO, so as to take the question of legality out of its area of concern, merely because peace and security fell within the concerns of the Security Council.

The effects of nuclear weapons on health showed the futility of awaiting a nuclear catastrophe for WHO to move into action in providing medical services. The nuclear weapon was, *inter alia*, the greatest cancer-inducing instrumentality yet devised. WHO was just as much entitled to concern itself with the legality of this agency of ill health as it was to inquire into the legality of a cancer-inducing pharmaceutical product. Depending on the answer to that question, it would have to adopt different strategies to deal with the problem.

Moreover, this was the first case ever in which the Court had refused to consider the request of a specialized agency of the United Nations for an advisory opinion. Such a refusal should only be for compelling reasons. No such reason has been shown to exist in the present case. Judge Weeramantry's view was that international law joined with the imperatives of global health in requiring the Court to answer WHO's request.

Dissenting opinion of Judge Koroma

In his dissenting opinion, Judge Koroma stated that the Court's finding that it lacked jurisdiction to respond to the request by WHO was not only unprecedented but also inconsistent with its own jurisprudence.

He also disputed the Court's finding that the question posed by the Organization was outside its competence and scope of activities. To reach that conclusion, Judge Koroma maintained that the Court had misconstrued the question put by WHO as relating to the legality of the use by a State of nuclear weapons in armed conflict. In his view, that question related to the health and environmental effects of nuclear weapons and to the problem of whether those effects would be in breach of the obligations of States, a matter which falls eminently within the competence and scope of the agency's activities.

He recalled that WHO is the specialized agency responsible for the protection and the safeguarding of the health of all peoples at the international level and its responsibilities include the taking of measures to prevent health problems like those which are bound to arise following the use of nuclear weapons. In this connection, he pointed out that the Organization dealt primarily with preventive medicine.

Accordingly, in his view, a request to the Court seeking legal clarification about the health and environmental effects of the use of nuclear weapons not only is a matter which is within the competence of the Organization but is one which should have led the Court to render an advisory opinion.

Judge Koroma recalled that the Court had previously stated that it would:

"give an opinion based on law, once it has come to the conclusion that the questions put to it are relevant and have a practical and contemporary effect, and consequently . . . not devoid of object and purpose".

He maintained that the request for an advisory opinion by WHO related to an issue which not only was of direct relevance to the Organization, but had practical and contemporary effect as well, and is not devoid of object and purpose.

Having analysed the evidence presented by delegations including those of Japan and the Marshall Islands, and the study carried out under the auspices of WHO on the *Effects of Nuclear War on Health and Health Services*, he came to the conclusion that should a nuclear weapon be used in an armed conflict the number of dead would vary from one million to one thousand million, to which the same number of people injured was to be added. If a larger number of such weapons were to be used, they would have catastrophic effects, including the destruction of transport, food delivery, fuel and basic medical supplies, resulting in possible famine and mass starvation on a global scale. He concluded that nuclear weapons when used are incapable of discriminating between civilians and non-civilians, nor would such weapons spare the hospitals or reservoirs of drinking water that are indispensable for survival after a nuclear attack. He was therefore convinced that nuclear weapons caused superfluous injury and unnecessary suffering to their victims, going so far as to prevent the treatment of those wounded.

Such effects, he maintained, would be patently contrary to international law applicable in armed conflict, and in particular international humanitarian law, as well as constituting a breach of the health and environmental obligations of States under international law, including the WHO Constitution. The Court's findings that such matters were not within the competence or scope of activities of the Organization were therefore incoherent and incomprehensible.

Judge Koroma regretted that, in order to reach those findings, the Court not only had misinterpreted the question—a misinterpretation which both distorted the intention of the question and proved fatal for the request—but had also had to depart from its jurisprudence according to which it would only decline to render an advisory opinion for "compelling reasons". In his view, no such compelling reasons existed or had been established in this case. He was therefore left wondering whether the finding of the Court that it lacked jurisdiction was not the kind of solution resorted to in cases where the need to give a decision on the merits would involve unusual difficulty or embarrass-

ment for the Court. On the other hand, the Court had always responded positively to requests for advisory opinions and regarded its role as a form of participation in the activities of the Organization, while at the same time protecting its judicial character. By declining to render an opinion in this case the Court had, in his view, chosen to vacate its positive record in this sphere, particularly on an issue of such

vital importance that embraced not only a legal but a moral and humanitarian dimension as well. He concluded by recalling that “medicine is one of the pillars of peace”, but that it can equally be said that health is a pillar of peace—or, as is stated in the WHO Constitution, “the health of all peoples is fundamental to the attainment of peace and security”.
