

(c) Case Analysis

The Advisory Opinion of the International Court of Justice in the WHO Nuclear Weapons Case: A Critique

Keywords: International Court of Justice; Nuclear Weapons case; World Health Organization.

1. THE BACKGROUND

The World Health Organization (WHO) had, among other things, been examining and deliberating the hazardous effects to health by the use of nuclear weapons. These discussions culminated in a resolution which requested an advisory opinion from the International Court of Justice (ICJ) on the legality of the use of nuclear weapons in the following terms:

[i]n 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?¹

The question, which marked the culmination of a long process, took up familiar matters, in that it referred to the "health and environmental effects of nuclear weapons", with which the WHO had already been concerned for many years.² In other respects, the question was unprecedented. It is without precedent in dealing for the first time with an aspect never previously considered by the WHO and not dealt with in any of the reports presented by its Director General. The issue was no longer simply one of the 'effects of the use of nuclear weapons'.

It would nonetheless seem, from reading 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-govern-

1. Resolution WHA 46.40, 14 May 1993.

2. See, for an account of the events leading up to Resolution 46.40, the oral presentation of the Legal Adviser of the WHO on 30 October 1995, ICJ Document CR 95/22, at 25-32.

mental organizations had been involved in its preparation. The association known as International Physicians for the Prevention of Nuclear War stated during the discussions that the "WHO would be right to seek an opinion on the matter from the International Court of Justice".³ The World Federation of Public Health Associations, for its part, informed the Committee that it had unanimously adopted a resolution on nuclear weapons and public health, which *inter alia* urged the forty-sixth World Health Assembly (WHA) to request an advisory opinion from the International Court of Justice on the legal status of the use of nuclear weapons.⁴ Furthermore, it would seem that the failure at that time - but this is obviously no longer the case - of attempts to get the United Nations General Assembly (GA) to request an advisory opinion also played some part.

The inclusion of this new matter of the 'lawfulness' of the use of nuclear weapons evoked reactions from various delegations. Some of them formally contested, first, in Committee the Assembly's competence to adopt such a resolution in the course of discussions which were essentially concerned, both in committee and in plenary, with this controversy. The delegations supporting the Assembly's competence to deal with questions of 'lawfulness' referred to Article 1 of the WHO Constitution⁵ and argued that this resolution fell within the scope of the organization's constitutional functions, as described in Article 2 of its constitution. They called to mind the principles contained in the preamble of the constitution, and accordingly considered, as one delegate said, that: "[t]he Health Assembly had the competence, wisdom and mandate to consider the [...] resolution".⁶

On the other hand, whilst it was acknowledged that the WHO's studies on the health effects of nuclear war 'were within its mandate', it was stressed that, under the terms of Article 76 of its Constitution, the WHO was entitled to request the International Court of Justice to give an advisory opinion only on legal questions 'within the competence of the Organization'. Reference was made to Article 96(2) of the Charter and to Article X(2) of the Agreement between the United Nations and the WHO.

3. Presentation of the WHO Legal Advisor to the ICJ, 30 October 1995, ICJ Doc. 95/22, at 16-17.

4. *Id.*

5. World Health Organization Constitution, 14 UNTS 185 (1946), adopted by the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946, entered into force on 7 April 1948.

6. 46th WHA. Verbatim Records of Plenary Meetings. at 278.

In short, various delegations considered that the 'lawfulness' of the use of nuclear weapons, which was the crux of the question put to the Court, was a matter not for the WHO but for the United Nations General Assembly.⁷

A motion contesting the competence of the Assembly was tabled, in accordance with Rule 65 of its Rules of Procedure.⁸ This motion was rejected, with 38 votes in favour, 62 votes against, and 3 abstentions. The resolution itself was adopted by the Committee, with 73 votes in favour, 31 against, and 6 abstentions. In the plenary meeting, the same arguments were put forward for or against the competence of the Assembly. Specifically questioned on the subject, the then Legal Counsel considered that it was not within the normal mandate of the WHO to refer the question of 'lawfulness' to the Court, but that it was ultimately for the Assembly to decide the issue.⁹ The resolution was nonetheless adopted by 73 votes in favour to 40 against with 10 abstentions.¹⁰

2. THE ARGUMENTS

Before the ICJ, 35 states filed written statements. These were 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, The Netherlands, New Zealand, Norway, Papua New Guinea, Philippines, Republic of Moldova, Russian Federation, Rwanda, Samoa, Saudi Arabia, Solomon Islands, Sri Lanka, Sweden, Uganda, Ukraine, UK, and USA. In addition, written comments on those written statements were submitted by nine states: Costa Rica, France, India, Malaysia, Nauru, Russian Federation, Solomon Islands, UK, and USA. At the public sittings oral statements were heard from the WHO and 22 states, some of which had not submitted written statements. These were Australia, Costa Rica, Egypt, France, Germany, Indonesia, Iran, Italy, Japan, Malaysia, Mexico, New Zealand, Philippines, Qatar, Russia, San Marino, Samoa, Marshall Islands, Solomon

7. Agreement Between the United Nations and the WHO, adopted by the first World Health Assembly on 10 July 1948, 19-II UNTS 193 (1947).

8. Rules of Procedure, adopted by the eighth World Health Assembly, Resolutions WHA 8.26 and WHA 8.27, 26 May 1955.

9. Verbatim Records, *supra* note 6, at 278.

10. Resolution WHA 46.40, *supra* note 1.

Islands, UK, USA, and Zimbabwe.

Of the 35 states which made written statements on the question asked by the WHO on whether the use of nuclear weapons by a state in an armed conflict would be a breach of its obligations under international law including the WHO Constitution, nine states argued that the Court should not consider the case, stating that the WHO did not have the mandate to request such an opinion or that the Court should use its discretion not to respond.¹¹ Five of these nine states argued that should the Court decide to consider the merits of the case, it should determine that the use of nuclear weapons is not illegal *per se*. Five other states which addressed the issue of admissibility argued that the case was admissible and that the Court should give an opinion.¹² Twenty-two states took the position that the use of nuclear weapons is illegal. In the oral proceedings, while the number of states opposing the rendering of an opinion remained constant, eight more states¹³ which addressed the issue were of the view that there was no bar to the ICJ giving an opinion, bringing the number to 13 of those who had addressed the issue of 'admissibility' and favoured 'admissibility'. But all those who did not address that issue were more or less of the view that the Court should declare the use of nuclear weapons illegal.

3. THE COURT'S OPINION

The Court was of the view that the WHO was duly authorized in accordance with Article 96(2) of the Charter to request advisory opinions from the Court. The point was not disputed. As the Court pointed out,¹⁴ it had already dealt with a request for an advisory opinion by the WHO in the *WHO/Egypt* case.¹⁵

11. These states were Australia, Finland, France, Germany, Italy, Netherlands, Russia, the UK, and USA.

12. These states were Ireland, Mauru, Somao, Saudi Arabia, and the Solomon Islands.

13. These were Egypt, Iran, New Zealand, Qatar, San Marino, Marshall Islands, Costa Rica, and Zimbabwe.

14. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (World Health Organization), Advisory Opinion, 1996 ICJ Rep. 66, at 72, para. 12; reproduced in 35 ILM 814 (1996).

15. *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*, Advisory Opinion, 1980 ICJ Rep. 73.

There were three points to which the Court adverted.

1. The first question was whether in the exercise of its discretionary power, it should refuse to give an opinion. The Court did not answer the question, because it refused to give the opinion on a different ground. It said:

[v]arious arguments have been put forward for the purpose of persuading the Court to use the discretionary power it possesses under Article 65, paragraph 1, of the Statute, to decline to give the opinion sought. The Court can however only exercise this discretionary power if it has first established that it has jurisdiction in the case in question: if the Court lacks jurisdiction, the question of exercising its discretionary power does not arise.¹⁶

2. The second point related to the 'legal' nature of the question. The Court determined that the question raised was, indeed, a legal question:

[t]he Court must therefore first satisfy itself that the advisory opinion requested does indeed relate to a 'legal question' within the meaning of its Statute and the United Nations Charter.¹⁷

The Court 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.¹⁸

The question put to the Court by the World Health Assembly does in fact constitute a legal question, as the Court is requested to rule on whether,

in view of the health and environmental effects, [...] the use of nuclear weapons by a State in war or other armed conflict [would] be a breach of its obligations under international law including the WHO Constitution.¹⁹

To do this, the Court must identify the obligations of states under the rules of law invoked, and assess whether the behaviour in

16. WHO Nuclear Weapons case, *supra* note 14, at 73, para. 14.

17. *Id.*, at 73, para. 15.

18. Western Sahara case, Advisory Opinion, 1975 ICJ Rep. 12, at 18, para. 25.

19. WHO Nuclear Weapons case, *supra* note 14, at 73, para. 16.

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. Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of states with regard to the obligations imposed upon them by international law.

Furthermore, as the Court said in the Opinion it gave in 1980 in the *WHO/Egypt* case:

[I]ndeed, in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate, especially when these may include the interpretation of its constitution.²⁰

The Court also finds that the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion.²¹

The Court incidentally dismissed what may be regarded as a separate point, namely that the question (even if it were a legal one) was essentially a political one. As it said in the citation above, political motivation or implications did not deprive the question of its legal character.

3. The next issue, by far the most important one, was whether the question arose 'within the scope of activities' of the WHO, as

20. *WHO/Egypt* case, *supra* note 15, at 87, para. 33.

21. *WHO Nuclear Weapons* case, *supra* note 14, at 73, paras. 15-17.

required by Article 96(2) of the UN Charter. The Court concluded that

[h]aving arrived at the view that the request for an advisory opinion submitted by the WHO does not relate to a question which arises 'within the scope of activities' of that Organization in accordance with Article 96, paragraph 2, of the Charter, [...] an essential condition of founding its jurisdiction in the present case is absent and [...] it cannot, accordingly, give the opinion requested.²²

4. THE IMPORTANT POINTS

Strictly, if the Court was right in finding that the question did not arise within the scope of activities of the WHO, the question whether it should have refused an opinion in the exercise of its discretionary power did not need to be answered. Indeed, what it did was to avoid the latter question because of its answer to the former question. However, both points are of importance and will be examined here.

4.1. The discretionary argument

A convenient starting point for the examination of the discretionary argument is the written statements of states (35) in the case and the written comments of states (nine) responding to them. The arguments supporting the exercise of the Court's discretion in favour of not giving an opinion were as follows:

1. the question was a political one, though the formulation of the question was in legal terms (e.g., Australia, France, UK);
2. nuclear weapons are political weapons essential for deterrence and, thus, for security - a variation of argument 1. (e.g., France, Germany, Russia);
3. the question is too abstract for judicial consideration and is one to which a specific reply cannot be given (e.g., USA, France);
4. the request is devoid of object and purpose, because the opinion will have no practical effect - it will neither be enforceable nor

22. *Id.*, at 84, para. 31.

- have any effect on the policies of the nuclear-weapon states (e.g., Australia, UK);
5. an opinion not complied with would undermine the Court's authority - the nuclear-weapon states may ignore the opinion (e.g., Australia);
 6. an opinion would interfere with disarmament negotiations and undermine the progress already made in them (e.g., Australia, France, UK, USA);
 7. an affirmative opinion would undermine deterrence - the policy of discussion has contributed to the maintenance of world stability and peace (e.g., France, USA, Germany, Russia); and
 8. an opinion would not help enforce the constitutional obligations of member states of the WHO (e.g., UK).

All the states opposing the rendering of an opinion on discretionary grounds were developed states. The view taken by those states supporting the refusal to give an opinion was opposed by a large number of other states. The best presentation of their arguments is to be found in the Written Comments of Malaysia (attachment to Note Verbale to the Court, dated 19 June 1995) and Nauru (attachment to Letter to the Court, dated 19 June 1995). It is unnecessary to detail the responses. Suffice it to state that the conclusions reached regarding each of the eight points raised by the states opposing the rendering of an opinion were that the objections in each case should not affect the Court's decision in the exercise of its discretion.

It would appear that, as far as discretion went, the arguments were cogent that the discretion should be exercised *in favorem iurisdictionis*. It may be said briefly that the eight arguments raised against the exercise of jurisdiction were really not good reasons. As has already been pointed out, the Court did not consider it necessary to answer this question.

4.2. The scope of activities of the organization

In identifying the necessity for the question raised by the WHO to be 'within the scope of the activities' of the organization the Court was doing no more than implementing the terms of Article 96(2) of the UN Charter. In finding that the question did not fall within the WHO's scope of activities, not only did the Court agree with the conclusion of the minority of

states that took the same view but, it is believed, it came to the correct conclusion. The arguments of the majority were not as cogent as the view taken by the Court in its conclusion.

That having been said, the reasoning of the Court bears examination. The first view of importance or, indeed, one of prime importance, was whether by duly adopting a resolution pursuant to the proper procedures the WHA could influence the issue whether the resolution was *intra vires* the organization. The Court rightly took the position that procedural propriety and the question of *ultra vires* were two separate issues. As it said,

the mere fact that a majority of States, in voting on a resolution, have complied with all the relevant rules of form cannot in itself suffice to remedy any fundamental defects, such as acting *ultra vires* [...].²³

What was said is nothing new. Referring to the powers of organs vis-à-vis their competence, the Court rightly said:

as the Court has stated, each organ must, in the first place at least, determine its own jurisdiction.^[24] It was therefore certainly a matter for the World Health Assembly to decide on its competence - and, thereby, that of the WHO - to submit a request to the Court for an advisory opinion on the question under consideration, having regard to the terms of the Constitution of the Organization and those of the Agreement of 10 July 1948 bringing it into relationship with the United Nations. But likewise it is incumbent on the Court to satisfy itself that the conditions governing its own competence to give the opinion requested are met; through the reference made, respectively, by Article 96, paragraph 2, of the Charter to the 'scope of activities' of the Organization and by Article X, paragraph 2, of the Agreement of 10 July 1948 to its 'competence', the Court also finds itself obliged, in the present case, to interpret the Constitution of the WHO.²⁵

There are some significant problems that may arise in connection with the question who may finally interpret the constitution of an organization or interpret with binding effect,²⁶ but while it is correct that, in the first place at least, the relevant organ must interpret the constitution in the

23. *Id.*, at 82-83, para. 29. The question of *ultra vires* is discussed in detail in C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, Chapter 6 (1996).

24. *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, 1962 ICJ Rep. 151, at 168.

25. *WHO Nuclear Weapons case*, *supra* note 14, at 82-83, para. 29.

26. *See* Amerasinghe, *supra* note 23, at 24-32.

course of its work, there can be no doubt that the organ could not in the present case bind the Court and that the Court could decide, particularly with binding effect, for the purpose in hand, at any rate, how the constitution was to be interpreted.

The Court also adverted to the action of the GA in supporting the request of the WHO. The Court concluded that such action did not confirm the competence of the WHO to request the opinion but merely lent political support to it. It may be asked what the position might have been if the GA had, indeed, expressed the view that the WHO was within its competence. The better view is that this would not have bound the ICJ. The GA would merely have been a third party, though an important third party, expressing a point of view. Finality in the circumstances was the prerogative of the ICJ clearly, because the matter concerned its own competence to give an advisory opinion. Subject to an indication to the contrary, an international court, and particularly the ICJ, must have the competence to determine its own competence.

The Court regarded the issue of the competence of the WHO as a matter of constitutional interpretation, which cannot be faulted. Among other things, it examined as a supportive source the *practice* of the WHO and came to the conclusion that the WHO had never regarded the issue of the *legality* of the use of nuclear weapons as a matter with which it had to concern itself.²⁷ Practice is only a supportive source. Had the practice of the WHO been otherwise, would this have influenced the Court? Such practice may have been a factor to be taken into account but it could not of itself correct what was clearly *ultra vires* from other primary indications into an *intra vires* act. Were this not the position organizations would by consistent subsequent practice virtually *amend* their constitutions.²⁸

In interpreting the provisions of the Constitution of the WHO relating to the competence of the WHO the Court, applying the textual approach to interpretation, came to the conclusion that

[i]nterpreted 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

27. WHO Nuclear Weapons case, *supra* note 14, at 81-82, para. 27.

28. See Amerasinghe, *supra* note 23, at 53.

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, 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 environmental effects. Whatever those effects might be, the competence of the 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 [...]. 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 the 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. Whether nuclear weapons are used legally or illegally, their effects on health would be the same. Similarly, while it is probable that the use of nuclear weapons might seriously prejudice the WHO's material capability to deliver all the necessary services in such an eventuality, for example, by making the affected areas inaccessible, this does not raise an issue falling within the scope of the Organization's activities within the meaning of Article 96, paragraph 2, of the Charter. The reference in the question put to the Court to the health and environmental effects, which according to the WHO the use of a nuclear weapon will always occasion, does not make the question one that falls within the WHO's functions.²⁹

The distinction between issues of legality and of effects of the use of nuclear weapons is well taken. The effects, and such matters as prevention of adverse effects, of the use of nuclear weapons can be addressed without determining the legality or illegality of their use. The Court's approach to this question cannot be faulted.

In this context the Court referred to a principle which has apparently not been discussed before. It was regarded as a qualifying principle of interpretation relating to the implication of powers. In explaining application of the principle of speciality the Court said:

[t]he Court need hardly 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

29. WHO Nuclear Weapons case, *supra* note 14, at 76-77, paras. 21-22

promotion those States entrust to them [...].

It follows from the various instruments mentioned above that the WHO Constitution can only be interpreted, as far as the powers conferred upon that Organization are concerned, by taking due account not only of the general principle of speciality, but also of the logic of the overall system contemplated by the Charter. If, according to the rules on which that system is based, the 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. Besides, any other conclusion would render virtually meaningless the notion of a specialized agency; it is difficult to imagine what other meaning that notion could have if such an organization need only show that the use of certain weapons could affect its objectives in order to be empowered to concern itself with the legality of such use.³⁰

The principle which was said to have been referred to by the PCIJ was not really expressed by the PCIJ³¹ in these terms. Thus, the ICJ for the first time in effect gave expression to the principle in the form in which it was stated. The Court also spoke of "the logic of the overall system" of the Charter which becomes an additional subsidiary principle of interpretation in the interpretation of the constitutions of the UN specialized agencies, among others.

These two allied principles cannot be questioned either in their articulation or the manner in which they were applied in the circumstances. They could be useful as supplementary means of interpretation and, indeed, were properly resorted to by the Court in the case. If *express* terms of a constitution go against the principles or what might be clear and necessary implications point in the opposite direction, there will be an additional question raised of the conflict of treaties. The Court must certainly be given a mark of credit for drawing attention to these principles which are important ones.

The dissenting opinions in the Advisory Opinion which took the view that the matter of legality was within the competence of the WHO clearly did not agree with the approach of the Court.³² The views expressed there-

30. *Id.*, at 78-79, paras. 25-26.

31. *Id.*, at 78-79, para. 25, where the Jurisdiction of the European Commission of the Danube case, 1927 PCIJ Rep. (Ser. B) No. 14, at 64, is cited as the source for the principle.

32. WHO Nuclear Weapons case, *supra* note 14, at 97, 101, and 172 respectively, (Judges Shahabuddeen, Weeramantry, and Koroma, Dissenting Opinions).

in must be seen as rejecting the interpretation given to the constitutional texts by the Court. In this matter the Court was correct.³³

The specific issue whether the question should have been answered because it touched upon the obligations of member states under the WHO Constitution is a more difficult one. The Court dismissed the issue by simply stating virtually that the reference to the WHO Constitution did not make a difference.³⁴ But in fact put in these terms the question does assume a different dimension.

There are really two parts to the resolution of this issue. First, the question must be faced whether, if there were an obligation owed to the WHO by member states (under the Constitution) which would be violated by the use of nuclear weapons, the question put by the WHO would be within its competence. Secondly, if the WHO would be acting within its competence in these circumstances, the question arises how should the Court approach the issue regarding whether the matter concerns obligations under the WHO Constitution. The Court did not approach the problem in this way, though in effect the refusal to give an opinion because the WHO lacked competence to ask the question, may have been justified in the circumstances. It merely dismissed the issue out of hand, as has been seen.

On the first question that arises, it would seem that the answer given by Judge Shahabuddeen in his Dissenting Opinion was correct. Judge Shahabuddeen confronted the question fully. He analyzed the situation as follows:

[t]he Court correctly holds that the duties of the WHO in relation to any situation do not depend on the legality of the causes producing that situation. Thus, in order to determine what are its functions in relation to a given situation, the WHO is not justified in requesting an advisory opinion on the subject of the legality of the causes which produced the situation. The WHO would have to deal with the resulting situation regardless of whether or not the State which produced it did so in breach of its obligations under the Constitution of the Organization. A different question is whether, in order to determine what are the rights and obligations between itself and a Member State, the WHO has competence to request an advisory opinion as to whether, in producing a situation calling for action by the WHO, that Member States may have breached its obligations under the Constitution of the

33. The arguments presented by the states which opposed the rendering of an opinion by the Court were generally in agreement with the Court's arguments.

34. WHO Nuclear Weapons case, *supra* note 14, at 82, para. 28.

WHO. Is the WHO competent to request an advisory opinion as to whether there is such a breach?

In the course of carrying out its activities, the WHO can be confronted with the constraining effects of the conduct of a Member State. If that conduct constitutes a breach by that State of its obligations under the Constitution of the WHO, the latter could take or initiate appropriate remedial measures to remove any resulting impediment to the carrying out of its activities. Hence, a legal question as to whether there has been such a breach can arise 'within the scope of (WHO's) activities'.³⁵

This perceptive statement captures the flavour of an appropriate answer to the first question. To seek an opinion on whether member states were in violation of an obligation under the WHO's Constitution could have been within the WHO's competence.

The second question is much more difficult. A cue to the answer to it is given in Judge Shahabuddeen's Opinion. He asserted that

[f]rom its analysis of the Constitution of the WHO, the Court concludes that the Organization has no competence to address the question of the legality of the use of nuclear weapons. That implies a finding that, under the Constitution of the WHO, a Member State has no obligation not to use weapons, such as nuclear weapons, which could result in health and environmental effects, for, if a Member State had such an obligation, the WHO would have had some competence to address the question of the legality of a use of weapons which might have occurred in breach of that constitutional obligation.

If a Member State has no obligation under the Constitution of the WHO not to use weapons (such as nuclear weapons) which could result in health and environmental effects, it follows that, in using such weapons, it is not in breach of any obligation under that Constitution. This is an answer to the WHO's question. The Court's holding therefore concerns the merits of the question which is actually asked.³⁶

There seems to be identified, correctly, it is believed, a contradiction in what the Court did. It decided the merits on this issue while still holding that it did not have jurisdiction to give an advisory opinion.

The question may seem academic, because in principle the holding that there was no violation of an obligation owed to the WHO by member states because there were no obligations under the Constitution of the WHO not to use nuclear weapons may have been correct. However, to be consistent, the Court should not have examined what were in fact the merits of the question, if it took the view that it had no jurisdiction in the

35. *Id.* (Judge Shahabuddeen, Dissenting Opinion; at 97 of the Opinion).

36. *Id.*, at 99 of the Opinion.

matter. It is submitted that what the Court should have done was to examine, as a matter connected with jurisdiction, whether there was *prima facie* evidence that there could be an obligation relating to the use of nuclear weapons under the WHO Constitution. If there was, then it could conclude that the question asked was within the scope of the WHO's activities. If not, it became clear that the question was not within such scope. On the arguments presented to the Court and by an examination of the WHO Constitution, it was possible to conclude that there was no *prima facie* evidence that the obligation contended for relating to nuclear weapons arose under that Constitution. The question whether there was an obligation not to use nuclear weapons and whether that obligation had been breached if there were one, would not have been answered as such as if it were a question on the merits, though in effect the answer given by the Court would have had the same result as holding that there was no constitutional obligation with the specified content. This is the proper way in which the question should have been handled to avoid the accusation implied by Judge Shahabuddeen that the merits were being examined. It is difficult to agree with Judge Shahabuddeen (and the other dissenters) that the Court had jurisdiction because the answer to the question relating to constitutional obligations was so clear.³⁷

C.F. Amerasinghe*

37. The question of the legality of the use of nuclear weapons has now been dealt with and answered in some measures by the ICJ in the subsequent Legality of the Threat or Use of Nuclear Weapons (General Assembly of the United Nations), Advisory Opinion, as published by the ICJ on 8 July 1996, General List No. 95.

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