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AVIS CONSULTATIFS ET ORDONNANCES

LICÉITÉ DE L'UTILISATION DES ARMES NUCLÉAIRES PAR UN ÉTAT DANS UN CONFLIT ARMÉ

AVIS CONSULTATIF DU 8 JUILLET 1996

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INTERNATIONAL COURT OF JUSTICE

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

ADVISORY OPINION OF 8 JULY 1996

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

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ADVISORY OPINION

Present: *President* BEDJAOUI; *Vice-President* SCHWEBEL; *Judges* ODA, GUILLAUME, SHAHABUDDEEN, WEERAMANTRY, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, FERRARI BRAVO, HIGGINS; *Registrar* VALENCIA-OSPINA.

1. By a letter dated 27 August 1993, filed in the Registry on 3 September 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-

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 weapons [1];

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 weapon[2];

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 weapons[2];

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:

'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

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:

for the WHO:	Mr. Claude-Henri Vignes, Legal Counsel;
for the Commonwealth of Australia:	Mr. Gavan Griffith, Q.C., Solicitor-General of Australia, Counsel, The Honourable Gareth Evans, Q.C., Senator, Minister for Foreign Affairs, Counsel;
for the Arab Republic of Egypt:	Mr. Georges Abi-Saab, Professor of International Law, Graduate Institute of International Studies, Geneva, Member of the Institute of International Law;
for the French Republic:	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;
for the Federal Republic of Germany:	Mr. Hartmut Hillgenberg, Director-General of Legal Affairs, Ministry of Foreign Affairs;
for Indonesia:	H.E. Mr. Johannes Berchmans Soedarmanto Kadarisman, Ambassador of Indonesia to the Netherlands;
for Mexico:	H.E. Mr. Sergio González Gálvez, Ambassador, Under-Secretary of Foreign Relations;
for the Islamic Republic of Iran:	H.E. Mr. Mohammad J. Zarif, Deputy Minister, Legal and International Affairs, Ministry of Foreign Affairs;
for Italy:	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, 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,

Mr. James Crawford, Whewell Professor of International Law, University of Cambridge;

for Costa Rica: Mr. Carlos Vargas-Pizarro, Legal Counsel and Special Envoy of the Government of Costa Rica;

for the United Kingdom of Great Britain and Northern Ireland: The Rt. Honourable Sir Nicholas Lyell, Q.C., M.P., Her Majesty's Attorney-General;

for the United States of America: Mr. Conrad K. Harper, Legal Adviser, United States Department of State,
Mr. Michael J. Matheson, Principal Deputy Legal Adviser, United States Department of State,
Mr. John H. McNeill, Senior Deputy General Counsel, United States Department of Defense;

for Zimbabwe: Mr. Jonathan Wutawunashe, Chargé d'affaires a.i., Embassy of the Republic of Zimbabwe in the Netherlands.

Questions were put by Members of the Court to particular participants in the oral proceedings, which replied in writing, as requested, within the prescribed time-limits; the Court having decided that the other participants could also reply to those questions on the same terms, several of them did so. Other questions put by Members of the Court were addressed, more generally, to any participant in the oral proceedings; several of them replied in writing, as requested, within the prescribed time-limits.

* * *

10. The Court has the authority to give advisory opinions by virtue of Article 65 of its Statute, paragraph 1 of which reads as follows:

> "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."

It is also stated, in Article 96, paragraph 2, of the Charter that the

> "specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities".

Consequently, 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 (cf. *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, pp. 333-334).

11. Where the WHO is concerned, the above-mentioned texts are reflected in two other provisions, to which World Health Assembly resolution WHA46.40 expressly refers in paragraph 1 of its operative part. These are, on the one hand, Article 76 of that Organization's Constitution, under which:

> "Upon authorization by the General Assembly of the United Nations or upon authorization in accordance with any agreement between the Organization and the United Nations, the Organization may request the International Court of Justice for an advisory opinion on any legal question arising within the competence of the Organization."

And on the other hand, paragraph 2 of Article X of the Agreement of 10 July 1948 between the United Nations and the WHO, under which:

> "The General Assembly authorizes the World Health Organization to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its competence other than questions concerning the mutual relationships of the Organization and the United Nations or other specialized agencies."

This agreement was approved by the United Nations General Assembly on 15 November 1947 (resolution 124 (II)) and by the World Health Assembly on 10 July 1948 (resolution [WHA1.102]).

12. There is thus no doubt that the WHO has been duly authorized, in accordance with Article 96, paragraph 2, of the Charter, to request advisory opinions of the Court. The first condition which must be met in order to found the competence of the Court in this case is thus fulfilled. Moreover, this point has not been disputed; and the Court has in the past agreed to deal with a request for an advisory opinion submitted by the WHO (see *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, pp. 73 *et seq.*).

* *

13. However, during both the written and oral proceedings, some States have disputed whether the other conditions necessary for the jurisdiction of the Court have been met in the present case. It has been contended that the question before the Court is an essentially political one,

and also that it goes beyond the scope of the WHO's proper activities, which would *in limine* have deprived the Organization itself of any competence to seise the Court of it.

14. Further, various 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.

* *

15. The 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.

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" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, para. 15).

16. 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".

To do this, 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" (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 172, para. 14). 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 (cf. *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, pp. 61-62; *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, pp. 6-7; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155).

Furthermore, as the Court said in the Opinion it gave in 1980 concerning the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*:

> "Indeed, 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." (*I.C.J. Reports 1980*, p. 87, para. 33.)

17. 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.

* *

18. The Court will now seek to determine whether the advisory opinion requested by the WHO relates 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 notes that this third condition to which its advisory function is subject is expressed in slightly different terms in Article X, paragraph 2, of the Agreement of 10 July 1948 — which refers to questions arising within the scope of the WHO's "competence" — and in Article 76 of the WHO Constitution — which refers to questions arising "within the competence" of the Organization. However, it considers that, for the purposes of this case, no point of significance turns on the different formulations.

19. 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. As the Court has said with respect to the Charter:

> "On the previous occasions when the Court has had to interpret the Charter of the United Nations, it has followed the principles and rules applicable in general to the interpretation of treaties, since it

> has recognized that the Charter is a multilateral treaty, albeit a treaty having certain special characteristics." (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 157.)

But the constituent instruments of international organizations 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, 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 (see *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Judgment, I.C.J. Reports 1991*, pp. 69-70, para. 48; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, pp. 582-583, para. 373, and p. 586, para. 380; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 21-22, para. 41; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 18, para. 33); it will also apply it in this case for the purpose of determining whether, according to the WHO Constitution, the question to which it has been asked to reply arises "within the scope of [the] activities" of that Organization.

*

20. The WHO Constitution was adopted and opened for signature on 22 July 1946; it entered into force on 7 April 1948 and was amended in 1960, 1975, 1977, 1984 and 1994.

The functions attributed to the Organization 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 the 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". As for the Preamble to the Constitution, it sets out various principles which the States parties "declare, in conformity with the Charter of the United Nations, . . . [to be] basic to the happiness, harmonious relations and security of all peoples": hence, it is stated therein, *inter alia*, that "[t]he enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being" and that "[t]he health of all peoples is fundamental to the attainment of peace and security"; it is further indicated, at the end of the Preamble that,

> "for the purpose of co-operation among themselves and with others to promote and protect the health of all peoples, the Contracting Parties . . . establish . . . the . . . Organization . . . as a specialized agency within the terms of Article 57 of the Charter of the United Nations".

21. 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.

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.

22. World Health Assembly resolution WHA46.40, by which the Court has been seised of this request for an opinion, expressly refers, in its Preamble, to the functions indicated under subparagraphs *(a),(k),(p)* and *(v)* of Article 2 under consideration. These functions are defined as:

> "*(a)* to act as the directing and co-ordinating authority on international health work;
>
> . . . . . .

(k) to propose conventions, agreements and regulations, and make recommendations with respect to international health matters and to perform such duties as may be assigned thereby to the Organization and are consistent with its objective;

. . . . . .

(p) to study and report on, in co-operation with other specialized agencies where necessary, administrative and social techniques affecting public health and medical care from preventive and curative points of view, including hospital services and social security;

. . . . . .

[and]

(v) generally to take all necessary action to attain the objective of the Organization."

In the view of the Court, none of these functions 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 the 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 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.

23. However, in its Preamble, resolution WHA46.40 refers to "primary prevention" in the following terms:

> "Recalling that primary prevention is the only appropriate means to deal with the health and environmental effects of the use of nuclear weapons[2];
>
> . . . . . .

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

> 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;
>
> . . ."

The document entitled *Effects of Nuclear War on Health and Health Services*, to which the Preamble refers, is a report prepared in 1987 by the Management Group created by the Director-General of the WHO in pursuance of World Health Assembly resolution WHA36.28; this report updates another report on the same topic, which had been prepared in 1983 by an international committee of experts in medical sciences and public health, and whose conclusions had been approved by the Assembly in its above-mentioned resolution. As several States have observed during the present proceedings, the Management Group does indeed emphasize in its 1987 report that "the only approach to the treatment of health effects of nuclear warfare is primary prevention, that is, the prevention of nuclear war" (Summary, p. 5, para. 7). However, the Group states that "it is not for [it] to outline the political steps by which this threat can be removed or the preventive measures to be implemented" (*ibid.*, para. 8); and the Group concludes:

> "However, WHO can make important contributions to this process by systematically distributing information on the health consequences of nuclear warfare and by expanding and intensifying international cooperation in the field of health." (*Ibid.*, para. 9.)

24. The WHO could only be competent to take those actions of "primary prevention" which fall within the functions of the Organization as defined in Article 2 of its Constitution. In consequence, the references to this type of prevention which are made in the Preamble to resolution WHA46.40 and the link there suggested with the question of the legality of the use of nuclear weapons do not affect the conclusions reached by the Court in paragraph 22 above.

25. The 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 promotion those States entrust to them. The Permanent Court of International Justice referred to this basic principle in the following terms:

> "As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed

upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it." (*Jurisdiction of the European Commission of the Danube, Advisory Opinion, P.C.I.J., Series B, No. 14*, p. 64.)

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 which govern their activities. It is generally accepted that international organizations can exercise such powers, known as "implied" powers. As far as the United Nations is concerned, the Court has expressed itself in the following terms in this respect:

"Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties. This principle of law was applied by the Permanent Court of International Justice to the International Labour Organization in its Advisory Opinion No. 13 of July 23rd, 1926 (Series B, No. 13, p. 18), and must be applied to the United Nations." (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, pp. 182-183; cf. *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954*, p. 57.)

In the opinion of the Court, to ascribe to the 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.

26. The World Health Organization 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". Article 57 of the Charter defines "specialized agencies" as follows:

"1. The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63.

2. Such agencies thus brought into relationship with the United Nations are hereinafter referred to as 'specialized agencies'."

Article 58 of the Charter reads:

"The Organization shall make recommendations for the co-ordination of the policies and activities of the specialized agencies."

Article 63 of the Charter then provides:

"1. The Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations. Such agreements shall be subject to approval by the General Assembly.

2. It may co-ordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations."

As these provisions demonstrate, the Charter of the United Nations laid the basis of a "system" designed to organize international co-operation 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 exercise of these powers by the organizations belonging to the "United Nations system" is co-ordinated, notably, by the relationship agreements concluded between the United Nations and each of the specialized agencies. In the case of the WHO, the agreement of 10 July 1948 between the United Nations and that Organization actually refers to the WHO Constitution in the following terms in Article I:

"The United Nations recognizes the World Health Organization as the specialized agency responsible for taking such action as may be appropriate under its Constitution for the accomplishment of the objectives set forth therein."

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. It is therefore difficult to maintain that, by authorizing various specialized agencies to request opinions from the Court under Article 96, paragraph 2, of the Charter, the General Assembly intended to allow them to seise the Court of questions belonging within the competence of the United Nations.

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

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27. A consideration of the practice of the WHO bears out these conclusions. None of the reports and resolutions referred to in the Preamble to World Health Assembly resolution WHA46.40 is in the nature of a practice of the WHO in regard to the legality of the threat or use of nuclear weapons. The Report of the Director-General (doc. A46/30), referred to in the third paragraph of the Preamble, the aforementioned resolutions WHA34.38 and WHA36.28, as well as resolution WHA40.24, all of which are referred to in the fourth paragraph, as well as the abovementioned report of the Management Group of 1987 to which reference is made in the fifth and seventh paragraphs, deal exclusively, in the case of the first, with the health and environmental *effects* of nuclear weapons, and in the case of the remainder, with the *effects* of nuclear weapons on health and health services. As regards resolutions WHA42.26 and WHA45.31, referred to in the sixth paragraph of the Preamble to resolution WHA46.40, the first concerns the WHO's contribution to international efforts towards sustainable development and the second deals with the effects on health of environmental degradation. None of these reports and resolutions deals with the legality of the use of nuclear weapons.

Resolution WHA46.40 itself, adopted, not without opposition, as soon as the question of the legality of the use of nuclear weapons was raised at the WHO, could not 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.

Nowhere else does the Court find any practice of this kind. In particular, such a practice cannot be inferred from isolated passages of certain resolutions of the World Health Assembly cited during the present proceedings, such as resolution WHA15.51 on the role of the physician in the preservation and development of peace, resolution WHA22.58 concerning co-operation between the WHO and the United Nations in regard to chemical and bacteriological weapons and the effects of their

possible use, and resolution WHA42.24 concerning the embargo placed on medical supplies for political reasons and restrictions on their movement. The Court has also noted that the WHO regularly takes account of various rules of international law in the exercise of its functions; that it participates in certain activities undertaken in the legal sphere at the international level — for example, for the purpose of drawing up an international code of practice on transboundary movements of radioactive waste; and that it participates in certain international conferences for the progressive development and codification of international law. That the WHO, as a subject of international law, should be led to apply the rules of international law or concern itself with their development is in no way surprising; but it does not follow that it has received a mandate, beyond the terms of its Constitution, itself to address the legality or illegality of the use of weaponry in hostilities.

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28. It remains to be considered whether the insertion of the words "including the WHO Constitution" in the question put to the Court (which essentially seeks an opinion on the legality of the use of nuclear weapons in general) could allow it to offer an opinion on the legality of the use of nuclear weapons by reference to the passage in the question concerning the WHO Constitution. The Court must answer in the negative. Indeed, 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.

* *

29. Other arguments have nevertheless been put forward in the proceedings to found the jurisdiction of the Court in the present case.

It has thus been argued that World Health Assembly resolution WHA46.40, having been adopted by the requisite majority, "must be presumed to have been validly adopted" (cf. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 22, para. 20). The Court would observe in this respect that the question whether a resolution has been duly adopted from a procedural point of view and the question whether that resolution has been adopted *intra vires* are two separate issues. 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*, with which the resolution might be afflicted.

As the Court has stated, "each organ must, in the first place at least, determine its own jurisdiction" (*Certain Expenses of the United Nations*

(Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 168). 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 [the] 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.

The exercise of the functions entrusted to the Court under Article 65, paragraph 1, of its Statute requires it to furnish such an interpretation, independently of any operation of the specific recourse mechanism which Article 75 of the WHO Constitution reserves for cases in which a question or dispute arises between States concerning the interpretation or application of that instrument; and in doing so the Court arrives at different conclusions from those reached by the World Health Assembly when it adopted resolution WHA46.40.

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30. Nor can the Court accept the argument that the General Assembly of the United Nations, as the source from which the WHO derives its power to request advisory opinions, has, in its resolution 49/75 K, confirmed the competence of that organization to request an opinion on the question submitted to the Court. In the last preambular paragraph of that resolution, the General Assembly

> "[welcomed] resolution 46/40 of 14 May 1993 of the Assembly of the World Health Organization, in which the organization requested the International Court of Justice to give an advisory opinion on whether 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 Constitution of the World Health Organization".

In expressing this opinion, the General Assembly clearly reflected the wish of a majority of States that the Assembly should lend its political support to the action taken by the WHO, which it welcomed. However, the Court does not consider that, in doing so, the General Assembly meant to pass upon the competence of the WHO to request an opinion on the question raised. Moreover, the General Assembly could evidently

not have intended to disregard the limits within which Article 96, paragraph 2, of the Charter allows it to authorize the specialized agencies to request opinions from the Court — limits which were reaffirmed in Article X of the relationship agreement of 10 July 1948.

* *

31. Having 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 [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. Consequently, the Court is not called upon to examine the arguments which were laid before it with regard to the exercise of its discretionary power to give an opinion.

* * *

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.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this eighth day of July, one thousand nine hundred and ninety-six, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Secretary-General of the United Nations and the Director-General of the World Health Organization, respectively.

(Signed) Mohammed BEDJAOUI,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

Judges RANJEVA and FERRARI BRAVO append declarations to the Advisory Opinion of the Court.

Judge ODA appends a separate opinion to the Advisory Opinion of the Court.

Judges SHAHABUDDEEN, WEERAMANTRY and KOROMA append dissenting opinions to the Advisory Opinion of the Court.

(Initialled) M.B.

(Initialled) E.V.O.