DISSENTING OPINION OF JUDGE WEERAMANTRY

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I. PRELIMINARY

It has been argued that the question asked by the World Health Organization (WHO) travels outside its legitimate concerns. The Court has accepted that argument. I respectfully dissent.

The question on which WHO seeks the Court's opinion is 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?"

I read this question as containing an enquiry in relation to State 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.

This opinion will endeavour to show that the question asked is directly within WHO's legitimate and mandated area of concern. It relates to an issue fundamental to global health. It relates to the integrity of the human environment which is fundamental to global health. It relates to the fundamental constitutional objective of WHO, which is the attainment by all peoples of the highest possible level of health.

Global health is central to the question, just as global health is central to the concerns of WHO. Health issues may have political or legal overtones, as they often do, but such overtones do not lift them out of the category of health issues; and health issues are the central concerns of WHO.

Moreover, the Court's ruling has significance for other specialized agencies as well, who may in the future desire to invoke the Court's advisory jurisdiction on matters of importance to them in the discharge of their functions.

It will be noted that the International Court of Justice has not thus far refused to render an advisory opinion requested of it by any organ or agency of the United Nations which has been given authority to seek an opinion from the Court. It is important therefore that when such a request is declined for the first time in the Court's jurisprudence, the reasons for so declining must be compelling. The consistent jurisprudence of this Court to this effect is reflected in a stream of decisions[1], which the Court cites with approval in its Opinion responding to the General Assembly's request concerning the legality of nuclear weapons.

[1] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956*, p. 86; *Certain Expenses of the United*

1. The Genesis of WHO's Request

It appears from the report of the Director-General of the World Health Organization (doc. A46/30 of 25 April 1993) entitled "Health and Environmental Effects of Nuclear Weapons", which has been furnished to the Court, that the reference to the Court was proposed by Vanuatu, Ecuador, Panama and Mexico for the agenda of the Forty-sixth World Health Assembly.

Vanuatu explained its co-sponsorship of the resolution in terms of its commitment to the health of the international community, in the context of its own health-related experiences of nuclear weapons. As one of many thousands of small islands scattered in the Pacific, it claimed it had suffered as a result of nuclear activity in the Pacific commencing in the 1950s, in that its people were facing many complicated health issues which they did not have the expertise to diagnose, or the resources to treat. According to its representative, increases in leukaemia, in cancer, in fish poisoning, and in skin diseases were common; the food chain, the water and the ecosystem had been contaminated; miscarriages were common, and grotesquely deformed babies were being born[2].

Tonga, another supporting member, referred to Article 1 of the WHO Constitution and related the enquiry to the constitutional functions of WHO as listed in various parts of Article 2 of its Constitution[3]. Other members also addressed the Assembly. The matter had been debated earlier in Committee B of the Assembly, where it had been fully discussed, with over a hundred delegates taking part.

At the Assembly, strong objections were raised to the reference by, among others, the United Kingdom, whose representative asserted that this action was not within the competence of WHO, and characterized it as a "pointless and expensive, and a disruptive exercise"[4]; by the United States, whose representative stressed that "This resolution would inject

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Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 155; *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. 27; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 183; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 21; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 191.

[2] Record of 13th Plenary Meeting of the World Health Assembly, 14 May 1993, doc. A46/VR/13, p. 11.

[3] *Ibid.*, p. 12.

[4] *Ibid.*, p. 9.

the World Health Organization into debates about arms control and disarmament that are the responsibility of other organizations in the United Nations system . . ."[5]; by France, whose representative thought that the Assembly was not the appropriate forum to deal with a subject with purely political connotations[6]; and by Russia, whose representative stated that the resolution went beyond the competence of WHO, and would lead to politicization and involvement of the organization in the problem of disarmament, without its having a proper perspective on the matter[7].

WHO's legal counsel then took the floor to advise the Assembly. His advice was as follows:

> "The question of health and health-related environmental effects of nuclear weapons falls squarely within the mandate of WHO as a technical agency. The question of whether the use of nuclear weapons by a State would be contrary to the spirit and objective of WHO and, as such, a violation of the Constitution of WHO, is also within the mandate and competence of this World Health Assembly. It is not within the normal competence or mandate of WHO to deal with the lawfulness or illegality of the use of nuclear weapons. In consequence, it is also not within the normal competence or mandate of WHO to refer the lawfulness or illegality question to the International Court of Justice."[8]

As already observed, the WHO question was not framed in terms of lawfulness or illegality in general, but in terms of State obligations in relation to health, the environment and the WHO Constitution.

The matter turned out to be so sensitive that it was proposed that the voting be by secret ballot. 75 votes were received in favour of a secret ballot, 33 against and there were 5 abstentions. The matter was then voted upon by secret ballot, with the following result:

> "Members entitled to vote, 164; absent, 41; abstentions, 10; papers null and void, 0; number of Members present and voting, 113; number required for a simple majority, 57; number of votes in favour, 73; number of votes against, 40."[9]

Thereafter the General Assembly, in its resolution 49/75 K of 15 December 1994 (by which the Assembly itself requested an opinion of the question of the legality of nuclear weapons), welcomed the resolution of the Assembly of the World Health Organization to seek an advisory opinion from the Court.

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[5] Record of 13th Plenary Meeting of the World Health Assembly, 14 May 1993, doc. A46/VR/13, p. 9.
[6] *Ibid.*, p. 12.
[7] *Ibid.*, p. 15.
[8] *Ibid.*, p. 13.
[9] *Ibid.*, p. 17.

This brief recital of facts shows a clear division of opinion within WHO, notwithstanding which a decision was taken by a substantial majority to refer the matter to the Court.

2. The Court's Advisory Jurisdiction

The entitlement of specialized agencies, who have been admitted to this privilege to seek an advisory opinion from the Court in relation to matters arising within the scope of their activities, is an important constitutional right which they enjoy.

Advisory jurisdiction was an innovation in international adjudication, adopted not without difficulty[10] after World War I. The right to seek an opinion was initially given only to the Council and the Assembly of the League of Nations. After World War II, the San Francisco Conference approved the patterns of advisory practice as they had evolved, but the circle of those entitled to seek it was extended. The United Nations family of organizations today is widely expanded, closely knit, and works together, in developing areas of international activity, within the framework of the international rule of law. While each of these organizations has its specific functions, they all interlock in the common service of the ideals of the United Nations and they all operate under the common aegis of international law. Though each of them is given a particular sphere of activity, they do not necessarily function in closed compartments, for the complex nature of United Nations activities may often result in overlapping areas of interest. The work of one organization may interweave with that of other organizations, and hence would have repercussions on the work of other members of the United Nations family.

An important role assigned to the Court in this network of interrelated activity, under the aegis of international law, is the grant of advisory opinions on matters of law to assist authorized organizations in the United Nations system who may need it. This represents an important part of the contribution the Court can make as a member of the United Nations family of organizations, all pursuing the common objectives of the United Nations, each in its different ways. It is, *inter alia*, a means of ensuring a clearer understanding of the principles of international law relating to their work.

The right of such organizations to seek an opinion from the Court is a hard-won right and is valuable, both to each organization in particular, and to the United Nations system in general. This right therefore needs to be carefully conserved from the standpoint of assisting these organi-

[10] See Shabtai Rosenne, *The World Court: What It Is and How It Works*, 5th ed., 1995, p. 107.

zations in the discharge of their duties, from the standpoint of the development of international law, and from the standpoint of ensuring the smooth interrelationship of these organizations within the family of United Nations organizations.

The Court's consciousness of its role in assisting the United Nations in this respect through the Court's advisory jurisdiction has been manifested in its prior jurisprudence. For example, in the case concerning *Interpretation of Peace Treaties*, the Court observed that:

> "the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused" (*I.C.J. Reports 1950*, p. 71).

A refusal by the Court to grant an opinion at the request of a specialized agency authorized to request one is therefore fraught with far-ranging implications. The first such refusal in the history of this Court could well affect the readiness of other specialized agencies to approach the Court, even on a matter relating to their own Constitutions.

This becomes particularly important when decisions are involved which may have political overtones, or else different organizations may, in case of doubt, tend to go their different ways on the basis of the dominant political influences playing upon them rather than on the basis of international law. As this Court observed in a previous Advisory Opinion sought by WHO:

> "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.*" (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, I.C.J. Reports 1980*, p. 87; emphasis added.)

The reference already made to the history of this request indicates the deep divisions of opinion that operated within WHO, on a politically sensitive issue. It is precisely on such matters that great value attaches to the right to seek an independent opinion based on international law, rather than on the varying political perceptions of parties.

The Court is of course entitled to refuse a request for an advisory opinion for cogent reasons — and indeed should so refuse if cogent reasons be present. However, in their absence, there is created a climate of uncertainty in the relevant area, which can result in a diversity of interpretations on the same legal question. This does not augur well for the concept of their all functioning harmoniously under a common mantle of international law.

WHO seeks this opinion to assist it in the discharge of one of its weightiest responsibilities. It is the organ responsible for the planning of the worldwide medical services which can be offered to the world's population in relation to the various health hazards that will confront it from time to time. A nuclear attack is one such health hazard and perhaps the most awful of them all; and WHO will be called upon to bear the brunt of the international responsibility for organizing medical assistance to stricken populations after a nuclear attack — not only in the belligerent countries, but also in the neutral countries (all Member States of the United Nations) who would suffer dire consequences in a war to which they are not parties. In view of the health and environmental effects of nuclear weapons, WHO seeks information from the Court regarding State obligations under international law in relation to health, in relation to the environment, and in relation to the WHO Constitution.

I believe that the Court's refusal to grant an opinion is based upon restricted principles of treaty interpretation. The present application requires, rather, a construction of WHO's statute in the light of its object and purpose. Its overall purpose is "to promote and protect the health of all peoples" — an objective which all the nations subscribing to the WHO Charter have recognized in the opening words of that Constitution to be basic to the security of all peoples. A literal construction of WHO's Constitution, so as to deprive it of an advisory opinion on the legality of a serious threat to global health, is not in accordance with the spirit of WHO's Constitution, or the purposes of the Court's advisory jurisdiction.

3. The Requisites to Be Fulfilled

I begin by stating my agreement with the Court in regard to the three conditions to be fulfilled to enable a specialized agency to make a request for an advisory opinion. They are that the agency must be authorized to request advisory opinions, that the request must be in respect of a legal question, and that this question must arise within the scope of its activities.

I believe that in the present case all three conditions are satisfied. I agree in principle with the Court's treatment of the first and second requisites, which it is therefore not necessary to consider in this opinion. I agree in particular with its observations that the presence of political aspects in the question referred to the Court cannot suffice to deprive it of its character as a legal question (Advisory Opinion, para. 16), and that the political implications are of no relevance in this respect (*ibid.*, para. 17).

I respectfully disagree, however, with the Court's finding in regard to the third requisite and this opinion will centre mainly on an examination of this aspect.

4. The Question Posed by WHO, Compared with the Question Posed by the General Assembly

There is a substantial difference between the question posed by WHO and that posed by the General Assembly. Both organizations raise issues of vital importance and both equally call for the most careful consideration, but it would not be correct to treat the questions posed by the two bodies as though they raise the identical issues.

The WHO question, as already noted, is 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 General Assembly question reads:

> "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"

The following differences appear at once in the phraseology of the two questions:

(a) the WHO request relates to use only;
(b) the WHO request is cast in terms of State responsibility;

(c) the WHO request concentrates on health and environmental effects;
(d) the WHO request is limited to use in war or other armed conflict;

(e) the WHO question is cast also in terms of obligations under the WHO Constitution;
(f) the WHO question raises the issue of specific State obligations vis-à-vis health and the environment, and of any conflict between these and the use of nuclear weapons.

It will be seen that the WHO question is carefully drafted, in conformity with the health concerns of WHO as contrasted with the broader concerns of the General Assembly. The question concerns itself with actual use (and not threat of use), with State responsibility (rather than the broader question of illegality under international law), with health and environmental effects (which are the proper sphere of concern of WHO), with use in war or other armed conflict (and not, again, with the status of nuclear weapons generally), and with obligations under the WHO Constitution (which is manifestly a matter of concern to WHO).

WHO's question shows awareness of the need to confine its attention to questions arising within the scope of its activities, as required by Article 96 (2) of the United Nations Charter, and to questions "arising within the competence of the Organization", as specified in Article 76 of

the WHO Constitution. In conformity with these provisions, it did not traverse the whole ground of illegality, but made a very specific enquiry. The question was set in the framework of actual use, which produces medical consequences, and did not enter the theoretical area of threats. It homed in on health and environmental effects, which are its undoubted areas of concern. It sought a legal opinion on the interpretation of its own Constitution which, in my view, it cannot in any event be denied. Unless there are compelling reasons to take an opposite view, an enquiry by WHO, set within the framework of health and environment and of its own Constitution, seems directly related to its mandate and its functions and seems eminently to be a question on which, in the event of uncertainty, WHO is entitled to seek an opinion from the Court.

As already observed, there are three specific segments of WHO's enquiry which call for particular attention — State obligations in regard to health, in regard to the environment, and in terms of WHO's Constitution.

These require the Court to enquire with some degree of particularity into the effects of nuclear weapons on health and on the environment. The general awareness that nuclear weapons damage both health and the environment is insufficient for this purpose. A more precise examination is required of the facts.

The next stage of the enquiry is to consider current international law relating to each of the three heads of obligation set out above.

With the factual and legal material thus placed in juxtaposition with each other, a clear picture will be obtained as to whether there are conflicts between State obligations and the results produced by the use of the weapon. The ensuing discussion will proceed on this basis.

The Opinion of the Court nowhere examines the nature of State obligations in regard to health and the environment under international law in general, nor does it examine those obligations in terms of the WHO Constitution. In my view, it was necessary for the Court to undertake this examination in order to decide whether or not this enquiry falls within WHO's legitimate areas of concern.

Moreover, the Court does not focus its attention precisely on the terms of WHO's question, but addresses, rather, the question of general legality or illegality of the use of nuclear weapons. This takes the discussion further away from the immediate concerns of WHO, as reflected in its carefully worded question, and nearly equates it to the question of general illegality asked by the General Assembly. Had the Court proceeded on the basis of an examination of State obligations regarding health and the environment under international law and under the WHO Constitution, it would have been more apparent how closely these were related to the work of WHO.

5. WHO's Presentation of its Request before the Court

I must confess to some unease at the manner in which WHO presented its submissions to the Court.

WHO's presentation was extremely detached and objective. This approach reflected the division of opinion within WHO. WHO's presentation indeed prompted two questions from a Member of the Court who asked whether resolution WHA46/40 was "validly adopted" and

> "If so, is it now open to any State which was then a member of the World Health Organization to challenge the competence of the World Health Organization to request the Court to give an advisory opinion in terms of the question set out in that resolution?" (CR 95/23, p. 51.)

The reply to the first question was in the affirmative, and the reply to the second reflected this divided attitude within WHO[11].

There is no requirement now, as there was in the days of the League of Nations, that a request for an advisory opinion should be based upon a unanimous vote. That requirement was left behind after World War II and, as Rosenne observes, "In the United Nations, the unanimity rule has been completely abandoned . . ."[12]. What we have here is a deliberate decision democratically taken by a large majority in WHO to seek an opinion. That must be taken to be the decision of WHO and acted upon as such. The different view held by a minority, whoever they may be, does not make the request to the Court any the less a request by WHO, considered as a whole.

Speaking for myself, I would have appreciated a fuller and ampler presentation, based upon the rich material which was formally placed before the Court by WHO.

WHO's representative observed that WHO's attitude in its presentation:

> "has never prevented it — and will never prevent it — from being profoundly concerned by the sufferings of people, nor from doing everything within its power to improve their 'level of health'" (CR 95/22, p. 32).

He submitted further that:

> "Neutrality does not signify indifference. Neutrality here is the neutrality of Henri Dunant on the evening of the battle of Solferino,

[11] It stated that

> "the legal nature of this type of resolution, and the absence of a specific provision in the Constitution on this subject, suggest that there is nothing to prevent a Member State from challenging before the Court the competence of WHO to request an advisory opinion in terms of the question set out in that resolution".

[12] *Op. cit.*, p. 109.

> who, regardless of the merits of the belligerents' dispute, was overwhelmed by the suffering and devastation that the fighting had caused." (CR 95/22, p. 22.)

The Organization's neutrality did not therefore mean that it took no interest in the health-related effects of the use of weapons. The comparison with Dunant scarcely matches the situation of WHO. The neutrality of Dunant was a neutrality between two warring States. That great humanitarian was concerned only with the sufferings of the victims and not with the merits of the dispute. There are no hostile parties involved in this request for an opinion — only member States of WHO, all of them equally committed to the pursuit of global health — a cause to which they have all without distinction committed themselves by being parties to WHO's Constitution.

Unlike the warring nations at Solferino, the member States of WHO are at peace with each other, genuinely pursuing through their common organization their common objective of global health. Those nations, by a large majority, have decided to seek an advisory opinion from this Court. That decision needed, in my view, to be implemented in the spirit as well as the letter, and not in a spirit of neutrality.

6. Two Levels of WHO's Involvement

There are two broad positions that can be taken regarding WHO's interest in the matters on which the Court's opinion is sought.

One position is that nuclear weapons are so devastating that thereafter all medical treatment is meaningless. The preventive ethic, which is part of the medical enterprise, then comes into play and one needs to examine WHO's interest in prevention.

Those who argue in terms of limited nuclear war tend however to deny the proposition of total devastation, for they seek to equate the use of nuclear weapons as far as possible to the use of conventional weapons. In that event, one must go further and ask what services WHO can prepare itself to provide after a nuclear attack.

The utility to WHO of an opinion from the Court must therefore be examined at both levels, if proper consideration is to be given to both points of view:

(a) the futility of medical services after a nuclear attack, in which case the emphasis must be on prevention; and

(b) preparedness to deliver medical services after a nuclear attack, in which case WHO must direct its attention to such matters as planning, medical equipment, and research and training in radiation injuries.

Another factor to be borne in mind in this regard is that even on the supposition that both parties to the nuclear exchange are completely destroyed, the question will still remain of damage to non-combatant

States. Urgent medical services will be required on the peripheries of the nuclear devastation — perhaps in countries hundreds or thousands of miles away from the belligerents. WHO has a constitutional responsibility towards them no less than to the belligerents and must be prepared to render what assistance it can.

7. WHO's Constitutional Responsibilities in Regard to Public Health in General

It is well accepted that public health concerns itself not merely with cure, but also with prevention and planning and the provision of technical assistance and aid in emergencies (*vide* Art. 2 *(d)* of WHO Constitution). No one would deny that WHO must warn of the medical dangers of foreseeable emergencies (Art. 2 *(r)*), or that it should concern itself with regulations (Art. 2 *(k)*) governing activities that spread disease, such as travel from the infected area or transport of infected foodstuffs. It must co-ordinate arrangements for the necessary nutrition and sanitation (Art. 2 *(i)*) when an epidemic occurs. It must evaluate the probabilities of an outbreak and must plan for them (Art. 2 *(p)*). These obligations of planning and prevention (see Art. 2 *(p)*) become all the more compelling when the disease is incurable. These general obligations apply to WHO's activities, whatever the source of danger to health — whether resulting from sanitational, nutritional, epidemiological or military sources.

It may be noted in this connection that the Court itself observes, in paragraph 21 of its Opinion, that:

> "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".

I would agree, respectfully, with this view, and many of the areas of relevance to the WHO Constitution outlined in this opinion proceed on that basis. However, the preventive function of WHO is not limited to providing assistance after the event.

Each of the details set out in the next Part of this opinion, on health problems caused by the nuclear weapon, has a bearing upon the constitutional responsibilities of WHO in such areas as maternal and child health (Art. 2 *(l)*); improving standards of teaching and training (Art. 2 *(o)*); studying and reporting on public health from preventive and curative points of view (Art. 2 *(p)*); providing information (Art. 2 *(q)*); developing an informed public opinion (Art. 2 *(r)*); promoting co-operation among scientific and professional groups (Art. 2 *(j)*); making recommendations with regard to international health matters (Art. 2 *(k)*);

and furnishing practical assistance in emergencies (Art. 2*(d)*). This list is by no means complete.

Health services perform only half of their function if they concern themselves only with curative procedures after disease has struck. They need also to explore two other areas — prevention before the disease strikes and advance planning against the eventuality of a sudden and perhaps massive outbreak. This is all the more so when the threatened damage to health is of an incurable or irreversible nature.

1. *Prevention.* There can be no argument concerning the wisdom of the ages that prevention is better than cure. This was so since the inception of medical science and must be so whatever the agency that damages health — be it a microbe which can kill tens of thousands or a nuclear weapon which can kill tens of millions. The topic of prevention is more fully dealt with in Section III.6 below.

2. *Planning.* There must be planning in advance for handling the medical emergency, if prevention is not possible. WHO can summon global medical resources as no other organization can. How many nurses and doctors should be available, what stock of painkilling and damage-limiting drugs should be kept in readiness, how many hospital beds and how much equipment? How should the populace be informed and educated regarding immediate precautionary measures that can lessen the chances of agonizing suffering, of the formation of cancers and keloids, and even help in prolonging life? A domestic medical service that fails to provide prevention and planning would fail dismally in the discharge of its responsibilities. An international medical service that focuses its attention only on cure after the event and neglects prevention and preparation, would be a no less dismal failure. Indeed, the responsibility for prevention and planning would rank even higher, with a service that carries global responsibility — a service of last resort so to speak, for the world has no higher medical service to turn to when domestic systems fail. The copious medical material placed before the Court provides the background to the WHO request.

II. Effects of Nuclear Weapons on Health

1. Overview of the Effects of Nuclear Weapons on Health

This survey commences with a brief overview, and follows with a more detailed examination of the material placed before the Court by WHO.

The legal counsel of WHO has given the Court an overview of the health-related effects of the use of nuclear weapons. In a presentation not

disputed by any States appearing before the Court, he drew attention to the threefold immediate effects of nuclear explosions — mechanical, thermal and radioactive. While the first two differ quantitatively from those resulting from the explosion of conventional bombs, the third is peculiar to nuclear weapons. In addition to instantaneous radiation, there is also radioactive fallout. Further, the explosion generates an electromagnetic pulse which disrupts electronic devices, including those needed for health services. Over and above this, there are longer-term effects caused by ionizing radiation acting on human beings and on the environment.

WHO has collected a large amount of data from the 1945 bombings and also from an analysis of tests and mathematical models. It has also taken into account information obtained after nuclear accidents, such as those at Kyshtym, Rocky Flats and Chernobyl.

This information reveals *inter alia* that radiation overexposure suppresses the body's immune systems and increases victims' vulnerability to infection and cancers (CR 95/22, pp. 23-24).

Other effects upon health which were referred to by the WHO representative are the increase in genetic defects, the psychological traumas which continue to be noted among the survivors of Hiroshima and Nagasaki, and the effects of ionizing radiation on the crops, the food chain, livestock and the marine ecosystem.

As observed by the WHO representative:

> "Obviously a specialized agency whose purpose, as laid down in Article 1 of its Constitution, is the 'attainment by all peoples of the highest possible level of health' could not ignore such a topic, and this was the case well before the request for an advisory opinion was transmitted to the Court in 1993." (CR 95/22, p. 24.)

An international group of experts was set up to investigate the effect of nuclear war on health and health services. After their report was received, the Director-General set up a management group to consider the implications of the report. When the management group's report was presented, the Chairman of the group observed that, while long-term effects were worrying, "the immediate effects were utterly staggering" (CR 95/22, p. 28).

Reference should also be made to the testimony of the Mayor of Hiroshima to the effect that medical treatment after Hiroshima was a matter of groping in the dark, with hospitals in ruins, medical staff dead and a lack of drugs and medicines, all of which caused an incredible number of victims to die without sufficient treatment.

WHO has analysed the effects of nuclear weapons on health in its Report, *Effects of Nuclear War on Health and Health Services*[13], under

[13] World Health Organization, Geneva, 2nd ed., 1987.

two heads — "Health Problems in the Short Term" (Ann. 6) and "Intermediate and Long-Term Health Effects" (Ann. 7). A perusal of these annexes demonstrates very clearly WHO's grave concerns and legitimate interests in the aspects of prevention and planning.

It is necessary to outline these facts and findings briefly, as that is the setting in which the WHO request has been brought to this Court. To consider the functions of WHO in the abstract, on the basis of formal constitutional provisions read apart from their medical and factual context, would be an academic exercise not sufficiently related to the dire medical realities which WHO must face, as the only organization which is under a duty to co-ordinate global medical assistance in this fearsome eventuality. As this Court observed in *Barcelona Traction*, it is important not to "lose touch with reality" in considering a legal question (*Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 37).

A short summary follows of the medical material placed before the Court.

2. Health Problems in the Short Term

(i) *Heat*. The enormous thermal energy released by thermonuclear explosions, rather than blast, will be the major cause of casualties. The direct thermal pulse or thermal wave would cause immediate charring of exposed parts of the body in the direct line of the thermal rays. Flash burns would occur within fractions of a second and reach their maximum within a few seconds. Indirect burns would result in many more casualties.

The danger of immediate burn injuries becomes apparent when one considers that a single one-megaton air burst could ignite combustible material within a radius of 5-15 km depending on the clarity of the atmosphere. With usual weather conditions this radius would be around 12 km. Simultaneous fires breaking out within this area would probably coalesce into a superfire over an area of some 450 square kilometres. Air temperatures within the fire zone will exceed that of boiling water. The effect of such heat on the human body would be devastating.

(ii) *Blast* will cause shock waves, collapsing buildings and flying debris and individuals will be hurled into the air like projectiles. On contact with immovable objects, there would be head injuries, fractures, crush injuries and penetrating abdominal and thoracic wounds. A one-megaton air burst is capable of killing everyone within a radius of 7 km from the hypocentre.

(iii) *Radiation* effects, such as whole body irradiation, result from two

sources — the immediate burst of gamma and neutron radiations or the radiation from fall-out of radioactive particles. Resulting injuries would be:

(a) *gastrointestinal effects*, including anorexia, nausea, vomiting, diarrhoea, intestinal cramps, dehydration;
(b) *neuromuscular effects* producing fatigue, fever, headache, hypertension and hypotensive shock.

In peacetime conditions some such cases would be survivable, with treatment which would include antibiotics, white blood cell or whole blood transfusions and 8 to 12 weeks of hospitalization. The WHO Report[14] states that following a nuclear war, such conditions of medical care would not be available. Even in cases where there are few or no symptoms, a late increase in cancers, particularly leukaemias, will occur.

As stated by a professor of radiology at the Sixth World Congress of the International Physicians for the Prevention of Nuclear War, radiation injuries include anorexia, cessation of production of new blood cells, diarrhoea, haemorrhage, damage to the bone marrow, convulsions, vascular damage and cardiovascular collapse[15].

(iv) *Inhalation* of radioactive dust could cause acute effects leading to death and long-term effects such as fibrosis and cancer, permeability of the membranes of the alveoli (air sacs) with symptoms of coughing, shortness of breath and feelings of drowning — leading to death by hypoxia, pneumonia and sepsis. There is no means of prevention of this source of infection except wholesale relocation of populations.

(v) *Ingestion*. Among the radionuclides present in the fall-out, iodine-131 presents a special risk, especially to cancer of the thyroid. The effects of radioactive strontium and caesium will be apparent only later. These are dealt with under the long-term effects.

The WHO Report[16] points out that "the casualties incurred even in a so-called 'limited' nuclear exchange would be truly overwhelming".

It states that the kinds of injuries cited are most demanding of medical resources. Burns of second or third degree involving 20 per cent of the

[14] *Op. cit.*, Ann. 6, p. 157.
[15] Herbert Abrams, "Chernobyl and the Short-Term Medical Effects of Nuclear War", in *Proceedings of Sixth World Congress of International Physicians for the Prevention of Nuclear War (IPPNW)*, Cologne, 1986, published under the title *Maintain Life on Earth!*, 1987 pp. 122-125.
[16] *Op. cit.*, Ann. 6, p. 158.

body surface are generally regarded as fatal unless given intensive therapy with massive fluid replacement, sterile management, antibiotics, surgical care and general nursing, dietary and supportive care for periods of weeks in hospital, followed by lengthy rehabilitation. Even with today's sophisticated medical care, there would be considerable mortality[17].

In these circumstances, WHO, as a body of experts, has no alternative but to direct its thoughts to prevention and planning for the minimization of injury and suffering when cure is impossible.

It is pointed out further that up to 80 per cent of physicians could well be casualties. With reference to a single megaton air explosion over a metropolitan area such as Boston with a population of 2,844,000, reference is made to a 1979 United States Arms Control and Disarmament Agency estimate of 695,000 direct fatalities and 735,000 surviving injured. Of the 12,816 hospital beds in Boston, at the date of that investigation, around 83 per cent were expected to be destroyed, leaving 2,135 beds and a heavily depleted force of doctors and nurses for the care of 735,000 seriously injured survivors[18].

According to another study, burn injuries, which are particularly painful, present special medical problems and require careful and specialized treatment[19]. Montreal, a city of 2 million people, had facilities (in 1983) for six severe burn cases. In the whole of North America, it was estimated that there were only 2,500 beds for serious burn cases. Yet a one megaton bomb exploding over Montreal would result in as many as 10,000 people requiring such facilities. Moreover, whatever facilities there are tend to be concentrated on the cities, and will themselves be destroyed.

Indeed, in all branches of medicine, the bulk of practising doctors tend to be within a few miles of the city — as in Quebec with 50 per cent of all practising physicians being within 5 miles[20].

The total inadequacy of medical facilities to cope with nuclear war is graphically indicated in a study already referred to[21]. It reveals that after a major nuclear attack, even if medical resources remain substantially intact:

[17] *Op. cit.*, Ann. 6, pp. 159-160.
[18] *Ibid.*
[19] Don G. Bates, "Medical and Ecological Effects of Nuclear War", *McGill Law Journal*, 1983, Vol. 28, pp. 722-724.
[20] *Ibid.*, p. 724.
[21] Herbert Abrams, "Chernobyl and the Short-Term Medical Effects of Nuclear War", *op. cit.*, p. 127.

> "The disparities are great: 273,000 available hospital beds compared to the 17.6 million needed; few burn beds, with 5.3 million needed; 15,000 intensive care beds, with 6.7 million required. Among essential personnel, 48,000 physicians may be confronted with the work of 1.3 million; or 150,000 registered nurses with that of 6.7 million; or 17,000 medical technologists with that of 450,000. If there are 14,000 units of whole blood available, for example, and 64 million units required, the problem of developing a credible medical response for the millions of surviving injured can readily be grasped."[22]

Even years before the WHO Report, many detailed studies had been made on the effects of nuclear war on health. For example, the Japanese Association of Doctors Against the A- and H-Bombs appointed an international commission of medical specialists to examine the biological effects of the radioactive fallout produced by United States nuclear tests in the Pacific in 1954. The Japanese fishing boat *Fukuryu Maru* was found to be contaminated while 80 miles outside the estimated danger zone. All 23 members of the crew showed symptoms of radiation disease and were found to have fissionable material in their organs. One of the crew died. The vessel was rendered radioactive, dust from it producing radiation sickness in animals and genetic effects in plants.

Fish caught in various parts of the Pacific, even eight months after the explosion, were found to be contaminated and unfit for human consumption. Crops in different parts of Japan were affected by radioactive rain The medical experts, who arrived unanimously at these conclusions, were drawn, *inter alia*, from Paris, East Africa, Berlin, Santiago, Czechoslovakia, Moscow and Mukden[23].

It is little wonder that WHO seeks information on a question fundamental to prevention and planning — the question of State obligations under international law. Is this a lawful weapon of war? Is the use of such a weapon by a State a violation of the State's obligations under international law or under the WHO Constitution? As the global coordinating authority for health work, it must plan for the nuclear contingency as part of its statutory duty. It is entitled to know the answer to this question. If it is to be held to its duties in terms of its Constitution, it must know the reciprocal duties of States in terms of that same Con-

[22] Herbert Abrams, "Chernobyl and the Short-Term Medical Effects of Nuclear War", *op. cit.*, p. 127, quoting Abrams, "Medical Resources after Nuclear War: Availability *v.* Need", *Journal of the American Medical Association*, 1984, pp. 252, 653-658.

[23] Singh and McWhinney, *Nuclear Weapons and Contemporary International Law*, 1989, p. 124.

stitution. I cannot agree that they can be denied this basic information and, even more so, their very entitlement to seek it.

It is difficult to conclude that this is not their business. Rather, I would consider WHO to be neglectful of its responsibilities if it did not address this question.

Indeed, as is only to be expected, it has for years been turning its attention to this problem, and the reference to this Court for an opinion on the legal aspects is only a part, and a necessary part, of the much broader investigation it has engaged in for the purpose of discharging this aspect of its responsibilities. There is no material before this Court showing that any exception was ever taken to such investigations relating to nuclear weapons, which WHO has been conducting ever since 1966.

By way of analogy, in the field of chemical and bacteriological weapons, WHO has been pressing for prohibition "as a necessary measure in the fight for human health" (WHA resolution 23.53 of 1970). No objection was raised relating to any alleged "intrusion" into the sphere of actual regulation. The current enquiry relates not to an attempt at regulation, but only to an enquiry for information. If WHO was not seen to be intermeddling outside its province when it asked for the actual *prohibition* of chemical and bacteriological weapons, it is difficult to see how it could be seen to be intermeddling when it merely *asks for information* regarding nuclear weapons.

3. Intermediate and Long-Term Health Effects

These conclusions, reached upon an analysis of the short-term effects, are strengthened even further upon an examination of the intermediate and long-term effects[24].

Iodine-131, we are told, constitutes the greatest potential long-term hazard. Iodine-131 enters the body primarily by ingestion of milk. The route from bomb, to atmosphere, to grass, to cow, to milk, to man is described as surprisingly rapid, and milk with high concentrations of iodine-131 has been detected thousands of miles away from test explosion sites. The radioactive iodine concentrates in the thyroid gland, destroying thyroid tissue and producing late thyroid cancer[25].

While iodine-131 has a half-life of only 8 days, strontium-90 and caesium-137 are nuclides with half-lives of 29 and 30 years respectively. The long delayed descent of global fallout does not therefore effectively reduce their potency. When they do descend, they are trapped in the

[24] See WHO Report, *op. cit.*, Ann. 7.
[25] *Ibid.*, p. 165.

superficial layers of the soil. They are taken up from there by plants which are eaten by animals. Through vegetables and meats, they are ingested by humans, both elements increasing the incidence of cancers. Once ingested, there is no rapid means of ridding the body of these carcinogenic elements[26].

Strontium mimics calcium in the body and is deposited in bones and teeth, thus placing its radiation close to the highly sensitive bone marrow. Caesium accumulates in cells in close juxtaposition to nuclear DNA[27].

Ionizing radiation impairs the function of the immune system, and virtually all elements of the immune system are affected by irradiation. Hard ultraviolet radiation also has an immuno-suppressive effect.

The long-term effects add to the pressure on WHO to turn its attention to prevention and planning to minimize human suffering[28], even if no cure is possible.

The long-term effects range from after-effects of the injuries sustained to long-term effects of radiation exposure, and health problems resulting from the disruption and destruction of health services. They are conveniently summarized in the Report by the Director-General of WHO to the Forty-sixth World Health Assembly (doc. A46/30 of 26 April 1993). Survivors of nuclear explosions will be confronted with protracted non-healing wounds, suppurating extensive burns, skin infestations, gastrointestinal infections, and psychic trauma (*ibid.*, para. 20).

A recognized consequence of radiation overexposure is the suppression of the body's immune system. Ionizing radiation, according to this Report, reduces the helper T-lymphocytes and increases the suppressor T-lymphocytes, thus increasing the victims' vulnerability to infection and cancers (*ibid.*, para. 21).

Survivors of the nuclear explosion and the populations of contaminated areas will be at risk of cancer induction and genetic damage, the risk varying with the dose received (*ibid.*, para. 23)[29].

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[26] WHO Report, *op. cit.*, pp. 165-166.

[27] *Ibid.*, p. 165.

[28] On the long-term effects, see also Z. Dienstbier, "Long-Term Medical Effects of Nuclear War", in *IPPNW Congress Proceedings, op. cit.*, pp. 130 ff.

[29] At an exposure of 1 Gray whole body irradiation, there will be an estimated lifetime risk of mortality from all forms of cancer in the range of 4 per cent to 11 per cent of survivors. A Gray is the "International System unit of absorbed dose, equal to the energy imparted by ionizing radiation to a mass of matter corresponding to 1 joule per kilogram" (*McGraw-Hill Dictionary of Scientific and Technical Terms*, 2nd ed., p. 696).

Exposure to plutonium alpha particles produces chromosomal instability which can be transmitted to progeny, thus causing cancer in future generations (doc. A46/30 of 26 April 1993, para. 24). Also the effects of internal exposure from the inhalation or ingestion of radioactive materials is much greater than was originally thought *(ibid.)*.

Further, with special reference to public health and sanitary facilities, it was pointed out that a nuclear explosion would destroy these, thus opening the way for the spread of disease. Water supplies would be contaminated not only by radioactivity, but also by pathogenic bacteria and viruses. Sewage treatment and waste disposal facilities would have almost completely disappeared (*ibid.*, para. 29).

In addition:

> "Great numbers of putrefying human bodies and animal carcasses as well as untreated waste and sewage would provide easy breeding ground for flies and other insects. Diseases like salmonellosis, shigellosis, infectious hepatitis, amoebic dysentery, malaria, typhus, streptococcal and staphylococcal infections, respiratory infections and tuberculosis would occur in epidemic form over vast areas." (*Ibid.*, para. 30.)

These are areas *par excellence* of WHO's constitutional concern and medical expertise.

Long-term effects on health through the disruption of the food supply on a regional or a global scale, resulting from environmental damage, is another important factor, impairing health and lowering resistance to disease. A multiple nuclear exchange could result in a nuclear winter, causing famine situations on a global scale.

4. The Appearance of Devastating Epidemics

The various glands and organs of the body that provide natural immunity against infection are, according to the writings on this topic, particularly sensitive to radiation. "When combined with social disintegration, this would invite the rapid spread of communicable diseases in unusually severe forms."[30]

Diseases such as plague, smallpox, cholera and typhoid fever, now largely relegated to the history books, which have been kept at bay by nutrition, sanitation and immunization programmes would reappear.

[30] Abrams and Von Kaenel, "Medical Problems of Survivors of Nuclear War: Infection and the Spread of Communicable Disease", *New England Journal of Medicine*, 1981, Vol. 305, p. 1226, cited in Bates, "The Medical and Ecological Effects of Nuclear War", *op. cit.*, p. 726.

Nuclear war would compromise those defences severely[31], and in addition would lower the body's organic and glandular resistance to them.

The World Health Report 1996, issued by WHO on 20 May 1996, warns that there is currently a devastating upsurge in infectious diseases caused *inter alia* by the weakening of people's immune systems[32]. The Report warns that, "We are standing on the brink of a global crisis in infectious diseases", with 17 million deaths every year. Up to half of the 5.72 billion people on earth are at risk of many endemic diseases — old diseases such as tuberculosis and malaria which are resurgent, and deadly new diseases such as ebola, for which no cure is known. Diarrhoeal diseases such as cholera, typhoid and dysentery, caused by contaminated water or food kill millions every year. If this is so in the comparatively organized societies of today, the danger of uncontrollable epidemics after the social disintegration, the breakdown of sanitation systems, especially in cities, and the weakening of the immune system caused by nuclear war must be self-evident, and must surely be an important constitutional concern of WHO.

5. The Relevance of the Medical Material Placed before the Court

This brief summary of the material placed before the Court demonstrates:

(a) the futility of awaiting a nuclear catastrophe to move into action in relation to medical services;

(b) the incurability of most of the medical afflictions resulting from the bomb;

(c) the prospect of worldwide famine in the event of nuclear war, with its resultant disastrous effect on human health;

(d) the need to plan in advance for rapid emergency services and supplies in such an eventuality;

(e) the need to plan in advance for public education, medical research, medical education;

(f) the need to understand what precisely are the obligations of States under international law in relation to the health effects of use of nuclear weapons;

[31] Bates, *op. cit.*

[32] Reported in *International Herald Tribune*, 21 May 1996, p. 10, and *The Guardian Weekly*, 26 May 1996. According to the Report, "In the contest for supremacy the microbes are sprinting ahead."

(g) the need to understand what precisely are the obligations of States under international law in relation to the environmental effects of use of nuclear weapons;

(h) the need to understand what precisely are the obligations of States under the WHO Constitution in relation to the use of nuclear weapons;

(i) the deep constitutional concerns of WHO with the medical consequences of nuclear war.

The relevance of the medical material placed before the Court can be more pointedly illustrated by taking just one effect — the cancer-inducing qualities of the bomb, for the nuclear weapon can well be described as the greatest cancer-inducing instrumentality yet devised. The legality of cancer-inducing agencies, whatever their scale, are already concerns of WHO. Thus the legality of the sale of a drug that increases the risk of cancer, for example cervical or womb cancer, is clearly a matter that concerns WHO, for it would have to adopt different strategies to deal with the problem depending on whether the drug is legal (and thus freely available) or illegal (and thus less likely to be freely available).

It may be argued that the legality of the nuclear weapon is different from the legality of a drug, in that the weapon will in any event be used by those who desire to use it, irrespective of legality. However, this is a difference with which this Court cannot concern itself, as the Court operates on the assumption of a community ruled by law, and can only act on the assumption that member States of that community will abide by that law. If a particular weapon is a legal weapon of war, it stands on a very different footing from a weapon whose use is banned by law, and WHO is entitled to know in which category the weapon falls.

It is thus difficult to see a logical distinction between WHO's concern with the legality of a cancer-inducing drug and the legality of a cancer-inducing weapon. If the first concern is legitimate — which no one would doubt — it is difficult to see how the other is not. The concern of other organs of the United Nations with the political aspects of the problem cannot negative or override WHO's concern with the medical aspects of the same problem.

This background of medical information reveals numerous areas of obvious concern to WHO in the discharge of its constitutional responsibilities. It also provides the essential factual background to the various applicable principles of international law — particularly of international humanitarian law. If humanitarian concerns are the criterion which triggers into action the principles of humanitarian law, it must be self-evident that the preceding resumé of the medical effects of nuclear war must activate those principles and bring them into play.

6. The Experience of Hiroshima and Nagasaki

As is well known, even a comparatively minor catastrophe such as Chernobyl imposes on domestic health services a burden greater than they can bear. There would be no other entity to which a nation stricken by a nuclear attack could turn, for its medical services, however rich the country, would be virtually non-existent. Even a comparatively "small" nuclear attack such as occurred in Hiroshima and Nagasaki crippled and destroyed the health services of a well-organized nation. As Dr. Henry Kissinger observed in his work on *Nuclear Weapons and Foreign Policy*:

> "Under normal conditions, a hospital requires five persons to care for one patient. It has been estimated that at Nagasaki, under the most primitive medical conditions, each survivor required two persons to care for him. The whole surviving population of an affected area would therefore either be injured or engaged in caring for the injured.
>
> Even then, adequate medical assistance for the injured will be impossible, for most hospitals and most medical personnel are themselves within the target area."[33]

One has only to peruse medical accounts of the aftermath of Hiroshima and Nagasaki to understand how futile medical services can be *after* the nuclear event, especially if they are caught unprepared. *Hiroshima Diary: The Journal of a Japanese Physician August 6-September 30, 1945*, by Michihiko Hachiya, M.D.[34], is one such.

The multitude of descriptions available on the position of a society which has been the victim of a nuclear attack heavily underscore this aspect of the breakdown of all health services, in which we have the grotesque situation of human beings with shreds of flesh hanging upon them, their eyeballs melted away, and their senses dazed by blast and radiation, wandering around in their thousands in search of assistance, and helpless in the midst of a prevailing despair[35]. Such scenes, the sad realities of the aftermath of a "small" nuclear attack, are amply documented as having occurred in Hiroshima and Nagasaki. They will occur again whenever and wherever nuclear weapons are used. They are the health administrator's worst nightmare, and any institution concerned with world health needs to know whether the only agency capable of causing such a

[33] 1957, p. 70

[34] University of North Carolina Press, 1955.

[35] Here is a quote from *Hiroshima Diary*:

> "And they had no faces! Their eyes, noses and mouths had been burned away, and it looked like their ears had been melted off. It was hard to tell front from back. One soldier, whose features had been destroyed and was left with his white teeth sticking out, asked me for some water and I didn't have any. I clasped my hands and prayed for him. He didn't say anything more. His plea for water must have been his last words." (P. 15.)

scenario stands within or without the international legal system, and whether therefore it is permitted or banned.

III. Matters Relating to WHO's Competence

1. The Objections to WHO's Competence

Of the 189 member States of WHO as at 19 May 1994, only nine have raised objections before this Court on grounds that WHO does not have the competence to make this request, namely, Australia, Finland, France, Germany, Italy, Netherlands, Russia, the United Kingdom and the United States. It will be noted that one nuclear power, China, is not among those who have objected to WHO's competence.

The objections to WHO's competence centre around two broad propositions:

(a) that the *legality* of the use of nuclear weapons is not a matter for WHO, whose competence is limited to the *effect* of nuclear weapons on human health and environment; and

(b) that WHO has no special interest in the matter and a recognition of its competence would, in effect, expand the scope of its activities.

Thus France has urged before the Court that:

> "WHO has no more competence to put this question than it would have, itself, to declare that the use of a particular kind of weapon was unlawful or to rule on the international legality of a particular conflict; it has not the slightest competence in this area." (CR 95/23, p. 56.)

France has submitted further that WHO's action "seems nothing less than an abuse of the Court's advisory functions and, to say the least, a somewhat alarming trend" (*ibid.*, pp. 56-57).

With their deep implications, both for the advisory jurisdiction of the Court and for the scope of the legitimate activities of specialized agencies, such submissions need careful consideration.

WHO has no means at its disposal to prevent nuclear war and in no way does its enquiry amount to any act of intermeddling in the causes of nuclear war. It only seeks information and that information could well be relevant in drawing attention to the need to prevent nuclear war. Alternatively, on the supposition that there is room for medical action after a nuclear attack, it is relevant to its state of preparedness. As already noted, even if an entire nation should be destroyed, medical services would be urgently required by neighbouring States. Relevant to its duties in this situation are Article 2 *(d)* and *(e)* of the WHO Constitution which cast upon WHO the express duty of furnishing aid in emergencies and providing health services and facilities to special groups.

It is therefore a mistake to read into WHO's enquiry an attempt at dabbling in the political question of prevention of nuclear war. It keeps well within its mandate in seeking information which it considers necessary for discharging its constitutional obligation of preparation to render assistance in the event of nuclear war. Here again the analogy of bacteriological or chemical warfare comes to mind. If these are legitimate weapons of war, WHO's state of readiness to cope with the medical problems they raise must surely be different from the situation where the law of nations accepts that they are illegal and should not be used in any circumstances.

2. The Importance of the Enquiry Relating to WHO's Constitution

Elsewhere in its jurisprudence, this Court has stressed the importance of rendering an opinion to a specialized agency when it relates to that agency's Constitution and, indeed, it has made this observation in relation to the constitution of WHO itself (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, I.C.J. Reports 1980,* p. 87. See p. 108, *supra.*)

As the Court has observed in its reply to the General Assembly's request for an opinion on the legality of nuclear weapons:

> "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." (*I.C.J. Reports 1996*, p. 234, para. 13.)

This principle assumes particular importance in regard to a request for interpretation of an organ's Constitution, for not only is that manifestly a question of law, but it is one of the most practical forms of assistance the Court can give to the members of the United Nations family of organizations. It is a question anchored to the law and, at the same time, lying at the heart of an organization's work. In short, it is the sort of question which in my view the Court would be under a special obligation to address.

With much respect, I must therefore disagree with the Court's conclusion 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" (Advisory Opinion, para. 28). The finding that the matter is "outside the scope of its functions" is itself an interpretation of WHO's Constitution and, in reaching this conclusion, the Court is in effect interpreting WHO's Constitution in response to WHO's request. I find it difficult also to accept that an organ of the United Nations, empowered to

seek an advisory opinion on a question of law, has no competence to seek an interpretation of its own Constitution.

3. The Constitutional Functions of WHO

There are a number of constitutional functions of WHO which have a bearing on the question referred to the Court. Some of them have been referred to earlier in this opinion. Among these functions, which are specified in Article 2 of its Constitution, are the following, shown against the respective subsections of Article 2:

(1) to act as the directing and co-ordinating authority on international health work (Art. 2 *(a)*);
(2) to establish and maintain effective collaboration with the United Nations, specialized agencies, governmental health administrations, professional groups and such other organizations as may be deemed appropriate (Art. 2 *(b)*);
(3) to furnish appropriate technical assistance and, in emergencies, necessary aid upon the request or acceptance of Governments (Art. 2 *(d)*);
(4) to provide or assist in providing, upon the request of the United Nations, health services and facilities to special groups (Art. 2 *(e)*);

(5) 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 (Art. 2 *(k)*);
(6) to promote and conduct research in the field of health (Art. 2 *(n)*);
(7) to promote improved standards of teaching and training in the health, medical and related professions (Art. 2 *(o)*);
(8) to provide information, counsel and assistance in the field of health (Art. 2 *(q)*);
(9) to assist in developing an informed public opinion among all peoples on matters of health (Art 2 *(r)*);
(10) generally to take all necessary action to attain the objective of the Organization (Art. 2 *(v)*).

These will be referred to in the course of the ensuing discussion. It will be sufficient to draw attention at the present stage to the following areas relevant to nuclear weapons in which these constitutional provisions become pertinent:

(i) *Co-ordination of international health work (Art. 2* (a)*)*

WHO's obligations under Article 2 may be summarized in terms that: "WHO's first constitutional function is to act as the directing and co-

ordinating authority on international health work"[36]. Part of this task is stated to be to "devise strategies, principles and programmes to give effect to these policies".

WHO cannot act as the directing and co-ordinating authority on international health work if it has to act behind a veil of ignorance regarding the legality or otherwise of the greatest of man-made threats to human health.

Moreover this provision highlights the fact that WHO is concerned with "health work". The expression "health work" clearly refers, as already observed, not merely to the curative, but also to the preventive and planning aspects of health services, which are an integral part of modern medical services.

The consideration, already referred to, that planning for any contingency requires a knowledge of the legal structure within which a particular hazard takes place acquires even greater significance in a world where many violent conflicts are raging concurrently. The possibility is ever present of an escalation of any of these conflicts and, if the nuclear weapon is a legal weapon of war, any one of one of them could quite "legally" flare into a nuclear war.

(ii) *Collaboration with the United Nations, specialized agencies, etc. (Art. 2* (b)*)*

WHO is part of the United Nations system, dedicated to the aims and objectives of the United Nations. It is the agent *par excellence* for co-ordination with other specialized agencies and professional bodies in relation to the medical hazards of nuclear weapons. For example, the effects on crops and the world famine situation resulting from nuclear weapons constitute an obvious area for collaboration with organizations such as the Food and Agriculture Organization. Professional groups of doctors, worldwide, need to be alerted regarding the medical effects of nuclear weapons. WHO must liaise with medical organizations worldwide and share information with them, alert them to the medical dangers and promote readiness to deal with the medical hazards. It must currently do so in the dark, unaware whether these weapons are legal or not.

[36] A compendium of *United Nations Action in the Field of Human Rights*, 1988, p. 29, para. 234.

(iii) *Emergencies (Art. 2* (d)*)*

The inadequacy of national health services to cope with the after effects of a nuclear attack have already been discussed at some length. The practical situation that existed in Hiroshima and Nagasaki has also been described. Such realities, nowhere discussed in the Court's Opinion, make WHO the obvious authority for national Governments to turn to for assistance, in the emergency created by a nuclear attack. If the nuclear weapon is a legal weapon of war, the responsibility lies all the more heavily on WHO to plan for this. It would quite clearly be the only international authority to whom the stricken nation could turn for assistance. All this is consistent with WHO's responsibilities for promoting "the rationalization and mobilization of resources for health"[37].

WHO's constitutional mandate is to be ready with medical services needed for emergencies.

(iv) *Provision, upon the request of the United Nations, of health services and facilities to special groups (Art. 2* (e)*)*

The radiation victims of a nuclear attack would be a special group within the meaning of this clause. People far from the source of the explosion — hundreds or thousands of miles away — will be affected. Non-belligerent States, far distant from the scene, will need assistance. WHO is the only organization they could turn to. The dire event of a nuclear attack, whatever the nation that is struck, would raise health problems of such proportions that WHO would be the only entity to which the United Nations itself could turn for special services. WHO cannot be unprepared for such an eventuality, especially if it is one which is permitted by the law.

(v) *To propose conventions, agreements and regulations (Art. 2* (k)*)*

If the use of nuclear weapons is a legal form of warfare, WHO will need to take the initiative in relation to conventions, agreements and regulations regarding such matters as the exchange of knowledge and facilities relating to the treatment of radiation victims. Granted the impossibility of any one country being able by itself to treat all radiation victims, there will need to be a consideration of mutual medical assistance in the event of such a catastrophe. WHO's constitutional functions in regard to conventions, agreements and regulations then come into play. If an international medical convention is the best means for arranging emergency medical services to a country stricken by a nuclear attack, who but the World Health Organization could take the initiative in this?

[37] *Op. cit.* footnote 36, *supra.*

(vi) *Research (Art 2* (n)*)*

In the words of the United Nations study already cited:

> "The Organization brings together the world's experts in health matters and serves as a neutral ground for absorbing, distilling, synthesizing and widely disseminating information which has practical value for countries in solving their health problems."[38]

Medical knowledge regarding radiation injuries and their treatment is still the subject of ongoing research. There needs to be co-operation in this field. This task devolves heavily on the shoulders of WHO. Especially if the nuclear weapon is a legal weapon of war, WHO would have little excuse for not planning for the co-ordination and spread of such scientific knowledge.

Contemporary accounts of Hiroshima or Nagasaki show how ill equipped medical practitioners were to deal with radiation injuries[39].

(vii) *Improved standards of teaching and training (Art. 2* (o)*)*

The promotion of improved standards of teaching and training are also activities falling within this field. The medical response to nuclear war, especially if the nuclear weapon is legal, calls for special teaching and training.

(viii) *Public education (Art. 2* (q) *and 2* (r)*)*

These functions, dealt with in Article 2 *(q)* and 2 *(r)* of WHO's Constitution, are discussed elsewhere in this opinion. It is sufficient to note at this point that the WHO Report stresses WHO's role in "systematically distributing information on the health consequences of nuclear warfare"[40]. As the radiation injuries resulting from the Chernobyl accident continue to manifest themselves, even ten years after the event, the world is offered repeated confirmation of the importance of prior public knowledge of how best to react to exposure to radiation. Most people in Chernobyl, unaware of the dangers of radiation, were, from all medical reports now emerging, unable to react in a manner that would minimize the health damage caused to them. In terms of human health, an enormous price is being paid for this lack of knowledge. Spreading such knowledge is clearly within WHO's constitutional functions.

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[38] *Op. cit.* footnote 36, *supra.*

[39] See *Hiroshima Diary: The Journal of a Japanese Physician August 6-September 30, 1945, op. cit.* footnote 34, supra.

[40] *Op. cit.* footnote 13, *supra*, p. 5, para. 9.

4. The Work and Concerns of WHO

It has been said in argument that nuclear weapons are matters exclusively within the area of peace and security — matters which are within the exclusive jurisdiction of other agencies such as the Security Council — and that therefore WHO can have no concern with them. WHO's function is confined to health, pure and simple, and it strays into unauthorized fields when it enters the area of peace and security. The cobbler to his last.

The work of WHO cannot be said to be unrelated to peace and security. In fact, the very Constitution of WHO draws attention in the preamble itself to the interrelatedness of health and security when it states that the health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States. WHO is also empowered by Article 2 *(v)* of its Constitution "generally to take all necessary action to attain the objective of the Organization". The objective of the Organization is set out in Article 1 to be "the attainment by all peoples of the highest possible level of health". The highest possible levels of health must obviously be achieved both by curative and preventive processes, there being no restriction to the former.

There are clearly some areas where WHO's concern with health overlaps with concerns of peace and security. One of the dangers of nuclear war, as pointed out in Section II.4 above, is the appearance of devastating epidemics. The decimation of populations caused by severe epidemics can reduce thriving societies to total helplessness. Such an event would quite obviously be a matter affecting global peace and security, for law and order, both domestic and international, would in those circumstances tend to break down. The linkage in its own Constitution (to which all Member States of the United Nations have agreed) between health on the one hand, and peace and security on the other, renders the argument unavailable that the two concerns are incompatible with each other. Indeed the greater the threat to global health, the greater would be the overlap with peace and security.

The argument that concern with peace and security removes a matter from WHO concerns is analogous to the argument that, although a matter clearly involves a legal issue, this Court should not enter into it if the matter is also political. Such an argument, as repeatedly held in the jurisprudence of the Court, is unsustainable. The Court is the pre-eminent authority on questions of law and must attend to matters properly within its jurisdiction, irrespective of whether they also involve political considerations. Likewise, WHO is the pre-eminent authority on questions of health and must be permitted to attend to matters properly within its sphere, irrespective of whether they are also within the sphere of peace and security.

This case is concerned not with a natural threat, but with a man-made threat to human health so great as to dwarf all other threats, whether man-made or natural. The agency of damage is fully within human con-

trol. WHO desires to know what the law is regarding such potentially damaging activity, which occurs not accidentally, but in consequence of deliberate State action.

It is difficult to subscribe to the view that WHO can be told that this is none of its concern — that its legitimate business is curing the sick after the disaster occurs and that it has no right to knowledge which has a bearing on how it is caused. That is the implication of the Court's Opinion and with that I cannot agree. The state of the law, relating to any form of activity hazardous to human health, is WHO's legitimate concern, and though WHO may not have the power to alter the law, it has at least the right to know what the law is. The greater the hazard, the greater is WHO's right to information. If the hazard can be created legally, the duty of preparedness for that eventuality becomes all the greater.

The lawfulness of deliberate State conduct which damages public health on a global scale cannot, in my view, be excluded from the area of WHO's concerns without serious damage to the authority and mission of WHO in relation to the health of the world's population, and without a restricting effect also upon other United Nations agencies who may be guided by this narrow view of the area of their legitimate concerns.

The causes of damage to world health do not have to be medical causes in the sense in which they are commonly understood. The causes may be natural disasters, such as forest fires or earthquakes, or man-made disasters, such as occur in war. Whatever the sources of danger to human health, WHO needs to study them, understand their causes, anticipate them, and plan to meet these emergencies. It has a global mandate to do so and every organ of the United Nations system must co-operate with it in the discharge of that global mandate.

5. The Analogy with Chemical and Biological Weapons

If chemical and biological weapons were accepted as legal weapons of war, WHO would no doubt have had to take that factor into account in its global planning. The knowledge that these weapons are outlawed is a factor relevant to WHO's consideration of that problem. No doubt it was for such reasons that WHO, before the Convention relating to these weapons, emphasized the need for their prohibition, by resolution 23.53 of 1970.

The same reasoning must apply to nuclear weapons. Legality or illegality makes a major difference to the authority charged with responsibility for global health, particularly when the health hazards are so far flung and long-enduring as those caused by the nuclear weapon.

If WHO, before the chemical and biological weapons treaty, had made an enquiry as to whether the use of those weapons was a violation of

State obligations under the WHO Constitution, it is difficult to imagine that any objections would have been taken to that enquiry. The intimate concern of nuclear weapons with geopolitics and military strategy does not alter the principle involved. WHO needs to know, no less than it needs to know in the case of chemical and bacteriological weapons, whether nuclear weapons, like chemical and bacteriological weapons, are banned by international law.

This Court cannot say in what precise ways the information sought by WHO will help it in its planning. What it does know is that WHO has considered such knowledge to be useful to it and, on this matter, the Court will naturally be guided by the professional judgment of WHO in regard to its usefulness.

WHO, be it noted, is not pressing one view or the other in relation to State obligations. It only seeks information.

6. The Importance of Prevention

It has been stressed already that medical services are quite obviously not confined to matters of cure. Prevention looms large, even if not larger than cure, in the planning of modern medicine.

A standard modern text-book on public health medicine observes in its chapter on the "Promotion of Health":

> "Drawing on the great success of preventive medicine in the past, the United States Surgeon General, in his 1979 report *Healthy People*, set in context the need for a modern impetus for health promotion and disease prevention:
>
> > 'Not to find and employ those [preventive] strategies would be irresponsible — as irresponsible as it would have been for our predecessors merely to alleviate the ravages of smallpox and polio and cholera, without attempting to eradicate them.'
>
> Health services should have as their major aims to reduce the amount of illness, disease, disability and premature death in the population . . . Health services do not have direct control over all the factors which can influence these aspects of the health of the population but the design and implementation of health promotion strategies is one of their major functions."[41]

In the arguments before the Court, the term "primary prevention" has been frequently used. The meaning of this term appears from the following passage in the same work:

[41] R. J. and L. J. Donaldson, *Essential Public Medicine*, 1993, p. 107.

"Traditionally, prevention has been classified into three types:

(a) Primary prevention

This approach seeks actively to prevent the onset of a disease. The ultimate goal of preventive medicine is to alter some factor in the environment, . . . or to change behaviour so that disease is prevented from developing . . .

(b) Secondary prevention

This level of prevention aims to halt the progression of a disease once it is established. The crux, here, is early detection or early diagnosis followed by prompt, effective treatment . . .

(c) Tertiary prevention

This level is concerned with rehabilitation of people with an established disease to minimize residual disabilities and complications."[42]

It is little wonder that the pre-eminent health organization in the world concerns itself with all aspects of prevention. If it did not, it would not be true to the first principles of its vocation.

With prevention comes advance planning. Both prevention and advance planning, enabling WHO to deal with a possible medical situation which can be anticipated, are thus part of WHO's essential duties. It is not surprising therefore to observe WHO's practice in this regard which indicates quite clearly its concern with the legal and regulatory aspect of matters under its charge.

The WHO Report puts its concerns and its legitimate interests in this area very succinctly when it observes that:

> "When treatment is ineffective, the only solution available to the health professions is prevention. Prevention is obviously the only possibility in case of a nuclear war."[43]

The world's leading judicial authority would show little recognition of this undeniable truth if it were to say to the world's leading health authority, on a matter intimately concerning the world's health, "Your function is care after disaster strikes. Prevention is the exclusive concern of other authorities properly vested with jurisdiction in that regard." Such a position seems not only highly legalistic and abstruse, but also irreconcilable with the known facts. Medical responsibilities at the highest possible level and involving the health of the entire global population need to be viewed in the context of the basic facts surrounding those responsibilities and not as though there somehow exists a watertight legal division of responsibilities which must be preserved whatever the cost.

[42] R. J. and L. J. Donaldson, *Essential Public Medicine*, 1993, pp. 120-121.
[43] *Op. cit.* footnote 13, *supra*, p. 33, para. 84.

I regret that I cannot subscribe to a conclusion that a body charged with the highest responsibilities in regard to the health of the global community should sit passively by, until the catastrophe occurs in which its services are required, for the technical reason that it would be trespassing upon the exclusive preserve of the Security Council, who are the sole custodians of peace and security. The Constitution of WHO, a body designed for humanitarian service, cannot be so encased in rigidity as to require it not to move into action in relation to nuclear weapons except in a nightmarish world of ghastly suffering which it is wholly unable to handle. Surely the more reasonable view is that WHO must, by the very nature of its functions and responsibilities, be empowered to warn of medical dangers, seek clarification of legal issues, and prepare itself as best it can in the light of the applicable law.

In this instance, WHO is by no means seeking to lay down a regulatory framework, in regard to the use of nuclear weapons, which of course would be beyond its competence, but is only making an enquiry for the clarification of a matter which is crucial to its proper discharge of its responsibilities.

As the Report of the WHO's Committee of Experts concluded:

> "As doctors and scientists, the members of the Committee feel that they have both the right and the duty to draw attention in the strongest possible terms to the catastrophic results that would follow from any use of nuclear weapons. The immediate and the delayed loss of human and animal life would be enormous, and *the effect on the fabric of civilization would be either to impede its recovery or make recovery impossible*. The plight of the survivors would be physically and psychologically appalling. The partial or complete disruption of the health services would deprive survivors of effective help.
>
> The Committee is convinced that there is a sound professional basis for its conclusions that nuclear weapons constitute the greatest immediate threat to the health and welfare of mankind."[44]

According to a summary of the 1986 Report on the Medical Implications of Nuclear War, published by the Institute of Medicine of the United States National Academy of Science:

> "Each successive study of the possible human destruction that would result from a nuclear war draws a grimmer conclusion about what the human cost would be. Instead of speculating that the casualties might amount to only a few tens of millions, recent studies

[44] *Effects of Nuclear War on Health and Health Services*, WHO, Geneva, 1984, p. 6; emphasis added.

have indicated that the casualties are more likely to number a billion or more, and even the survival of human beings on earth has been questioned." (CR 95/27, p. 77.)

The relevance of WHO's concern appears further from the following statement in the WHO Report which has been placed before the Court:

> "Historically medicine has played an important part in military campaigns. This has been particularly the case in recent wars in which the effectiveness of a prompt medical response did much to maintain morale among combat troops. Following a nuclear war, however, all the evidence indicates that medicine will have nothing to offer the injured survivors; the number of casualties will be too great and the remaining medical resources grossly insufficient."[45]

In nuclear war, physicians and health professionals will themselves be killed in large numbers and the depleted ranks of the survivors will have to cope with a situation where the hospitals themselves are destroyed. The WHO studies thus show that treatment after the event is at best a forlorn hope.

The view that WHO's role is limited to such assistance as it can give after the devastation of a nuclear attack was well answered in homely terms by the Marshall Islands — that it is not "merely a charlady, a *femme de ménage* called in to clean up after the event is over and all the participants have gone home" (CR 95/32, p. 86, Professor Crawford).

7. The Argument Relating to Abuse of the Court's Advisory Functions

For the various reasons set out above, the argument is untenable that WHO has no special interest in this matter. WHO's constitutional mandate relating to global health is concerned with all aspects of health — preventive, curative, educational, precautionary, research, regulatory, planning, emergency assistance, international co-operation. The nuclear weapon touches all of these and the measure in which it touches them will vary, depending on whether it is or is not a lawful weapon of war.

The deliberate act of spreading lethal disease, be it by chemicals or germs or poisons or noxious fumes, has, even in ancient times been considered to be contrary to the laws of war. I have dealt in my dissenting opinion in the General Assembly request with various cultural traditions on this matter, and do not need to cover the same ground here (see Section III.2). Nowhere in the age-old history of the laws of war — ancient or modern — is there found a principle which permits the poisoning of the enemy forces, leave alone the poisoning of the enemy population *en masse*. This is what nuclear weapons do (see my dissent in the General

[45] *Op. cit.* footnote 13, *supra*, Ann. 6, p. 158

Assembly request, Section II) — apart, that is, from poisoning the populations of non-combatant countries.

To vary the factor that damages health, I take the following hypothetical illustration. Before any bacteriological weapons convention had been entered into, a country has rockets on its launching pads, fitted, not with a nuclear warhead but with a warhead containing a fatal virus such as ebola, for which no cure is known. Since the spreading of this virus has not been specifically prohibited by any treaty, WHO makes an enquiry from this Court as to the legality of deliberately infecting enemy populations with such an incurable virus. In such a situation, it seems inconceivable that it could have been submitted that this was an abuse of the Court's advisory functions. Any objection that because it concerned peace and security, it was not therefore a matter for WHO, would attract incredulity and disbelief. It might indeed have been asked what necessity there was for WHO to ask a question, the answer to which was so obvious according to the principles of humanitarian law. The nuclear warhead causes no less a danger to global health than the warhead in the hypothetical illustration above, the difference being that it is not packed with germs, but with an agency that causes cancers, keloids, and deformities with equal irreversibility, but on an infinitely larger scale than that hypothetical warhead.

The nuclear weapon is not so powerful that it can sail above the law.

Further, the argument that WHO has no more competence to put this question than it would have, itself, to declare the use of a particular weapon illegal, is one which, with all respect, I have some difficulty in following. It is for the very reason that WHO manifestly does not have power to make declarations on the law that it has approached this Court, which manifestly has that power.

Finally, arguments that the World Health Organization has been goaded or influenced into taking this action by interested parties are not considered in this opinion. The WHO is a United Nations agency of high standing and repute and the argument suggests that this high body is permitting itself to be made use of in some way to satisfy the ulterior motives of others. I do not think this submission calls for any attention from this Court.

IV. State Obligations

1. State Obligations in Regard to the Environment

The Court is asked whether the use of nuclear weapons is a breach of State obligations in relation to the environment. The Court has not considered this question. The Court's Opinion (para. 16) states that

> "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",

but does not proceed to identify and examine those obligations in order to answer the question. I consider that it needs more attention. It is moreover an area very much within the legitimate concerns of WHO.

The question asked by WHO affords the Court an opportunity for contributing to an important aspect of this development, for it focuses attention on the vital question of the duties of States in regard to the environment. I regret this opportunity has not been taken by the Court.

(a) *The progress of environmental law*

From rather hesitant and tentative beginnings, environmental law has progressed rapidly under the combined stimulus of ever more powerful means of inflicting irreversible environmental damage and an ever increasing awareness of the fragility of the global environment. Together these have brought about a universal concern with activities that may damage the global environment, which is the common inheritance of all nations, great and small. To use the words of a well-known text on international environmental law:

> "The global environment constitutes a huge, intricate, delicate and interconnected web in which a touch here or palpitation there sends tremors throughout the whole system. Obligations *erga omnes*, rules *jus cogens*, and international crimes respond to this state of affairs by permitting environmental wrongs to be guarded against by all nations."[46]

Such compelling facts do not admit of any exceptions, however powerful the actor or compelling the purpose, for it is increasingly clear that what is at stake can well be the very survival of humanity. Nuclear weapons bring us to such a limit situation, and therefore attract the principles of environmental law. As was observed in the preamble of the Treaty of Tlatelolco:

> "nuclear weapons, whose terrible effects are suffered, indiscriminately and inexorably, by military forces and civilian population alike, constitute, through the persistence of the radioactivity they release, an attack on the integrity of the human species and ultimately may even render the whole earth uninhabitable".

[46] *International Environmental Law and World Order*, Guruswamy, Palmer and Weston, 1994, p. 344.

(b) *The growth of the notion of State obligations*

The Declaration of the United Nations Conference on the Human Environment (Stockholm), adopted on 16 June 1972, was designed to "inspire and guide the peoples of the world in the preservation and enhancement of the human environment". Principle 1 of that Declaration states that:

> "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations . . ."

Principle 21 has a direct relevance to WHO's enquiry, for it deals specifically with the *obligation of States* not to damage or endanger significantly the environment beyond their jurisdiction. Principle 2 of the Rio Declaration gives expression to the same principle. Both may be said to be articulations, in the context of the environment, of general principles of customary law. In the words of *Corfu Channel*, there is a "general and well-recognized" principle that every State is under an "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" (*I.C.J. Reports 1949*, p. 22).

Principle 24 of the Rio Declaration on Environment and Development (1992), whereby States are called upon to "respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary", is a further expression of this general principle. It cannot therefore be gainsaid that the concept of State responsibility in regard to the environment is today an established part of international law.

(c) *Active and passive State obligations*

There is a State obligation lying upon every member State of the community of nations to protect the environment, not merely in the negative sense of refraining from causing harm, but in the positive sense of contributing affirmatively to the improvement of the environment. A wide recognition of this principle was evidenced when, in 1971, the General Assembly affirmed "the responsibility of the international community to *take action* to preserve and enhance the environment" (General Assembly resolution 2849 (XXVI); emphasis added).

For the purposes of the present case, however, it is not necessary to enter the area of *active* State responsibility to conserve the environment — an aspect now receiving increasing attention. The *passive* responsibility not to damage the environment is sufficient for the purposes of this

case, for it is patently clear that any State action which damages the environment in the way that nuclear weapons do is a violation of the obligation of environmental protection which modern international law places upon States. A contrary view would negative the basic logic of environmental law and send a tremor through the foundations of this vital subdiscipline of modern international law.

(d) *The juristic nature of State obligations*

In relation to environmental obligations, the notion is evolving of duties owed *erga omnes* and of rights assertible *erga omnes*, irrespective of the compartmentalization of the planetary population into nation States.

The concept of an *erga omnes* right is not new. In 1915, the eminent American jurist, Elihu Root, who later became a member of the Committee which drafted the Statute of the Permanent Court, stated, in a paper on "The Outlook for International Law":

> "Wherever in the world the laws which should protect the independence of nations, the inviolability of their territory, the lives and property of their citizens, are violated, all other nations have a right to protest against the breaking down of the law."[47]

Such thinking is the background against which the damage caused to the environment must be considered, for the purpose of ascertaining whether the use of a nuclear weapon by a State is in conflict with State obligations under international law.

The concept of obligations *erga omnes* has, of course, received recognition in the Court's jurisprudence, though in a different context, in *Barcelona Traction, Light and Power Company, Limited, Second Phase* (*I.C.J. Reports 1970*, p. 3).

Indeed, in some areas, modern discussions of State responsibility take the matter even further, to elevate serious breach of State duty in regard to the environment to the level of an international crime when they state that:

> "a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas"

may result in an international crime[48].

It is not necessary for present purposes to examine the various levels of State obligations in respect of the environment, which may range from

[47] *Proceedings of the American Society of International Law*, 1915, Vol. 2, pp. 7-9, cited in Guruswamy, Palmer and Weston, *op. cit.*, p. 345.

[48] International Law Commission, Draft Article 19 (3) *(d)* on State Responsibility, *Yearbook of the International Law Commission*, 1976, Vol. II, Part II, p. 96.

obligations *erga omnes*, through obligations which are in the nature of *jus cogens*, all the way up to the level of international crime.

(e) *Multilateral treaty obligations*

There have been, since the Stockholm Declaration of the United Nations Conference on the Human Environment (1972), over one hundred multilateral environmental instruments which are in force. A United Nations Environment Programme is in force, major instruments have been signed regarding the law of the sea, transboundary pollution, hazardous waste, nuclear accidents, the ozone layer, endangered species — to name but a few. The United Nations Environment Programme register of multilateral treaties affecting the environment revealed as many as 152 treaties in May 1991[49].

The multifarious international instruments relating to the environment, to which reference has been made, build up the rising tide of international acceptance which creates in its totality a universal acceptance of State obligation which in turn translates itself into law. All of the areas they deal with are areas affected by the nuclear weapon to an extent which is impermissible under these instruments, had the damage been caused by any other agency.

The areas named are a small sample of the areas of State obligations under international law which are affected by the nuclear weapon. What WHO wants to know, in view of the close linkage of a pure environment with human health, is whether there is a breach of such State obligations when a State uses a nuclear weapon. It cannot, in my view, be denied this information, which lies at the very heart of its constitutional mandate of safeguarding global health.

2. State Obligations in Regard to Health

The next question to be addressed is whether there are State obligations in regard to health, and whether these are violated by the use of the nuclear weapon.

(a) *The human right to health*

An examination of the various international developments in regard to health shows that State duties in regard to health have now passed beyond the field of good intentions into the realm of binding international law.

[49] See Geoffrey Palmer, "New Ways to Make International Environmental Law", *American Journal of International Law*, 1992, Vol. 86, p. 262.

Even before the Universal Declaration of Human Rights, the Constitution of WHO (1946) recognized the enjoyment of the highest attainable standard of health as one of the fundamental rights of every human being. This will be dealt with more fully in the section on the WHO Constitution.

Article 25 (1) of the Universal Declaration recognizes the right of everyone to health and well-being, through its stress on the right to a standard of living adequate for health and well-being.

(b) *State obligations in relation to health*

A more specific recognition of the right to health is contained in Article 12 of the International Covenant on Economic, Social and Cultural Rights of 1966. Article 12 states that the "States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health". It will be noted here that the recognition by States of the right to health is in the general terms that they recognize the right of "everyone" and not merely of their own subjects. Consequently each State is under an obligation to respect the right to health of all members of the international community.

It is to be noted also that the formulation contained in the Covenant is not restricted to mere recognition or to statements of good intention. Article 2 (1) provides that:

> "Each State party to the present Covenant *undertakes* to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." (Emphasis added.)

Further, Article 2 (2) contains a guarantee by States that "the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, . . . national or social origin, . . . or other status". Quite clearly this is a reinforcement of the obligation *erga omnes* towards the entire global population which is contained in Article 12 and a further obligation to take active steps towards guaranteeing this right to health of the global population.

(c) *Global implementation measures involving State obligations in regard to health*

On 22 May 1981, the World Health Assembly, by resolution WHA34.36, unanimously adopted a "Global Strategy for health for all by the year

2000", which was noted with approval by the General Assembly. In that resolution, the Assembly urged all member States to assure its implementation and requested all appropriate organizations and bodies of the United Nations system to collaborate with the World Health Organization in carrying it out.

In particular, there has been much action on the regulation of products harmful to health and the environment. A consolidated list has been issued of products which have been banned, withdrawn, severely restricted or not approved. At its thirty-ninth session, the General Assembly received a report from the Secretary-General on products harmful to health and the environment, and decided that an updated consolidated list should be issued annually, and urged Member States to avail themselves of this information, and to supplement the data in the consolidated list.

Thus, not only has the right to health been recognized as a human right, but specific implementation measures have been urged on all States in measures which have been universally accepted by States, without any demurrer on the ground that health is not an area of State responsibility. Special action programmes have been worked out in relation to agencies likely to damage health and the environment.

(d) *The clash between State obligations and the health-related effects of nuclear weapons*

How does the use of the nuclear weapon accord with this obligation which States under binding treaty obligation, and by general agreement, have recognized as binding, and have in fact agreed by treaty to implement? The nuclear weapon produces the various effects upon health which have been outlined in this opinion. They include the inducement of radiation sickness, leukaemia, cancer, keloids, genetic deformities, and the like. They do so on a massive scale, not limiting their effects to the target population of the countries at war. Even within the countries at war, they promote these sources of destruction of human health among civilian and combatant alike.

It appears evident that there is here a clear contradiction between State obligations under international law in relation to health and the use of the nuclear weapon. There can be no doubt that if a State by deliberate action of any other kind should foster this sort of danger to human health, it would clearly be seen as a contradiction between that act and the State's obligations in regard to health. Even if that act should have been performed in conditions of war, there would still be a breach of State obligations under humanitarian law in relation to human health, as is clear with chemical, bacteriological or asphyxiating weapons. By what title of exemption does the nuclear weapon fall clear of this principle? I know of none.

3. The Duties of States under the WHO Constitution

WHO asks whether, in view of their health and environmental effects, the use of a nuclear weapon by a State would be a breach of its obligations under the WHO Constitution. Knowledge of the legal reach of its constitution is vital to the proper functioning of any agency. The Court is the pre-eminent authority under the United Nations system to advise a United Nations agency on such a matter which is unquestionably a matter of law, and which is unquestionably a matter of legitimate concern to the agency. WHO turns naturally to the Court for advice on precisely such a matter. The Court denies this advice on what seems to me to be a technicality.

Quite apart from their responsibilities under customary international law and any other conventions to which they are parties, the States that are parties to the WHO Constitution, which is itself an international treaty, accepted certain principles and obligations. The Constitution was signed by 61 States on 22 July 1946 and entered into force on 7 April 1948. Appendix I to the WHO volume of *Basic Documents* shows that, at 31 October 1992, 182 States had become party to the Constitution.

What are the obligations of States under the WHO Constitution?

In the first place, the States Parties to the Constitution declare *inter alia* that "The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being . . ."; that "The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States"; and that "Governments have a responsibility for the health of their peoples . . .".

They proceed to accept these principles and they establish the World Health Organization "for the purpose of co-operation among themselves and with others to promote and protect the health of all peoples . . .".

This Organization's objective, as stated in Article 1 is "the attainment by all peoples of the highest possible level of health".

There is thus a commitment to the attainment by all people to the highest possible level of health, to regarding the achievement of the highest achievable standard of health as a fundamental right of every person on the planet, a recognition of health as fundamental to peace, and of the duty of State co-operation to achieve this ideal. More such commitments would appear from a scrutiny of other articles of the Constitution, but the foregoing suffices for purposes of present discussion.

The Constitution is a multilateral treaty, and each participating State holds out to all others its adherence to these principles, on the basis of which all others make a similar commitment. All participating States

have committed themselves, to the extent of their respective abilities, to pursue this objective, consistently with the underlying assumption that the health of all peoples is fundamental to the attainment of peace and security.

As stated in the next section, the WHO Constitution and its object and purpose must be interpreted in accordance with the principle of broad interpretation approved by the Court in its Opinion in the present case. It is in this sense that the commitments of the participating nations under the WHO Constitution must be construed. It seems to be clearly inconsistent with this objective that any of these nations, even for purposes of war, should consciously spread a means by which global health is undermined. In fact, it is a contradiction in terms to commit oneself to the attainment by all peoples of the highest possible levels of health and at the same time to launch into the midst of the global population a lethal instrumentality for spreading ill health on an unprecedented scale.

The use of conventional weapons in war does not spread disease. It does not cause genetic deformities. It does not imperil crops. It does not cause intergenerational climatic effects which imperil the global food supply. The use of nuclear weapons does. The user of the weapon now knows, in the present state of scientific knowledge, that all these dangers to health will be caused.

There is thus a clear breach of State obligations undertaken in the treaty which forms the WHO Constitution, when States resort to the use of nuclear weapons. This is the crux of the WHO enquiry regarding the interpretation of its Constitution.

Such a result would be achieved even without the application of broad principles of interpretation, discussed in the next section, for it follows naturally from a consideration of these declarations and commitments collectively.

The Constitution also accepts the promotion of child health and welfare as one of the mandatory functions of the Organization (Art. 2 *(l)*). This principle has been accepted by every participating State. Nuclear weapons surely violate this principle, if for no other reason than the genetic damage they cause. The position is no different in regard to maternal health and welfare dealt with in the same Article (2 *(l)*).

V. Principles of Interpretation Relating to WHO's Constitution

1. Principles of Interpretation Applicable to WHO's Constitution

An important aspect of the question referred to the Court is the legal interpretation of State obligations under the WHO Constitution, which is

a multilateral treaty. As the Court has observed in its Advisory Opinion (at para. 19), the principles of treaty interpretation are thus brought into play and Article 31 of the Vienna Convention "makes it possible to give quite broad consideration to the particularities of the constitutional instruments of international organizations", for the terms of a treaty must be interpreted "in their context and in the light of its object and purpose". The Court's jurisprudence has given effect to this principle on numerous occasions, as the Court has observed[50].

In the interpretation of a multilateral convention of this type, particularly one which sets before itself certain sociological or humanitarian goals, the task of interpretation should be guided by the object and purpose which the Convention sets before itself. A literal interpretation, using strict methods of anchoring interpretation to the letter rather than the spirit of the convention, would be inappropriate. Fitzmaurice observes of interpretation by reference to objects, principles and purposes (the teleological method) that:

> "This is a method of interpretation more especially connected with the general multilateral convention of the 'normative', and, particularly, of the sociological or humanitarian type. The characters or constitutive instruments of international organizations may also be placed in this category."[51]

The interpretation of a multilateral, sociological or humanitarian treaty, such as the WHO Constitution, cannot be permitted to diverge from its objects, purposes and principles. I am of the view that the approach of the Court has in effect taken it far from these objects, purposes and principles, through a narrow and literal construction, which sees the Organization as being precluded from enquiring, *inter alia*, about the conformity of a certain item of State conduct with the terms of *its own Constitution*.

There are numerous specific provisions within the treaty, several of which have already been referred to. These need to be interpreted in accordance with the treaty's overall object and purpose as stated in its preamble. This is not to state that in the treaty in question there is any conflict between the natural meaning of the words used and its overall purpose, but merely to state that its various specific provisions should not be interpreted narrowly, but always with the end in view which the treaty seeks to achieve — the attainment of the highest standards of health on a global scale.

The object and purpose of the Constitution — the attainment by all peoples of the highest possible level of health — is clearly defeated by the

[50] See references to the relevant cases in paragraph 19 of the Court's Advisory Opinion.

[51] Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 1986, Vol. I, p. 341.

infliction upon the global population of multiple health dangers on a massive scale, as follows from the use of a nuclear weapon.

There is no ambiguity about the expression "highest possible level of health". States declare they will co-operate to achieve this, others make similar declarations on this basis, and a commitment to achieve this objective has emerged.

The governing principle as to whether the nuclear weapon violates State obligations under the Constitution is to be found in the object and purpose of the WHO Constitution. When so regarded, the answer emerges beyond any possibility of doubt or obscurity. State actions which negative the State declarations and commitments to health outlined earlier are clearly a violation of the WHO Statute. To interpret the statutory provisions outlined earlier, so as to enable a State to inflict health damage to present and future generations without violating its constitutional duties, does violence to this principle of interpretation, and to the Statute itself.

The maxim *ut res magis valeat quam pereat* may also be invoked in this regard[52]. The central purpose of the Statute is health. The Statute must be interpreted so as to promote that purpose, rather than endanger it. A statutory construction of the WHO Constitution which sees State use of the nuclear weapon as not being in conflict with State obligations thereunder is a construction that endangers rather than promotes the central purpose of the Statute.

In view of the clear and incontrovertible contradiction between the obligations assumed by States under the Constitution, and the use of nuclear weapons, it is scarcely necessary to examine other elements in the Constitution which are confirmatory of these conclusions. For example, the provisions that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being", or that the organization is established "for the purpose of co-operation . . . to promote and protect the health of all peoples" are just a few of the many provisions scattered throughout the Statute which confirm its dominant and incontrovertible purpose, to which all participating nations have subscribed without reservation.

2. The Principle of Speciality

The Court has attached much importance to the principle of speciality in dealing with the question whether the present request falls within the

[52] See Fitzmaurice, *op. cit.*, pp. 345 ff. See, generally, C. F. Amerasinghe, "Interpretation of Texts in Open International Organizations", *British Year Book of International Law*, 1994, Vol. 65, pp. 189 ff.; H. W. A. Thirlway, "The Law and Procedure of the International Court of Justice, 1960-1989", *British Year Book of International Law*, 1991, Vol. 62, pp. 20 ff.

proper sphere of activities of WHO. The Court is of course anxious to ensure that there should not be an unnecessary confusion or overlapping of functions between the different organs and agencies of the United Nations.

However, the principle of speciality does not mean that there can be no overlap. It is in the nature of a complex organization like the United Nations that there will be, owing to the multiplicity and complexity of its functions, some areas of overlap between the legitimate spheres of authority of its constituent entities. As observed earlier, at the highest levels of the United Nations Organization, this Court itself has an area of overlap with the Security Council. Although the Security Council has basic responsibility for matters pertinent to peace and security, the same matters can also present legal problems properly within the sphere of adjudication, which is the Court's particular responsibility. The inextricable interlinkage between the legal aspects of a matter and its political implications has never been seen as depriving the Court of its right and its duty to act in its proper legal sphere.

As so well observed by the Court in its Opinion in the present case (para. 16), the fact that a matter has political implications does not deprive a legal question of its quality of being a legal question. The same concerns should apply in regard to medical questions. In *Military and Paramilitary Activities in and against Nicaragua*, the Court gave expression to what may be described as the principle of complementarity at the highest levels of the United Nations Organization in the clearest terms when it observed:

> "The [Security] Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events." (*I.C.J. Reports 1984*, p. 435, para. 95.)

Likewise, a medical question may involve also some other ramifications which make it an appropriate matter for another specialized agency. For example, ventilation requirements on aircraft could equally well concern the World Health Organization and the International Civil Aviation Organization; safety regulations relating to the carriage of noxious waste may equally concern WHO and the International Maritime Organization; questions relating to patent rights in pharmaceuticals may equally concern WHO and the World Intellectual Property Organization; questions regarding the disposal of nuclear waste may equally concern WHO and the International Atomic Energy Agency; questions relating to herbicides may equally concern WHO and the Food and Agriculture Organization; unhealthy working conditions in the paint and chemical industry may equally concern WHO and the International Labour Organisation.The family of United Nations organizations was not set up in a fretwork pattern of neatly dovetailing

components, each with a precisely carved outline of its own. These organizations deal with human activities and human interrelationships, and it is of their very nature that they should have overlapping areas of concern. Their broad contours are of course defined, but different aspects of the self-same question may well fall within the ambit of two or more organizations. The particularities of various international organizations were never meant to exclude areas of overlap, so long as these lay within the legitimate sphere of concern of the respective agencies involved. Specialized agencies with specialized interests can home in on specialized implications of some activity, which might otherwise pass unnoticed in other reactions to other aspects of the same problem. Complex problems have ramifications in many specialized directions to which the specialists alone are most competent to draw attention. Such a view contributes to the richness of the United Nations system. To expect otherwise would be contrary to the essence and rationale of a complex organization which straddles all facets of human activity.

VI. WHO's Prior Efforts

1. WHO's Efforts in the Nuclear Field

WHO's representative has outlined three phases of WHO activity in the field of nuclear radiation going back to the 1950s. At that stage, WHO was concerned with the harmful effects of ionizing radiation of all kinds. In 1960 it directed its attention, *inter alia*, to the effects of radioactive fallout from experimental nuclear explosions in the atmosphere. In 1966 it adopted a resolution particularly referring to nuclear weapons. In 1979 it specifically concerned itself with nuclear war which was mentioned in WHA resolution 32.24.

In this phase, the Assembly began to concern itself with the "effects of nuclear war on health and health services". It produced a detailed report on the subject which took two years in preparation. This has been deposited with the Court and has already been cited.

That Report dealt with the explosion of a single bomb, a limited war and a total war. The dead in each of these scenarios ranged from one million to one billion, with a similar number of injured people in addition.

The next phase of WHO activity in this regard commenced in 1992 when a possible request to this Court for an advisory opinion was taken up, though not without opposition from some members, as noted earlier in this opinion.

2. WHO's Past Practice in Matters Relating to Peace

WHO has in the past asserted its "interest in the consolidation of peace as an inalienable prerequisite for preservation and improvement of the health of all nations" (WHA resolution 20.54, referring to resolutions 11.31 and 15.51), and it has called upon all WHO member States to implement United Nations General Assembly resolution 2162 (XXI). In 1969 WHO, in resolution 22.58, referred to "the necessity of achieving a rapid international agreement for the complete prohibition and disposal of all types of chemical and bacteriological (biological) weapons".

WHO has thus in its practice very clearly indicated its concern with the legal status of weapons that could have damaging effects on health and the environment. Health and the purity of the environment, without which health cannot be fostered, are undoubtedly within its purview and, indeed, constitute the very rationale for its existence. The suggestion that WHO should concern itself with the practicalities of attention to matters of health and the environment without any concern with the legal framework within which health and environment are affected has not been the basis on which WHO has conducted its activities thus far. It has viewed a concern for health and environment as including a concern for the legal framework within which damage to health and environment may be caused. WHO would indeed be lacking in due attention to its duties in this regard if it did not, where possible, draw attention to the need for clarification or correction of a legal framework within which such damage could occur.

If the legality of chemical and bacteriological weapons was a proper subject for WHO's concern, having regard to their effect on health and the environment, then *a fortiori* nuclear weapons would be.

If WHO did not concern itself with international legislation in regard to such matters as plague prevention, smallpox inoculation, or noxious waste disposal, this would be universally regarded as a grave omission. It could similarly concern itself with legislation in regard to the level of a toxic or carcinogenic substance that can be carried in a product offered for public consumption, or with the need for legislation regarding the advertising on product labels of the carcinogenic or other effects of the product. A WHO division, the International Agency for Research on Cancer puts out reports from time to time on such matters. Recent outbreaks of the deadly ebola virus have highlighted the imperative need for stringent regulations, be they on a global scale, for containment of the virus. Questions of legality — whether they be in regard to transport, food certification, quarantine and indeed any means of spread of disease — are very much the concern of WHO, whatever the agency that spreads it among the global population. The nuclear weapon may concern matters of high national policy, but it is also a global health hazard of the

first order, thus bringing its legality clearly within WHO's legitimate sphere of interest, no less than any of the other legal questions outlined above.

3. Lack of Objection to Prior WHO Actions

Furthermore, in taking such action as it has in the past, there has been, as far as may be gathered from material placed before the Court, no opposition to WHO action, on the basis of a transgression beyond the bounds of its mandate. There has been no suggestion that WHO should confine itself purely to the medical/epidemiologic level of prevention, and not enter the legal and political areas of prevention of activities damaging to health. If, indeed, it was outside WHO's province to dabble in these questions of the illegality of weapons and, if such action was viewed by the international community as such, one would have expected some exception to be taken to WHO venturing into this area.

It is only necessary to refer to resolution WHA23.53 of 1970, in which WHO emphasizes:

> "the need for the rapid *prohibition* of the development, production and stockpiling of chemical and bacteriological (biological) weapons and the destruction of stocks of such weapons as a necessary measure in the fight for human health" (emphasis added).

An illustration of WHO's actions protecting its areas of concern, even in relation to the legality of the use of force, is its appeal in resolution WHA42.24 of 1989 to all member States: "to abstain from aggression and the use of threats in their international relations, including threats against medical centres and medical production plants".

Another factor bearing upon this aspect is the General Assembly's own understanding of the practice relating to this matter, as reflected in its resolution 49/75 K, welcoming the WHO resolution to seek this opinion from the Court. Without being authoritative in itself on the legal question involved, this is a recognition by the General Assembly itself that the issues raised in the request were not seen as taking WHO outside its proper sphere of competence.

VII. Admissibility and Jurisdiction

1. The Court's Discretion

The precedential implications of this Court's first refusal of a specialized agency's request for an advisory opinion prompt me to set out spe-

cifically some reasons why I consider that the objections to admissibility and jurisdiction should fail.

The refusal of the Permanent Court in *Status of Eastern Carelia* — the only instance in the jurisprudence of this Court's predecessor where an opinion was declined — is distinguishable from the present, for in that case the refusal was based on the principle that an existing dispute to which a State was a party could not be indirectly brought to the Court in the form of an advisory opinion. No such situation exists in relation to the WHO request.

Many objections, mainly based on policy considerations, have been urged by those opposing the grant of this opinion. Several of those policy objections were raised also in regard to the opinion requested by the General Assembly, and the Court has, in its Advisory Opinion on that request, dismissed those objections. I agree with the Court's reasoning in dismissing those objections.

However, it is necessary to make some observations on those objections, in the context of the WHO request, for those objections must likewise be overcome in regard to this request as well.

To a large extent, the objections were common. For example, the United Kingdom observed:

> "The United Kingdom submits that the Court should exercise its discretion *not* to respond to the request from the General Assembly. Similarly, if, contrary to my earlier submission, the Court were to consider that WHO was competent to put its question to the Court, the United Kingdom submits that the Court should none the less decline to answer that question also. The reason is that both questions are too abstract and speculative for a meaningful response. A response would serve no useful purpose and may, in fact, actually do harm." (CR 95/34, p. 28, Sir Nicholas Lyell; emphasis added.)

In my view, these objections constitute no impediment to the grant of the advisory opinion sought by WHO, and in this section I set out my reasons for so concluding.

2. The Court's Duty to Act Judicially

The power of the Court to grant an advisory opinion is discretionary, in terms of the permissive rather than compulsory language (Statute, Art. 65 (1)) which states that 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" (emphasis added).

Yet the principle holds good that that discretion is not an absolute and overriding discretion, but is circumscribed by the overriding principle of the Court's duty, whether in contentious or in advisory jurisdictions, always to act judicially.

As the Permanent Court observed in *Status of Eastern Carelia:*

> "The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court." (*P.C.I.J., Series B, No. 5*, p. 29.)

In *Northern Cameroons* this Court emphasized the correspondence between the principles governing its contentious and advisory jurisdiction when it observed:

> "Both Courts have had occasion to make pronouncements concerning requests for advisory opinions, which are equally applicable to the proper role of the Court in disposing of contested cases; in both situations, the Court is exercising a judicial function." (*I.C.J. Reports 1963*, p. 30.)

So, also, in *Certain Expenses of the United Nations*, the Court stressed that its task in rendering advisory opinions is "an essentially judicial task" (*I.C.J. Reports 1962*, p. 155).

The essential rules guiding the Court's activity as a Court have not been comprehensively spelt out in any decision. An important guideline has however been spelt out in the jurisprudence of the Court — namely, that the Court will render an opinion in cases when it is so requested by a competent body, in the absence of "compelling reasons to the contrary"[53].

Do such compelling reasons exist?

3. The Objections

Among the reasons adduced by those opposing a request for an advisory opinion on nuclear weapons are the following:

(a) the requested opinion would enter into the sphere of politics, State policy and State security;
(b) nuclear weapons are being addressed in other contexts in the United Nations;
(c) an advisory opinion would be devoid of object or purpose;
(d) the opinion would have no effect on the conduct of States;
(e) an advisory opinion on this question could adversely affect important disarmament negotiations;
(f) the question referred is purely abstract and theoretical;

[53] For numerous decisions on this matter, see footnote 1, *supra.*

(g) the question is too general;
(h) an opinion rendered in this matter would be damaging to the prestige of the Court;
(i) the Court would be involved in a law-making exercise, were it to render an opinion;
(j) this case falls outside the categories of cases in which an opinion ought to be given;
(k) the opinion would trespass into areas of State policy.

(a) *The requested opinion would enter the political sphere*

The submissions under this head take a variety of forms.

In the first place, it was argued that the request is only a search for means of support of a political objective and that, despite the "legal camouflage" (France, Written Statement, p. 7), the question is not a legal one. France indeed argued that "the questions are of a purely political nature" and that they "have obviously been put for exclusively political purposes" (CR 95/23, p. 66).

It was further submitted that the ruling sought from this Court goes beyond the will of the States concerned into areas they have carefully refrained from entering. In developing this point, it was argued that the topic of legality or illegality is one which States have deliberately chosen not to broach directly or indirectly. The method deliberately chosen by States on this matter is, we are told, "by elaborating and developing a body of very complex and highly technical international treaty law" (CR 95/24, p. 41, Germany). Despite this, the request seeks, according to some submissions, to draw the Court into a purely political debate in a realm not pertaining to its judicial function. For such reasons, the request is said to be one which is not amenable to judicial enquiry.

These objections have been effectively answered by the Court, so far as concerns the General Assembly request. The same reasoning would apply in regard to WHO's request. Stronger objections have been taken to the WHO request than were taken in regard to the General Assembly request; but the same reasoning on which the Court has overruled the objections to the General Assembly request would apply equally to the WHO request. The fact that the legal question is inextricably interlinked with political considerations, that political motives are alleged to lie behind the request, that political consequences would ensue from a ruling of the Court — these are matters extraneous to the consideration whether a given matter is a legal one. In fact, in the international world there are few issues indeed which do not have political overtones in varying degrees. The weightier the issue, the heavier its likely political overtones. The heavier its political overtones, the more necessary it may be to seek a legal opinion. Whether the question be raised by the General Assembly

or by WHO, if it is a legal issue it is a proper matter for the Court, and there this particular objection ends. As this Court has observed:

> "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" (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, I.C.J. Reports 1980*, p. 87, para. 33).

The delicate nuances of diplomatic activity on the subject of nuclear weapons are matters for the appropriate political authorities to pursue. This Court cannot thereby be deterred from addressing its proper function — giving its considered opinion on the purely legal question referred to it, irrespective of the political implications of the subject.

Sir Gerald Fitzmaurice, in referring to the prior jurisprudence of the Court[54], observed that, "if the question put [to the Court] is in itself a legal question, . . . the fact that it has a political element is irrelevant"[55].

The joint dissenting opinion of Judges Onyeama, Dillard, de Aréchaga and Waldock is also worthy of note in this connection:

> "'Few indeed would be the cases justiciable before the Court if a legal dispute were to be regarded as deprived of its legal character by reason of one or both parties being also influenced by political considerations. Neither in contentious cases nor in requests for advisory opinions has the Permanent Court or this Court ever at any time admitted the idea that an intrinsically legal issue could lose its legal character by reason of political considerations surrounding it.' (*Nuclear Tests (New Zealand* v. *France), I.C.J. Reports 1974*, p. 518.)" (CR 95/27, p. 61.)

The statement referred to earlier that the questions are "of a purely political nature" does not stand the test of these considerations. Moreover, the suggested motivation of the questions is quite obviously not a matter for speculation on the part of the Court.

(b) *Nuclear weapons are being addressed in other contexts in the United Nations*

The argument that matters relating to nuclear weapons are the preserve of other organs of the United Nations has been used for two purposes in the present application:

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[54] *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*, p. 57, *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4, and *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 65.

[55] *The Law and Procedure of the International Court of Justice, op. cit.*, p. 116.

(a) so far as concerns the capacity of WHO to make this application; and
(b) so far as concerns the capacity of this Court to consider the application.

The first has been dealt with in the section of this opinion dealing with the Principle of Speciality (Sec. V.2).

The second has been dealt with by the Court in answering the General Assembly's request. I associate myself with the Court's answer to that objection as contained in its Opinion regarding the General Assembly request.

The mere circumstance that a matter is pending in other forums cannot deprive a legal question of the quality of being legal, nor can it deprive the Court of a jurisdiction expressly vested in it by the Charter. Nor can the circumstance that it relates to international peace and security preserve such a matter within the exclusive jurisdiction of the Security Council and exclude it from the jurisdiction of the Court. It would be quite impossible for the Court to function as the principal judicial organ of the United Nations if this were the case, and the Court is required to abdicate jurisdiction merely because a matter involves peace and security.

The entire jurisprudence of the Court militates against this proposition. Cases such as the *Genocide* case, relating to Bosnia, and the *Lockerbie* case, despite the heaviest implications attaching to them relating to peace and security, were nevertheless entertained and handled by the Court. Likewise, in regard to advisory jurisdiction matters, the fact that the international status of South West Africa was a question which threatened peace and security did not prevent the Court from giving the opinion requested.

Just as the presence of a political element does not take away the jurisdiction of the Court, so also the presence of an element relating to peace and security does not take away from WHO its undoubted competence in relation to medical matters.

(c) *An opinion would be devoid of object or purpose*

Advisory procedure is intended to allow the body invoking it to seek a legal opinion that will be of assistance to it in the performance of its duties. WHO, for reasons best known to it, has decided to seek the Court's opinion. It is an expert body charged with worldwide responsibilities in relation to the health of the global population. As discussed earlier, it has obligations not only to render assistance after a health catastrophe, but to plan its services before the occurrence of the catastrophe. It would otherwise be denying itself the ability to be of maximum usefulness to the global community. It seeks information in regard to the nuclear catastrophe, the worst health catastrophe that can befall humanity. Provided the request is within the scope of its activities, as the earlier part of this opinion seeks to show, the Court must respect the technical judgment of WHO when it decides that it needs that opinion. As Egypt put it, it would be "improper" for the Court to indulge in speculation

about the consequences of an opinion which the requesting organ, in its collective wisdom, has referred to the Court.

(d) *An opinion would have no effect on the conduct of States*

Clarification of the law by an authoritative body can never be described as having no effect upon the community bound by that law. The proposition is incontrovertible that clear law is a guide to societal conduct. Such clarity is in the interests of the community served by that law, whether that community be national or global. It is not for the Court to speculate as to whether that clarification of the law will be complied with or not.

As Egypt so aptly submitted, the first Advisory Opinion given by this Court on the status of South West Africa was a statement of the law which was not acted upon by those who should have acted upon it. The Court, rendering the opinion, was probably aware of the likelihood that this opinion would not be acted upon. Yet there can be little doubt that the clarification of the law resulting from that opinion was a factor which helped, over the long term, in the eventual dismantling of a structure which was anathema to the rule of law.

So, also, in regard to nuclear weapons. Whatever be the opinion of the Court, and whether the advisory opinion clarifying the law be acted upon or not, it must prove a valuable building block in the realization of a world ruled by law which in the ultimate analysis is what all members of the world community desire.

It is axiomatic that every individual in any community living under the rule of law is entitled to know the rules that relate to his or her protection, and the basic rules relating to the rights or duties of every member of that community. Not for nothing were the XII Tables publicly posted in the Roman forum. It would be strange indeed if the rule of law was said to prevail in any society whose individual members did not know whether, in quarrels between neighbours with which they were not concerned, their neighbours had the right to indulge in conduct which could destroy the former's lives and property. It would be stranger still if they did not have this right of information in matters which spell the difference between the survival and the extinction of their entire family. It cannot be any different in the international legal system.

The contention that the opinion would have no effect upon the conduct of States is thus not true to reality. The Court upholds the rule of law, serves a community bound to obey the rule of law and can only function on the supposition that a community subject to the rule of law will rule itself by law.

One is reminded of the statement of this Court in the *Western Sahara* case where the Court was greatly influenced, in deciding to respond positively to the request for an opinion, by the circumstance that its reply

fulfilled "a practical and contemporary purpose" (*I.C.J. Reports 1975*, p. 20). It is difficult to think of a more "practical and contemporary purpose" than the clarification of the law attendant on the use or threat of use of nuclear weapons.

There is another angle as well from which this objection can be viewed.

It is the unanimous sentiment of the international community, as evidenced in the Nuclear Non-Proliferation Treaty (Article VI of which commits every State to general and complete nuclear disarmament) and numerous other international documents, that there should be a striving towards the goal of total nuclear disarmament. The road towards this goal is a difficult one. The Court's opinion one way or another on the legality of nuclear weapons would clarify the steps which the international community needs to take towards removing the obstacles along the path to the attainment of that goal.

It is for the Court to pronounce upon what the law is. Other matters, extraneous to the question of legality, are not factors which should deter the Court from doing its duty.

(e) *An opinion could adversely affect important disarmament negotiations*

It has been said in argument that a reply by the Court will adversely affect the course of current disarmament negotiations.

In terms equally applicable to the WHO request, France observed of the General Assembly's request:

> "a reply from the Court, far from representing a positive contribution to the functioning of the General Assembly, and the United Nations as a whole, could but adversely affect the current negotiations to achieve a more secure world" (France, Written Statement, p. 16).

This is said to be particularly so at a time when, with the end of the Cold War, disarmament talks have achieved a fresh impetus.

It is not for the Court to indulge in speculation as to the likely effect upon future negotiations of a finding by the Court one way or the other. Nor is the Court competent to assess the subtle diplomatic nuances of complex situations in an area outside its proper domain. It is difficult to see how speculation as to whether an advisory opinion could adversely affect important disarmament negotiations can affect the question of the Court's competence to consider a legal question.

What the Court needs to consider is whether it is possessed of the requisite jurisdiction to address the particular matter on which an opinion is sought. If it has this jurisdiction it must proceed.

It is difficult to see how, if the Court has the authority to give this opinion, it should be invited to desist from using this authority merely because some members of the community of nations prefer to proceed upon the basis of uncertainty rather than clarity of the applicable law and thereby to proceed on premises which may eventually turn out to be false, one way or the other. Whether the use of the weapon would or would not be a breach of State responsibility, the sooner the correct position is known, the firmer will be the basis on which the negotiations will proceed.

(f) *The question referred is purely abstract and theoretical*

The question is said to be abstract and theoretical, as it is not related to any specific threat or imminent use of a nuclear weapon. Such opinion as the Court may give is said therefore to be one which has little regard to practicalities. It is submitted that the question is general, vague and imprecise, whereas Article 65 (2) of the Statute requires that the written request should contain "an exact statement of the question upon which an opinion is required". Reference is made in this connection to the Advisory Opinion on *Namibia* where this Court observed that:

> "to enable a court to pronounce on legal questions, it must also be acquainted with, take into account and, if necessary, make findings as to the relevant factual issues" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, p. 27).

France similarly argued that the Court's response should not involve speculation which, in the present case, is claimed to be inevitable in the absence of specific facts to which the legal question is related (France, Written Statement, p. 15).

France argued that it is:

> "impossible to examine the issue of nuclear weapons irrespective of their real purpose, which is to avoid war. Nor can it disregard the fact that, for decades, the policy of deterrence has helped to ward off the risk of a new world conflict." (*Ibid.*, p. 20.)

Finland contended that the legality of the use of nuclear weapons can only be determined in respect of specific circumstances, for there can be a large number of potential situations — for example, first use, counter use, different practices of targeting, different types of nuclear weapons — and the Court cannot hypothesize about all these possibilities (Written Statement of Finland, p. 4). This aspect was rather bluntly put by France

when it stated that, in the absence of factual issues, the Court would have to discover and invent them and that the Court's "function is to state the law, not to write scenarios" (CR 95/23, p. 62).

There are several reasons why this line of argument cannot succeed.

In the first place, the question posed to the Court is a very specific question relating to State responsibility for health, State responsibility in regard to the environment, and State responsibility under the WHO Constitution. The effects of nuclear weapons are amply documented and are well known. There is no element of abstractness about those concrete facts. The question posed by WHO relates those questions of State responsibility to those concrete facts.

Secondly, a distinction must be made between a question which is abstract in the sense of being unrelated to reality, and one which is abstract in the sense of being theoretical, though related to reality. A question based upon invented facts, unrelated to reality or upon problems stemming from those invented facts, is clearly the sort of abstract question which the Court cannot entertain. Self-evidently, the advisory jurisdiction of the Court was not constructed to enable it to stage moot courts, but to clarify legal problems on live issues in the real world. Few issues in the real world can be so live and cause such universal concern as the question whether or not the use of nuclear weapons is compatible with basic principles of State responsibility.

Thirdly, a request for an opinion upon a pure point of law which can clearly be of great practical importance to the community of nations cannot be ruled out on the basis of being abstract or hypothetical. The answer to such a question can be an invaluable source of guidance to the international community. The purpose of a clarification of the law is to assist individuals and entities subject to the law in guiding and controlling their social behaviour. Such a ruling, given in anticipation of an actual occurrence, would serve a useful societal purpose, as pointed out earlier. Such a ruling, given subsequent to an actual occurrence or threat, could savour of the ridiculous, especially in the context of such a question as the use of nuclear weapons.

In the fourth place, it seems to me that this objection is unrelated to the basic nature of the Court's advisory function. The advisory function was specifically tailored to deal with questions of law that have a practical connotation. For example, questions could be raised in anticipation, so as to clear doubts which might prevent an organization from deciding on its proper course of legal action in a foreseen eventuality. To attempt to restrict the advisory opinion to a specific situation which has actually

arisen is to confuse the advisory function with the judicial function in contentious cases. The latter looks back upon a factual situation that has already occurred. It necessarily operates *post factum*. The advisory function, on the other hand, may look back to a past event or it may look forward to the future, seeking guidance for the resolution of an expected practical problem. It has the flavour of the work of the Roman jurisconsult whose opinions, by giving guidance for the future, in relation to situations which may not already have occurred, formed one of the principal factors in developing that monumental system of law.

It was after considerable debate that this advisory function was given to the Permanent Court and its successor; and it was one of the means by which this first ever international court was taken out of the narrow mould of contentious jurisdiction which had confined international tribunals in the past. The world community was thereby given the means to seek *guidance*, having regard to the many matters on which the world community would need guidance on the law in order to shape its conduct. The case of nuclear weapons, on the use or non-use of which all civilization depends, is the classic instance of such a matter. It is indeed difficult to see a more appropriate case for the invocation of that advisory jurisdiction.

To conclude the consideration of this ground of objection, reference should be made to the *Conditions of Admission* case where this Court observed:

> "According to Article 96 of the Charter and Article 65 of the Statute, the Court may give an advisory opinion on *any legal question, abstract or otherwise*." (*Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), 1948, I.C.J. Reports 1947-1948*, p. 61; emphasis added.)

(g) *The question is too general*

Some submissions were made (for example, by Australia) that the question is too general. The analogy offered by Australia was the question "What are the rules of customary international law?" Though such a question is manifestly a legal question, it was submitted that this was the sort of question that the Court should not answer.

There can be little doubt that a question as broadly framed as the analogy suggested is far too general for it to be sensibly addressed. The present question is clearly in a totally different category. It does not traverse a considerable segment of the totality of international law as does the comparison offered, but is indeed a limited question, confined to State responsibility in regard to the use or threat of use of a specific type of weapon.

(h) *An opinion rendered in this matter would be damaging to the prestige of the Court*

It is submitted that if the Court should trespass outside its proper judicial function, such a course would be damaging to the Court's prestige. This case was contrasted with cases such as the *Conditions of Admission* case *(supra)* where the Court was invited to undertake what was described as an essentially judicial task, namely, the interpretation of a treaty provision. On the contrary, the question now before the Court is said to require the Court to engage in speculation and to encroach upon the sovereign powers of States. Were the Court to move in this direction, it is argued that it would compromise the Court's judicial role.

It cannot be damaging to the Court to consider a *legal* question properly referred to it. What could be damaging to the Court is a refusal by it to consider such a question on grounds of political implications and like considerations, for then the Court would (to quote the *P.C.I.J.*'s statement in *Status of Eastern Carelia*, as approved by this Court in *Northern Cameroons*) "depart from the essential rules guiding their activity as a Court".

(i) *The Court would be involved in a law-making exercise if it rendered an opinion*

This objection covers well-trodden jurisprudential ground. "Do judges, in deciding cases, make law under cover of merely applying pre-existing law?" It is not proposed to enter into that discussion here, except to observe that the law has always relied for its development on the ability of the judiciary to apply the general principle to the specific instance. Out of the resulting clarification comes further development.

If the law were all-embracing, self-evident and specifically tailored to cover every situation, the judicial function would be reduced to a merely mechanical application of rules. By very definition, international law is not such a system any more than any domestic system is. Its inherent principles infuse it with vitality, enabling it to apply them to new situations as they arise and give them a specificity they lacked before. When the nuclear weapon emerged, a hundred years after modern humanitarian law had begun to evolve, no specific rule banning nuclear weapons as such could have been contained within its repertory of specific rules. For various reasons, which have been dealt with in the relevant literature[56], the emergence of a rule dealing specifically with nuclear weapons has been delayed for half a century. The Court is now being invited to exer-

[56] See Nagendra Singh, *Nuclear Weapons and International Law*, 1959, p. 11; see, also, Richard Falk, Lee Meyrowitz and Jack Sanderson, "Nuclear Weapons and International Law", *Indian Journal of International Law*, 1980, Vol. 20, p. 542.

cise its classic judicial function. It is being asked to pronounce whether general principles already existing in the body of international law are comprehensive enough to cover the specific instance. To suggest that this is to invite the Court to legislate is to lose sight of the essence of the judicial function.

(j) *The case falls outside the categories of cases in which an opinion ought to be given*

The United Kingdom, in its written statement in reply to the General Assembly's request (p. 11, para. 2.27), submits that the present request does not fall within any of the categories of cases in which, as a matter of propriety, an opinion ought to be given. It was also argued (for example by Australia) that the facts and issues of this case raise matters different from any previous request for an advisory opinion. It was pointed out that previous requests have related to such matters as the constitutional powers of a United Nations organ or specialized agency, the construction of a constituent instrument, or the discharge of particular functions by the requesting organ.

The Court's jurisdiction to grant advisory opinions cannot be considered in terms of categories or precedents. The express language of the Statute enables the Court to give an advisory opinion on *any* legal question that is referred to it, and the categories of cases on which an advisory opinion may with propriety be sought are never closed. The qualification or limitation of such a wide enabling power cannot rest on the absence of precedent, but must rest on considerations based on some fundamental matter of principle.

(k) *An opinion would trespass into areas of State policy*

One of the submissions of States opposing the Court's consideration of this question was that the question on which the Court is invited to pronounce involves, *inter alia*, the place of the policy of deterrence in the maintenance of world peace. It was said that such a concept involves direct or indirect assessments of international strategic balances and of particular defence policies of individual States. The Court was urged not to stray into these areas of individual State sovereignty and, more importantly, into an evaluation of military considerations.

An argument adduced in support of this contention was that the requested opinion would render it necessary for the Court to deal with the different types of nuclear weapons — those of limited strike capability, for example, as distinguished from larger weapons, and that the Court would then be pronouncing upon which types of weapon a State

would be entitled to use, whereas such matters fall essentially within the province of each individual State to determine — matters of strategy and defence policy being undeniably within the purview of each State. It was argued also that if the Court pronounces on the illegality of one category of weapon, the nuclear, it would then equally have jurisdiction to pronounce upon other weapons of a more traditional nature, thus bringing it again within areas of authority appertaining to the individual State.

Reliance was placed in this context upon the Court's statement, already cited in another connection, that:

> "in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1986*, p. 135; CR 95/23, pp. 71 and 79, France).

Such contentions are unsustainable for a variety of reasons:

— the Court's dictum in the *Nicaragua* case, as already observed, does not deal with the *use* of weapons, which is the matter on which the Court's opinion is sought in this case;

— it has never been argued that the rules relating to the laws of war or international humanitarian law, which in fact regulate the conduct of States, constitute an intrusion upon State sovereignty, or an interference in a State's military decisions. What is sought from the Court is no more than an opinion on the legal question whether a particular weapon, by reason of its nature and known consequences, violates certain well-established principles of international law;

— if, in fact, a particular type of weapon — for example, chemical or bacteriological — is contrary to international law, its prohibition may indeed affect questions of strategy and strategic balance in the sense that a State without those weapons would be less powerful than a State with those weapons. One has yet to hear it argued that, for this reason, such prohibitions trespass upon a State's sovereign rights regarding the level of strategic balance it wishes to maintain. It can be no different with nuclear weapons. If international law decrees a particular weapon illegal, that can constitute no interference with questions of State strategy;

— the Court's opinion is sought on the question whether *all* nuclear weapons, irrespective of their size or quality, offend basic principles of international law. For this reason, it is competent to the Court to consider the question put to it without drawing any distinctions in regard to the category of nuclear weapons used;

— the WHO request makes an enquiry regarding State obligations in the special fields of environment and health. In the present state of international law, there can be no question that special State obligations have evolved in these fields. No serious contention has even been set up thus far that when international law recognizes special State obligations in those fields, it is trespassing into areas of State policy. International law has long passed the stage when it was possible to contend that the manner in which a sovereign treated his subjects or the territory under his control was a matter within his absolute authority, unlimited by international norms and standards.

4. The Court's Responsibilities

(a) *As a judicial institution*

As already observed (see Sec. VII.2), advisory opinion jurisdiction vests the Court with a judicial function which must be discharged in a judicial fashion. The Court's consistent jurisprudence reaffirming this principle has already been cited.

This means, *inter alia*, that the Court confines itself to legal issues, decides according to judicial criteria, uses judicial procedures, and exercises its discretion in a judicial manner. By such means is judicial duty discharged, and it is self-evident that political and diplomatic considerations are not part of this process.

The criteria and procedures the Court applies are contained in its Statute and Rules, in the corpus of international law, in its own jurisprudence, and in the well-accepted universal principles relating to the nature of the judicial process. The fact that the judicial function is exercised in an advisory capacity does not result in any deviation regarding the principles governing the judicial process, not the least of which is that jurisdiction can be declined only for a good judicial reason. The Court's own jurisprudence has held that nothing short of "compelling reasons" would constitute such a good judicial reason.

(b) *As a principal organ of the United Nations*

Quite apart from the Court's responsibility as a judicial body, there is also its responsibility within the United Nations family as the principal judicial organ of the United Nations. It is not a Court existing outside the United Nations system, but one functioning from within. It is in a state of harmonious co-existence and co-operation with the other organs of the Organization in their common goal of the attainment of world peace and the high ideals set before them all by the United Nations Charter.

As the Court observed in *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania:*

> "the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused" (*I.C.J. Reports 1950*, p. 71).

A factor to be borne in mind additionally is the precedential effect of a refusal to render an opinion. This is all the more so in regard to such a question as one relating to the future of global peace, to the well-being of the international community, and to the central objectives of the United Nations.

I believe that functions such as this are among the most important with which the Court can be entrusted and that it would not only be eminently proper and fitting, but obligatory upon the Court to render the legal opinion requested. Failure to render so important a decision on grounds such as those advanced is scarcely compatible with the Court's position as "the principal judicial organ" of the United Nations.

5. The Refusal for Want of Jurisdiction

I wish to note finally my disagreement with the Court's reasoning, which couches its refusal to answer WHO's request in terms of lack of jurisdiction. I do not think this is a case of lack of jurisdiction. The dismissal is based not upon any incapacity of the Court, for constitutional reasons, to consider the request, but rather upon the Court's view that WHO, in requesting this opinion, is traversing outside the proper area of its legitimate authority. The Court has held that WHO has no status to make this enquiry. It is for this reason that the application is refused.

The Court's jurisdiction to render an advisory opinion is an ample jurisdiction, conferred on the Court after mature deliberation, to enable it to make a vital contribution to the functioning of international society according to law. The formula of refusal for lack of jurisdiction tends to suggest some deficiency in the scope of that jurisdiction when in fact there is none.

The case is no more a case of want of Court jurisdiction than a case in which a court refuses to entertain an application made by an applicant who, for one reason or another — for example, minority — lacks the capacity to make such an application. Such a request would be refused by the court for the applicant's want of capacity and not for the court's want of jurisdiction. It may be a case of lack of jurisdiction in the sense that a court has no jurisdiction to make any order unless the party seeking it has, in the first place, the right to approach the court. Yet in such an instance the want or shortcoming is not in the powers of the court but in the status of the applicant.

I consider this aspect to be of some importance. It is essential to the

development of the Court's advisory jurisdiction that there should not be an impression among those who may seek to use it of some jurisdictional limitation which prevents the Court from taking cognizance of a matter such as this.

* * *

VIII. Conclusion

For the reasons set out above, it seems clear that

1. WHO has an interest in matters of global health, even though they also concern questions of peace and security.
2. WHO has an interest in environmental matters, even though they also concern questions of peace and security.
3. The fact that other organs in the United Nations system are expressly charged with responsibilities in the area of peace and security does not preclude WHO from concerning itself with matters of peace and security to the extent that they affect global health and the global environment.
4. There are compelling medical and environmental reasons which require WHO to take an interest in the matter on which it seeks an opinion.
5. There are several constitutional provisions rendering the requested opinion relevant to WHO.
6. The impossibility of curative steps forces WHO into the area of prevention.
7. WHO has a legitimate interest in knowing whether the use of nuclear weapons constitutes a violation of State obligations in relation to health.
8. WHO has a legitimate interest in knowing whether the use of nuclear weapons constitutes a violation of State obligations in relation to the environment.
9. WHO has a legitimate interest in knowing whether State obligations under its own Constitution are violated by the use of nuclear weapons.
10. *There are State obligations under international law in regard to health which would be violated by the use of nuclear weapons.*
11. *There are State obligations under international law in regard to the environment which would be violated by the use of nuclear weapons.*
12. *There are State obligations under international law in regard to the WHO Constitution which would be violated by the use of nuclear weapons.*

* * *

With much respect, it seems to me to be a compelling conclusion that, in the light of the medical facts surrounding the use of nuclear weapons, WHO is well within its constitutional functions in concerning itself with the question of the legality of nuclear weapons. It transcends no limitations of power or propriety in seeking this opinion from the Court. It does so in pursuance of its mandated constitutional functions as well as in pursuance of its duties as a protector of global health. The futility of medical treatment after a nuclear catastrophe is a reason that cries out aloud for attention in the fields of planning and prevention, and it would be an irresponsible custodian of global health that stands aloof from that question, waiting for the medical catastrophe to occur in which it is powerless to extend any meaningful medical assistance.

The matter assumes added importance because the increasingly complex ramifications of international life in the future will perhaps oblige the specialized agencies from time to time to seek clarifications from the Court of the law relating to their areas of interest. International law, in many of these new areas, will be in need of development, and this Court, by virtue of its advisory jurisdiction, will be in a special position to assist in that development.

These needs of the future will require all United Nations instrumentalities to work in the spirit of their respective constitutions rather than to confine their vision within compartmentalized categories of exclusive activity. They should in the like spirit be free to approach the Court for assistance in the clarification of legal matters they need to know for the due discharge of their responsibilities within their allotted sphere.

The family of United Nations agencies, in working harmoniously for the common welfare of the global community, will need to work as a team, each helping the other with the special expertise that lies within its province. The Court's advisory jurisdiction is a means *par excellence* by which the Court can discharge its responsibilities in this regard.

It is my opinion that the Court should answer the question WHO has addressed to it and that it should answer WHO's question in the affirmative.

If this dissent sets out my views in some depth and detail, it is because no less is necessary on an issue of this magnitude. An important feature of the tradition of judicial responsibility is that the judges "will not hesitate to speak frankly and plainly on the great issues coming before them".

* * *

This opinion may appropriately be closed with an extract from John Hersey's classic narrative, *Hiroshima*[57]. It shows the total inadequacy of medical facilities in a well-organized country *after* a single nuclear attack with a comparatively small weapon:

> "Patients were dying by the hundreds, but there was nobody to carry away the corpses . . . By three o'clock in the morning, after nineteen straight hours of his gruesome work, Dr. Sasaki was incapable of dressing another wound. He and some other survivors of the hospital staff got straw mats and went outdoors . . . and lay down in hiding to catch some sleep. But within an hour wounded people had found them; a complaining circle formed around them: 'Doctors! Help us! How can you sleep?'"

In this case the custodians of health have not been asleep, and it is to the Court that they turn for assistance. They do so on a matter which is within their legitimate sphere of interest. They do so on a matter peculiarly within the expertise of the Court. They do so in pursuance of their constitutional right to seek a legal opinion from this Court. They do so concerning the legality of the most profound and far-reaching man-made threat to health in human history. International law joins with the imperatives of global health in requiring the Court to answer that request.

(Signed) Christopher Gregory WEERAMANTRY.

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[57] John Hersey, *Hiroshima*, first published in *The New Yorker*, August 1946, reissued as a Penguin Modern Classic, 1966, pp. 68-69.