DISSENTING OPINION OF JUDGE KOROMA

The Court, in this Advisory Opinion in which it declines to grant the request of the WHO for an opinion as to whether

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

reached the rather unprecedented finding that the request does not relate to a question "arising within the scope of [the] activities" of the Organization in accordance with Article 96, paragraph 2, of the Charter, that an essential prerequisite for the exercise of its jurisdiction in the case is absent and that it does not, accordingly, have jurisdiction to render the opinion requested. This finding of lack of jurisdiction to respond to a request for an advisory opinion is not only unprecedented for this Court but is also at considerable variance with its *jurisprudence constante.*

In the *Western Sahara* case, the Court emphasized that its function

> "is to give an opinion based on law, once it has come to the conclusion that the questions put to it are relevant and have a practical and contemporary effect and, consequently, are not devoid of object or purpose" (*Advisory Opinion, I.C.J. Reports 1975*, p. 37, para. 73).

In the same Opinion, the Court reaffirmed that only "compelling reasons" should lead it to refuse to give a requested advisory opinion (*ibid.*, p. 21). The question put by the WHO, in my view, relates to an issue which is not only of direct relevance to the Organization but has practical and contemporary effect as well and is not devoid of object or purpose, as will be shown later, nor is there any "compelling reason" why the opinion should not have been rendered.

Confronted with what appears to me to be inconsistent jurisprudence, I find myself not only in disagreement with most of the reasoning of the Opinion of the Court but disagree totally with its findings. For, as the Court itself has stated, "whatever the legal reasoning of a court of justice, its decisions must by definition be just" (*North Sea Continental Shelf, I.C.J. Reports 1969*, p. 48). Since the request by itself is of such fundamental importance to the WHO and its member States and raises serious

issues of fact and law, I feel constrained to set out my position on the matter.

IMPORTANCE OF THE REQUEST BY THE WHO

On the basis of studies carried out by the WHO as well as other materials before the Court, the Court was told that, should a nuclear weapon be used in an armed conflict, the number of dead would vary from 1 million to 1,000 million, to which the same number of people injured is to be added. If a larger number of nuclear weapons were to be used, severe environmental effects, including the disruption of transport, food delivery, fuel, and basic medical supplies, would occur and result in possible famine and mass starvation on a global scale. Civilized and organized community life would come to an end not only in the countries involved in the conflict but even in those not involved; millions would die from the effects of intense and widespread radioactive fallout. Such a catastrophe, it was argued, would be in violation of the health and environmental obligations undertaken by States under international law, particularly international humanitarian law, as well as under the Constitution of the WHO. Whether or not such obligations exist for States and whether they would be violated in the course of war or other armed conflict involving the use of nuclear weapons is, in my view, an eminently suitable matter for the Court to determine in accordance with its Statute.

EFFECTS OF THE USE OF NUCLEAR WEAPONS IN AN ARMED CONFLICT

According to detailed studies carried out by the WHO on the *Effects of Nuclear War on Health and Health Services* and presented to the Court by the WHO, in a conflict involving the use of a single nuclear weapon, such a weapon could have a destructive power of a million times that of the largest conventional weapon.

A detonated nuclear weapon would produce three major sources of death and injury: the heat wave blast and instantaneous radiation. The enormous thermal energy produced will be the main cause of casualties. Immediate charring of the exposed parts of the body in the direct line of the thermal rays will be caused either by the direct thermal pulse or thermal wave. 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.

Blast will cause shock waves, causing buildings to collapse, debris to fly with individuals hurled into the air as immovable objects causing head injuries, fractures, crush injuries and abdominal and thoracic injuries. A 1-megaton air burst could kill everyone within a radius of 7 km from the hypocentre.

Radiation resulting from the immediate burst of gamma and neutron radiations or from the fallout of radioactive particles will produce gastrointestinal effects, including anorexia, nausea, vomiting, diarrhoea, intestinal cramps and dehydration. Neuromuscular effects producing fatigue, fever, headache, hypertension and hypertensive shock would occur. Inhalation of radioactive dust would produce long-term effects such as fibrosis and cancer, coughing, shortness of breath and feelings of drowning, leading to death by hypoxia, pneumonia and sepsis. Ingestion of radionuclides will induce thyroid cancer. An immediate source of destruction would be the electromagnetic pulse which would lead to the impairment of electronic devices, including those needed for health services. Initially, the release of radioactive substances and human exposure to them would play a secondary role in terms of the health effects produced.

The report further notes that the destruction and impairment of health services would greatly impede efforts to treat the victims; among those killed and injured would be about 80 per cent of physicians, nurses and other health workers. Hospitals and health facilities would be destroyed or greatly damaged, while power supplies, which are important for the operation of hospitals, would be interrupted and would severely interfere with the treatment and care that could be provided.

In the face of such catastrophe, the WHO has reached the conclusion that to cure the victims of a nuclear attack would hardly be feasible, hence preventing the consequences described is a more viable and realistic alternative.

Intermediate and Long-term Effects of the Use of Nuclear Weapons

The intermediate and long-term effects, the report continues, would range from after-effects of the injuries sustained from the explosion to long-term effects of radiation exposure and health problems caused by the disruption and destruction of health services. Those who survived the acute effects of a nuclear explosion would still be confronted by protracted non-healing wounds, suppurating extensive burns, skin infestations, gastrointestinal infections and psychic trauma.

Suppression of the body's immune system is recognized as a consequence of radiation over-exposure. Ionizing radiation would reduce the helper T-lymphocytes and would increase the suppressor T-lymphocytes, thus increasing the victim's vulnerability to infection and cancers. Other effects of the explosion, such as burns, trauma and psychic depression would also influence the immune response.

The drastic fall in available health services on account of the small number of remaining health personnel, health centres, supplies of functioning ambulances and the immense logistical difficulties would render care totally inadequate.

Long-term effects, such as cancer induction and genetic damage would result from instantaneous radiation during the explosion and long-term radiation contamination of the environment. The survivors of the nuclear explosion and the population of contaminated areas would be at risk from such effects. The risk from instantaneous radiation would vary depending on the dose received, whole-body irradiation or estimated lifetime risk of mortality, and all forms of cancer.

Genetic defects among offspring of the survivors is said to be one of the risks, which would not be limited to the immediate offspring of the exposed, but would extend over many generations. Exposure to plutonium particles could produce chromosomal instability which could be transmitted to the progeny, thus causing cancer in future generations.

Other long-term effects are said to include behavioural and psychological disturbances; after an initial tendency to profound apathy and disorientation, feelings of guilt would appear. Survivors would have a continuing fear of cancer and late effects of radiation and an expectation of abnormalities in their offspring.

Health-Related Environmental Effects of the Use of Nuclear Weapons

Effects of Actual Use

Furthermore and according to the material, within the extensive destruction of the built environment, a nuclear explosion would destroy public health and sanitary facilities, 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 almost completely disappear.

Great numbers of putrefying human bodies and animal carcasses as well as untreated waste and sewage would provide an easy breeding ground for flies and other insects. Diseases like salmonellosis (food

poisoning), shigellosis (dysentery), infectious hepatitis, amoebic dysentery, malaria, typhus, streptococcal and staphylococcal infections (pus-producing), respiratory infections and tuberculosis would occur in epidemic form over vast areas.

In addition to the acquired health risk for survivors from high-dose external radiation, the report points out that longer-lived radioisotopes would lead to a risk for the population over a large area and over long periods. An impaired immune system would contribute later to an increased incidence of cancer.

With regard to environmental effects, the report states that if a number of powerful nuclear weapons were used at the same time, global environmental disturbance and climatic changes would take place. As regards trees, evergreens would be especially vulnerable to radiation, coniferous forests would be liable to suffer most, whereas weeds which are more resistant would proliferate. Radiation, the report continued, would be harmful to crops and the food chain; livestock would be harmed and milk and meat products contaminated. Plant pests which are particularly resistant would abound. The marine ecosystem would become contaminated and suffer similarly. For all practical intents, the report points out, there would be a severe shortage of edible and sustaining substances, at a time when the victims' needs were greatest.

Thus, in a conflict involving the use of nuclear weapons, climatic and environmental changes would occur with extensive health implications.

The Socio-Economic Effects of the Use of Nuclear Weapons

While noting the socio-economic impact of the use of nuclear weapons, the report finds that this would be devastating. After a nuclear war, besides the extensive breakdown of health facilities, attendant social structures, the economic system, communication lines and the very fabric of society would be severely disrupted.

Evacuation of large numbers of people to uncontaminated areas in the same country or a mass exodus to neighbouring countries would imply not only exacerbated health problems but also a series of social and economic difficulties for both the abandoned area and the receiving regions. Shortages of food, the possibility of inter-communal strife, disarray due to lack of work, societal disorganization, poverty, dependence and apathy, or revolts, would all converge to create complicated social and economic problems that would in all likelihood be of some duration.

Environmental degradation would create poverty and shortages of food which, in turn, would exacerbate social friction, conflict and disorganization of authority, which might lead to violence and societal disintegration.

Adults, the report observes, tend to fear genetic defects and cancer, as has been noted among the survivors of Hiroshima and Nagasaki and the affected population of Chernobyl.

Thus, a society that suffered a major nuclear devastation would be traumatized and, most likely, profoundly changed.

According to the Mayor of Hiroshima who made a testimony to the Court, the atomic bomb which was detonated in Hiroshima produced an enormous destructive power and reduced innocent civilian populations to ashes. Women, the elderly and the newborn were said to have bathed in deadly radiation. The dropping of the bomb unleashed a mushroom cloud and human skin was burned raw while other victims died in desperate agony, he stated. He further told the Court that when the bomb exploded, enormous pillars of flame leaped up towards the sky and a majority of the buildings crumbled with many people dead or injured.

Later in his testimony he described the unique characteristic of the atomic bombing as one whose enormous destruction was instantaneous and universal. Old, young, male, female, soldiers, civilians were all killed *indiscriminately*. The entire city of Hiroshima, he said, had been exposed to thermal rays, shock-wave blast and radiation. The bomb purportedly generated heat that reached several million degrees centigrade. The fireball was about 280 metres in diameter, the thermal rays emanating from it were thought to have instantly charred any human being who was outdoors near the hypocentre. The witness further disclosed that according to documented cases, clothing had burst into flames at a distance of 2 kilometres from the hypocentre of the bomb; many fires had been ignited simultaneously throughout the city; the entire city had been carbonized and reduced to ashes. Yet another phenomenon was a shock-wave which inflicted even greater damage when it ricocheted off the ground and buildings. The blast wind which resulted had, he said, lifted and carried people through the air. All wooden buildings within a radius of 2 kilometres collapsed; many well beyond that distance were damaged.

The blast and thermal rays combined to burn to ashes or cause the collapse of approximately 70 per cent of the 76,327 dwellings in Hiroshima at the time. The remainder were partially destroyed, half-bombed or damaged. The entire city was said to have been instantly devastated by the dropping of the bomb.

On the day the bomb was dropped, the witness further disclosed that there were approximately 350,000 people in Hiroshima, but it was later estimated that some 140,000 had died by the end of December 1945. Hos-

pitals were said to be in ruins with medical staff dead or injured and with no medicines or equipment, and an incredible number of victims died, unable to receive sufficient treatment. Survivors developed fever, diarrhoea, haemorrhaging, and extreme fatigue, many died abruptly. Such was said to be the pattern of the acute symptoms of the atomic bomb disease. Other consequences were widespread destruction of cells, loss of blood-producing tissue, and organ damage. The immune systems of survivors were weakened and such symptoms as hair loss were conspicuous. Other experiences recorded were an increase in leukaemia, cataracts, thyroid cancer, breast cancer, lung cancer and other cancers. As a result of the bombing, children exposed to radiation suffered mental and physical retardation. Nothing could be done for these children medically and even unborn babies, the Mayor stated, had been affected. The exposure in Hiroshima to high levels of radiation, he concluded, continues to this day.

The Mayor of Nagasaki, in his testimony, described effects on his city that were similar to those experienced by Hiroshima as a result of the atomic bombing which had taken place during the war. According to the witness,

> "The explosion of the atomic bomb generated an enormous fireball, 200 metres in radius, almost as though a small sun had appeared in the sky. The next instant, a ferocious blast and wave of heat assailed the ground with a thunderous roar. The surface temperature of the fireball was about 7,000° C, and the heat rays that reached the ground were over 3,000° C. The explosion instantly killed or injured people within a two-kilometre radius of the hypocentre, leaving innumerable corpses charred like clumps of charcoal and scattered in the ruins near the hypocentre. In some cases not even a trace of the person's remains could be found. The blast wind of over 300 metres per second slapped down trees and demolished most buildings. Even iron reinforced concrete structures were so badly damaged that they seemed to have been smashed by a giant hammer. The fierce flash of heat meanwhile melted glass and left metal objects contorted like strands of taffy, and the subsequent fires burned the ruins of the city to ashes. Nagasaki became a city of death where not even the sounds of insects could be heard. After a while, countless men, women and children began to gather for a drink of water at the banks of nearby Urakami River, their hair and clothing scorched and their burnt skin hanging off in sheets like rags. Begging for help, they died one after another in the water or in heaps on the banks. Then radiation began to take its toll, killing people like a scourge of death expanding in concentric circles from the hypocentre. Four months after the atomic bombing, 74,000 were dead and 75,000 had suffered injuries, that is, two-thirds of the city population had fallen

victim to this calamity that came upon Nagasaki like a preview of the Apocalypse." (CR 95/27, p. 38.)

The witness went on to state that even people who were lucky enough to survive continue to this day to suffer from the late effects unique to nuclear weapons. Nuclear weapons, he concluded, bring in their wake indiscriminate devastation to civilian populations.

According to the testimony by the delegation of the Marshall Islands which was the site of 67 nuclear weapons tests from 30 June to 18 August 1958, during the period of the United Nations Pacific Islands territories trusteeship, the total yield of those weapons was said to be equivalent to more than 7,000 bombs the size of which destroyed Hiroshima. These nuclear weapon tests were said to have caused extensive radiation, induced illnesses, deaths and birth defects. Further on in the testimony, it was disclosed that human suffering and damage to the environment occurred at great distances, both in time and in geography, from the sites of detonations even when an effort was made to avoid or mitigate harm. The delegation went on to inform the Court that the unique characteristics of nuclear weapons are that they cause unnecessary suffering and include not only widespread, extensive, radioactive contamination with cumulative adverse effects, but also locally intense radiation with severe, immediate and long-term adverse effects, far-reaching blast, heat, and light resulting in acute injuries and chronic ailments. Permanent, as well as temporary, blindness from intense light and reduced immunity from radiation exposures were said to be common and unavoidable consequences of the use of nuclear weapons, but uncommon or totally absent when other destructive devices were employed.

The delegation further disclosed that birth defects and extraordinarily prolonged and painful illnesses caused by the radioactive fallout inevitably and profoundly affected the civilian population long after the nuclear weapons tests had been carried out. Such suffering had affected generations born long after the testing of such weapons. The Court was told that, apart from the immediate damage at and near ground zero (where the detonation took place), there had been a large-scale contamination of animals and plants and a poisoning of both soil and water. As a consequence thereof, some of the islands were still abandoned and on those islands that had recently been resettled, the presence of caesium in plants from the radioactive fallout rendered them inedible. Women on some of the other atolls in the Marshall Islands who had been assured that their

atolls were not affected by radiation, were said to have given birth to "monster babies". A young girl on one of these atolls was said to have no knees, three toes on each foot and a missing arm; her mother had not been born by 1954 when the tests started but had been raised on a contaminated atoll.

In the light of the foregoing, to hold as the Court has done, that these matters do not lie within the competence or scope of activities of the WHO borders on the unreal and smacks of cynicism, and the law is not cynical.

THE ROLE OF THE WORLD HEALTH ORGANIZATION AND INTERNATIONAL HEALTH WORK

The World Health Organization is the United Nations specialized agency responsible for protecting and safeguarding the health of all peoples at the international level and its responsibilities include the taking of measures to prevent health problems on a catastrophic scale, such as those which may result from the use of nuclear weapons. In this regard, the Organization deals primarily with preventive and more particularly with administrative preventive medicine.

Against this background, it is understandable, and in conformity with its mandate, that the WHO took the view that prevention is the only way from realizing the catastrophic consequences which the explosion of a nuclear weapon would bring in its trail.

Furthermore, according to its Constitution, the objective of the WHO is "the attainment by all peoples of the highest possible level of health", defined as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". In pursuance of its objectives, the WHO is endowed with 22 functions, including the following:

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

. . . . . .

(c) to assist Governments, upon request, in strengthening health services;

(d) to furnish appropriate technical assistance and, in emergencies, necessary aid upon the request or acceptance of Governments;

. . . . . .

(k) to propose conventions, agreements and regulations, and make recommendations with respect to international health matters

and to perform such duties as may be assigned thereby to the Organization and are consistent with its objective;

. . . . . .

(m) to foster activities in the field of mental health, especially those affecting the harmony of human relations;

. . . . . .

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

(q) to provide information, counsel and assistance in the field of health;

(r) to assist in developing an informed public opinion among all peoples on matters of health;

. . . . . .

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

Given the very serious health and medical problems which would ensue as a result of the use of nuclear weapons, death and injury to civilians and medical personnel alike, destruction of hospital and medical supplies, it follows that it would be within the WHO's mandate to take measures to address and alleviate such a situation. For instance, and in line with its mandate, the WHO would be required to provide medical assistance and emergency relief to the victims of such assistance, help in the restoration of medical services and attempt to organize and co-ordinate medical assistance in terms of the provision of necessary drugs and medical personnel both at the national and international level.

According to studies carried out, following the First World War, 20 million people — a higher figure than those killed in the course of the war itself — were said to have died as a result of an outbreak of an influenza epidemic with which the international community was not prepared to deal, and should such an eventuality occur in the wake of a nuclear war, the WHO would be expected and required to address a similar outbreak, in accordance with its Constitution.

Furthermore, according to the material before the Court, the WHO has been concerned with the effects of nuclear weapons on health for many years. In 1984 and 1987 it presented detailed reports on the effects of nuclear war on health and health services, recognizing that it had been established that no health service in the world could assure the conditions in which people could be healthy or achieve physical, social and mental well-being, or could alleviate in any significant way a situation resulting from the use of even one single nuclear weapon, and that primary preven-

tion is the only appropriate means to deal with the health and environmental effects of the use of nuclear weapons.

Faced with the possible magnitude of the health and environmental consequences resulting from the use of nuclear weapons and realizing that the health hazards associated with the use of such weapons could only be obviated by means of prevention, the WHO requested the Court to give an advisory opinion as to whether, in view of the health and environmental consequences, the use of nuclear weapons by a State in war or other armed conflict would be a breach of its obligations under international law, including the WHO Constitution.

The WHO's request was based on Article 96, paragraph 2, of the Charter of the United Nations, Article 76 of the Constitution of the World Health Organization, and Article X of the Agreement between the United Nations and the World Health Organization. Article 96, paragraph 2, of the Charter provides that:

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

According to Article 76 of the Constitution of the WHO,

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

Article X, paragraph 2, of the Agreement of 10 July 1948 between the United Nations and WHO states as follows:

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

HEALTH AND ENVIRONMENTAL OBLIGATIONS OF STATES

The question posed by the WHO presupposes that States had undertaken certain legal obligations in relation to health and the environment which would be violated by the use of nuclear weapons in war or other armed conflict. These obligations are said to be found mainly in interna-

tional humanitarian law as reflected in specific conventions and in customary international law applicable in war or armed conflict.

Foremost among these is said to be the obligation according to which the right of a State to injure a belligerent is not unlimited and means of warfare which caused unnecessary suffering are prohibited. This obligation is said to be reflected in the 1868 Declaration of St. Petersburg, which represents the beginning of the application of humanitarian principles to the necessities of war and forbids the use of projectiles weighing less than 400 g that are explosive or charged with inflammable substances. The obligation also found expression in the Declaration of Brussels of 1874, according to which the laws of war do not recognize in belligerents an unlimited power to adopt whatever means to injure the enemy. Based on this principle, States were, *inter alia*, prohibited from:

1. The employment of poison or poisoned weapons.
2. The employment of arms, projectiles or material calculated to cause unnecessary suffering, as well as the use of projectiles prohibited by the St. Petersburg Declaration.

The principle is also codified in the Hague Convention IV of 1907, Article 22 of which provides that the right of belligerents to adopt means of injuring the enemy is not unlimited. According to Article 23, paragraph *(a)*, the employment of poison and poisoned weapons, and the employment of arms, projectiles or materials calculated to cause unnecessary suffering is prohibited. Article 25 prohibits "the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended". Also said to be relevant in this regard are both the 1925 Geneva Protocol which reaffirms the prohibition of the use of poison gases and of analogous materials and bacteriological methods of warfare and the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction. The principle, it is said, was reaffirmed and codified in Article 35, paragraph 1, of Additional Protocol I of 1977.

It is argued that the explosive and blast effects of nuclear weapons and their other instant and long-term effects including genetic consequences place them in the category of weapons of mass destruction that cause superfluous and excessive injury and suffering over a long period of time and space. The use of such weapons, it is submitted, would violate the aforementioned principle and accordingly the obligations undertaken both under customary international law and the relevant international conventions and instruments.

One other obligation undertaken by States which, it was contended, would be violated by the use of nuclear weapons in an armed conflict relates to the principle of discrimination between combatants and non-combatants and between military and non-military objectives which also has its basis in customary international law. The principle is said to be

reflected in Article 27 of the Hague Regulations, and Articles 22 and 24 of the Draft Hague Rules on Air Warfare of 1923, is largely accepted as customary law, and is now codified in Articles 51 and 52 of Additional Protocol I to the 1949 Geneva Conventions. These instruments are said to prohibit indiscriminate attacks. It was argued that, given the known characteristics of nuclear weapons, the detonation of such a weapon in an armed conflict would fail to differentiate between combatants and non-combatants and, as such weapons release radioactivity which is detrimental to human beings and destructive to the environment, their use would violate the obligation to discriminate during armed conflict between combatants and non-combatants and between military and non-military objectives.

Furthermore, under the Geneva Convention of 1949, belligerents are said to be obliged to perform post-battle obligations, which include the duties of collecting the wounded and the dead, of individual burial, of evacuation of prisoners, of the ban on exposing prisoners to unnecessary danger, together with the rules on the protection of persons and property, wounded and sick members of the armed forces, hospital ships and medical transporters. It has been suggested that such duties could not be fulfilled should nuclear weapons be used in an armed conflict, because of their radioactive and other effects.

According to Article 147 of the Fourth Geneva Convention of 1949, the commission of acts against protected persons, serious injury to body or health, and extensive destruction of property not justified by military necessity are qualified as grave breaches of the Convention, while, according to Article 85 of Additional Protocol I "making the civilian population or individual civilians the object of attack" (para. 3*(a)*), and

> "launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects" (para. 3*(b)*),

are considered to be "grave breaches" of the Protocol and of the Convention and would constitute "war crimes".

It was accordingly argued that given the characteristics of nuclear weapons when used, their radioactive, heat and blast effects, the obligation to distinguish between protected persons and property from belligerent military objectives could not be observed. Consequently, the use of such weapons would result in the violation of obligations undertaken both under the Geneva Conventions and the Additional Protocol I.

MARTENS CLAUSE

Also said to be violated is the Martens Clause which dates back to the Hague Conventions of 1899 and 1907, considered applicable to every armed conflict and most recently codified in Additional Protocol I to the Geneva Conventions of 1949 relating to the protection of victims of international armed conflict and which stipulates that:

> "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of principles of international law derived from established custom, from principles of humanity and from the dictates of public conscience."

It has been submitted that the fact that civilians and combatants alike would not be spared the cruel effects of a war with nuclear weapons would constitute a violation of the obligations enshrined in this provision.

ENVIRONMENTAL OBLIGATIONS

The environmental obligations assumed by States, it is also argued, would be violated by the use of nuclear weapons. Such obligations are said to be found in various international legal instruments, among which is the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, Article 55 of which states that:

> "The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct."

This principle is said to be further reflected in the 1949 Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, Article 53 of which provides as follows:

> "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."

The 1977 Additional Protocol I to the 1949 Geneva Conventions was also invoked as having imposed obligations on environmental protection against military activities. The provisions of the Protocol in this regard

were said to represent the development of the relevant principles embodied in the 1899 and 1907 Hague Conventions. Article 35 of Protocol I — Basic Rules — stipulates that

> "1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
>
> . . . . . .
>
> 3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment."

Article 53 declares that

> "Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:
>
> . . . . . .
>
> *(c)* to make such objects the object of reprisals."

According to Article 54,

> "1. Starvation of civilians as a method of warfare is prohibited.
>
> 2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.
>
> . . . . . .
>
> 4. These objects shall not be made the object of reprisals."

Article 55 obliges States to observe the following during military conflict in relation to the natural environment

> "1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
>
> 2. Attacks against the natural environment by way of reprisals are prohibited."

The general prohibition of Article 55 of the Protocol is said to be made more specific in Article 56, which provides that "dams, dykes and nuclear electrical generating stations" shall not be made the object of attack

"even where these objects are military objectives". Article 56, paragraph 1, forbids attack upon military objectives located at or in the vicinity of these works or installations

> "if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population."

Also considered relevant is the Rio Declaration on Environment and Development, which was adopted during the Rio Conference in 1992 and which stipulates that

> "Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and co-operate in its further development, as necessary." (Principle 24.)

It was submitted that States would be in breach of their legal obligations were nuclear weapons, given their established characteristics, to be used in war or other armed conflict, as such use would violate the obligations undertaken by States in relation to the protection of the natural environment.

The Role of the Court in Exercising Its Advisory Function

The purpose of the Court's advisory jurisdiction is to offer an authoritative legal opinion and to enlighten the requesting body on certain legal aspects of an issue which it has to deal with in discharging its functions, or "to guide the United Nations in respect of its own action" (*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. 24).

The Court's authority to render an advisory opinion resides in Article 65 of its Statute. This has been reaffirmed in several of its advisory opinions, *inter alia*, in the case concerning *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, where it stated that: "The power of the Court to give an advisory opinion is derived from Article 65 of the Statute." (*I.C.J. Reports 1962*, p. 155; see also *Western Sahara, I.C.J. Reports 1975*, p. 21.)

Over the years the Court has taken the view that by exercising its advisory jurisdiction it participates in the activities of the United Nations. In the *Namibia* case the Court emphasized that:

> "by replying to the request it [the Court] would not only 'remain

faithful to the requirements of its judicial character' (*I.C.J. Reports 1960*, p. 153), but also discharge its functions as 'the principal judicial organ of the United Nations' (Art. 92 of the Charter)" (*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).

In the *Interpretation of Peace Treaties* case the Court pointed out that its

> "Opinion is given not to the States, but to the organ which is entitled to request it; 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" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, I.C.J. Reports 1950*, p. 71).

Accordingly, by rendering advisory opinions, the Court lends its assistance in the solution of problems confronting the United Nations while, at the same time, discharging its responsibilities as its principal judicial organ. In this regard, the Court has regarded the rendering of an opinion as a duty while pointing out, at the same time, that there are certain limits to its duty to reply to a request for an opinion. In the case concerning *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, the Court found that it would be entitled to refuse to render an opinion only for "compelling reasons" following its Opinion in *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco* (*I.C.J. Report 1956*, p. 86), and there are no "compelling reasons" when the principal question is one of treaty interpretation. A compelling reason, the Court had held, would be that the request requires the Court to depart from its judicial functions, such as passing on facts insufficiently established (*Status of Eastern Carelia, 1923, P.C.I.J., Series B, No. 5*).

Furthermore and as stated earlier, the Court has also perceived its advisory function as giving an opinion based on law once it has come to the conclusion that the questions put to it are relevant and have a practical and contemporary effect and are consequently not devoid of object and purpose. Hence, the Court has never declined to render an advisory opinion on jurisdictional grounds even though it has repeatedly observed that:

> "21. It is . . . a precondition of the Court's competence that the advisory opinion be requested by an organ duly authorized to seek it under the Charter, that it be requested on a legal question, and that . . . that question should be one arising within the scope of the activities of the requesting organ" (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, I.C.J. Reports 1982*, pp. 333-334).

THE ROLE OF THE COURT IN THE PRESENT REQUEST

In the case under consideration, the Court, after considering the request, found that the WHO had been duly authorized to request the opinion it seeks; that the WHO was entitled to ask the question and that the question constitutes a legal question within the meaning of the Statute and the United Nations Charter. The Court then went on to state that it

> "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" (para. 16).

"To do this", the Court stated, it

> "must identify the obligation 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." *(Ibid.)*

Having found that the WHO was entitled to ask the question posed and that it is legal, the Court then went on to determine whether the advisory opinion requested related to a question "arising within the scope of [the] activities" of the Organization, in accordance with Article 96, paragraph 2, of the Charter. In order to delineate the field of activity or area of competence of the WHO, the Court referred to the Constitution of the Organization, concluding that none of the functions attributed to it in Article 2 of its Constitution expressly referred to the *legality of any activity* hazardous to health, and that none of its functions is dependent upon the *legality of the situations* upon which it must act.

To reach such a conclusion, the Court "interpreted" the question posed as relating not to the obligations which might arise in view of the health and environmental effects of the use of nuclear weapons, but as to the *"legality of the use of such weapons"*. It is this interpretation which led the Court to hold that whatever the responsibility of the WHO to deal with such effects, it is not dependent on the *legality of the acts* which caused them. This interpretation also enabled the Court to reach the conclusion that Article 2 of the WHO Constitution cannot be understood as conferring upon the Organization a competence to address the *legality of the use of nuclear weapons*, and hence the competence to ask the Court about that legality. The interpretation also enabled the Court to hold that none of the *functions* of the agency has a sufficient connection with the question before it for that question to be capable of being considered as arising "within the scope of the activities" of the Organization. The Court's Opinion then went on to state that:

> "in particular, the *legality or illegality of the use of nuclear weapons*

> in no way determines the specific measures, regarding health or otherwise . . ., which could be necessary in order to seek to prevent or cure some of their effects" (Advisory Opinion, para. 22; emphasis added).

It continued, "whether nuclear weapons are used *legally or illegally*, their effects on health would be the same" (*ibid.*; emphasis added), and elaborated further as follows:

> "while it is probable that the use of nuclear weapons might seriously prejudice the WHO's *material capability* to deliver all the necessary services in such an eventuality, for example, by making the affected areas inaccessible, this does not raise an issue falling within the scope of the Organization's activities within the meaning of Article 96, paragraph 2, of the Charter" (*ibid.*; emphasis added).

In the view of the Court, the WHO could only be competent to take those actions of "primary prevention" which fall within the functions of the Organization as defined in Article 2 of its Constitution, therefore the reference to "primary prevention" in the preamble to resolution WHA46.40 and the link which is there established with the question of the *legality of the use of nuclear weapons* are not in themselves capable of casting doubt upon the conclusions reached by the Court that the question before it does not lie within the scope of the activities of the WHO.

In considering the principle of "speciality" which the Court recognized as governing international organizations, the Court went on to state that to ascribe to the WHO the competence to deal with the *legality of the use of nuclear weapons* — even in view of their health and environmental effects — would be tantamount to disregarding the principle of speciality, as such competence could not be deemed a necessary implication of the Constitution of the Organization in the light of the purposes assigned to it by its member States; that WHO's responsibilities in the sphere of "public health" cannot encroach on the responsibilities of the United Nations without giving rise to overlaps which are detrimental to the viability and effectiveness of the system. It further pointed out that questions concerning the use of force, the regulations of armaments and disarmament are within the competence of the United Nations and lie outside the domain of the specialized agencies.

It was on the basis of that reasoning that the Court came to the conclusion that the question posed in the request does not arise "'within the scope of [the] activities' of that Organization as defined by its Constitution", and accordingly that an essential condition of its jurisdiction in the present case is absent and that it does not therefore have jurisdiction to give the opinion requested. This conclusion was arrived at not only as a result of a fundamental misconstruction of the question posed by the WHO and of its Constitution, but also as a result of an unduly formal-

istic and narrow view taken of the competence and scope of activities of the Organization, a view which is unsustainable on the basis of both the material before the Court and the applicable law.

To focus, first of all, on the Court's finding that it lacks jurisdiction to render an opinion — while the Court has always emphasized that a precondition for it to exercise its jurisdiction to deal with a request for advisory opinion is that the request must be by an organ duly authorized to seek it under the Charter, and that the "question should be one arising within the scope of the activities of the requesting organ" (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, I.C.J. Reports 1982*, pp. 333-334; see also *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, I.C.J. Reports 1973*, pp. 171-172), yet the Court has repeatedly stated that

> "only 'compelling reasons' should lead it to refuse to give a requested advisory opinion (*Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, I.C.J. Reports 1956*, p. 86)" (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), I.C.J. Reports 1962*, p. 155),

and to date this Court has never declined to answer a request for an advisory opinion on the grounds of lack of jurisdiction, but has answered every question put to it even if to do so it had had to interpret or reformulate the question posed.

For instance, in the case of the *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal* referred to above, even though the Court noted a number of procedural irregularities in the way the request for an advisory opinion had been formulated and observed that the form in which the question had been formulated did not correspond to the intentions of the requesting organ, yet the Court did not decline to give an opinion in the matter. In its Opinion, the Court stated as follows:

> "45. Despite the irregularities described . . ., the Court nevertheless feels called upon . . . to accept the task of assisting the United Nations Organization. It is in accordance with the Court's jurisprudence that even though its power to give advisory opinions is discretionary under Article 65 of its Statute, only 'compelling reasons' would justify the refusal of such a request (cf. *I.C.J. Reports 1973*, p. 183; *I.C.J. Reports 1956*, p. 86). Of course the irregularities which feature throughout the proceedings in the present case could well be regarded as constituting 'compelling reasons' for a refusal by the Court to entertain the request. The stability and efficiency of the international organizations, of which the United Nations is the supreme example, are however of such paramount importance to world order, that the Court should not fail to assist a *subsidiary*

body of the United Nations General Assembly in putting its operation upon a firm and secure foundation. While it would have been a compelling reason, making it inappropriate for the Court to entertain a request, that its judicial role would be endangered or discredited, that is not so in the present case, and the Court thus does not find that considerations of judicial restraint should prevent it from rendering the advisory opinion requested. . . . While there can be no question . . . of any restriction on the Court's discretion, the Court will not refuse 'its participation in the activities of the Organization' (*I.C.J. Reports 1950*, p. 71), so that the important legal principles involved may be disposed of, whilst at the same time the Court must point out the various irregularities. It is not by appearing to shy away from the latter that the Court can discharge its true judicial functions.

. . . . . .

46. . . . Thus, in the first place, the question put to the Court is, on the face of it, at once infelicitously expressed and vague; and, in the second place, the records and report of the Committee cast doubt on whether the question as framed really corresponds to the intentions of the Committee in seising the Court.

. . . . . .

47. The Court has therefore to consider whether it should confine itself to answering the question put; or, having examined the question, decline to give an opinion in response to the request; or, in accordance with its established jurisprudence, seek to bring out what it conceives to be the real meaning of the Committee's request, and thereafter proceed to attempt to answer rationally and effectively 'the legal questions really in issue' (*I.C.J. Reports 1980*, p. 89, para. 35). . . . The dilemma has been emphasized in the written statement of France: while not going so far as to contend that the Court should not give effect to the request, the French Government observed that the question put to the Court 'does not indicate on what grounds the Committee on Applications for Review has decided that "there is a substantial basis" for the application presented by the United States of America' and that the Court may therefore 'encounter particular difficulties in exercising its jurisdiction'.

. . . . . .

48. The Court does not however conclude that in the present case it is obliged to decline on these grounds to give an opinion. The Court pointed out in its advisory opinion concerning the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* that

> 'if [the Court] is to remain faithful to the requirements of its judicial character in the exercise of its advisory jurisdiction, it must ascertain what are the legal questions really in issue in questions formulated in a request' (*I.C.J. Reports 1980*, p. 88, para. 35)."

(*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, I.C.J. Reports 1982*, pp. 347-349; emphasis added.)

While apologizing for this extended quotation, I consider it necessary to demonstrate how the Court has in the past exercised its advisory function. Thus in the case under reference, although the Court found the question posed to be irregular and considered that such irregularities could well be regarded as constituting "compelling reasons" for refusing to render an opinion or that the Court could have encountered particular difficulties in exercising its jurisdiction, it nevertheless took the view that it should not fail to assist a subsidiary body of the United Nations in putting its operation upon a secure and firm foundation on account of any reluctance to deal with the important legal principles involved in the case.

The Court, faithful to the requirements of its judicial character in the exercise of its advisory jurisdiction, ascertained what were the legal questions really in issue in the question formulated in the request and rendered the Opinion. In so doing, it did not consider that it was discrediting, let alone endangering, its judicial role.

The Court has accordingly always taken a liberal view of its advisory jurisdiction and, while not abandoning its judicial character, it has not taken as unduly restrictive and narrow a view of that jurisdiction as the Court appears to have done in the present case, even though the question put by the WHO is not only of cardinal importance to the WHO in terms of its constitutional functions, but is also of significance for the attainment of one of its objectives, namely, that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being".

Given the importance of the question formulated by the WHO in its request, if the Court had taken into consideration the overall mandate of the Organization — and even if it had found the question afflicted — it would have been consonant with its jurisdiction to apply to the WHO request the same standards as those applied in the case referred to above, so as to dispose of the important legal principles involved. Additionally, reasons of consistency in its jurisprudence should have recommended a similar treatment.

With regard to the principle of "speciality" and how it perceives that principle in relation to the question, the Court had rightly observed that that principle governs international relations. In other words, international organizations are limited to the powers and functions conferred on them by States. While such powers are normally expressed in the constituent instruments of the organization, the Court itself acknowledges that because of the necessities of international life, international organizations can exercise implied powers, which without conflicting with their constitution, are a logical incident of it and contribute to ensuring its

effectiveness. However, the Court then goes on to infer that to ascribe to the WHO the competence to address the *legality* of the use of nuclear weapons, which as I have already stated distorts the meaning and intention of the question, would be tantamount to disregarding the principle of speciality and would be "encroaching" on the responsibilities of other parts of the United Nations system. As if to reinforce that interpretation, the Court states that

> "questions concerning the use of force, the regulation of armaments and disarmament are within the competence of the United Nations and lie outside that of the specialized agencies" (Advisory Opinion, para. 26).

While it is recognized that questions relating to the use of force, regulation of armaments and disarmament are within the competence of the United Nations and lie outside that of the specialized agencies, it should nevertheless be recalled that the WHO is also part of the United Nations system, and that one of the objectives of the Charter of the United Nations is not only to maintain international peace and security but to "promote solutions of international economic, social, *health*, and related problems". Moreover, although the WHO is the agency primarily responsible for health matters at the international level, the need for international co-operation in that sphere is also mentioned in Articles 13, 55, 57 and 62 of the Charter as well. Article 13 provides that:

> "1. The General Assembly shall initiate studies and make recommendations for the purpose of:
>
> . . . . . .
>
> *(b)* promoting international co-operation in the economic, social, cultural, educational, and *health* fields . . ." (Emphasis added.)

Article 55 provides that:

> "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> . . . . . .
>
> *(b)* solutions of international economic, social, *health*, and related problems." (Emphasis added.)

Article 57 stipulates as follows:

> "1. The various specialized agencies, established by intergovernmental agreement and having *wide international responsibilities*, as defined in their basic instruments, in economic, social, cultural, edu-

cational, *health*, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63.

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

Article 62 provides that:

"1. The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, *health*, and related matters and may make recommendations with respect to any such matters to the General Assembly, to the Members of the United Nations, and to the specialized agencies concerned." (Emphasis added.)

In other words, the General Assembly has jurisdiction over health matters in general, but the WHO is given a specific assignment in relation to such matters under its Constitution.

According to that Constitution, "The enjoyment of the highest attainable standard of health" is not only "one of the fundamental rights of every human being", so also is that "the health of all peoples is fundamental to the attainment of peace and security". In a similar way, the primary purpose of the United Nations is "to maintain international peace and security". It can thus readily be seen that despite the fact that the Security Council and, to a lesser degree, the General Assembly are pre-eminent in the role of maintenance of international peace and security, functional co-operation with the specialized agencies was envisaged for the achievement of that common objective. It does not appear to have been the intention of the Charter that, because of the pre-eminent role of these bodies in the area of peace and security, they should become a legally exclusive domain to the extent of even precluding functional co-operation with other bodies who might be required to carry out their functions — especially in an emergency situation such as one resulting from the consequences of the use of nuclear weapons. Furthermore, among the functions of the WHO, in accordance with Article 2 of its Constitution, are

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

. . . . . .

(d) to furnish appropriate technical assistance and, in emergencies, necessary aid upon the request or acceptance of Governments;

. . . . . .

(f) to establish and maintain such administrative and technical services as may be required, including epidemiological and statistical services;

(g) to stimulate and advance work to eradicate epidemic, endemic and other diseases".

In effect, the WHO is competent to deal with every conceivable element in the field of health, and given its functions as the specialized agency on international health matters, this is why the health consequences of the use of nuclear weapons would naturally fall within the scope of activities of the Organization. In such a situation, the agency would be expected and required to direct and co-ordinate medical and health assistance at the international level, to furnish appropriate technical advice, for instance, on how to mitigate the effects of radiation both immediately and with respect to the intermediate and long term. Reference has already been made to the influenza epidemic which broke out after the First World War and to the fact that. because the international community was caught unprepared, 20 million people — more than the war casualties — died during that epidemic. The WHO is the body Governments would turn to for technical advice in case of such a contingency as a result of the use of nuclear weapons.

The United Nations has taken cognizance of such a contingency in resolution 47/168, in which it expressed deep concern about the suffering of the victims of disasters and emergency situations (such as could arise as a result of the use of nuclear explosions), resulting in the loss in human lives, the flow of refugees, the mass displacement of people and material destruction, and mindful of the need to strengthen and make more effective the collective efforts of the international community, established the Department of Humanitarian Affairs to provide international humanitarian assistance when disasters or catastrophes occur.

In that resolution, the Assembly also expressed its deep concern about the magnitude and ruinous effects of disasters and emergency situations which, *inter alia*, call for *more international co-operation* to mitigate the human suffering of the victims. To expedite the rehabilitation and reconstruction processes, the Assembly underlined the need for an adequate, co-ordinated and prompt response by the international community to disasters and emergency situations. Noting the increasing number and complexity of disasters and humanitarian emergencies, it established the Inter-Agency Standing Committee to ensure better preparation for, as well as rapid and coherent response to, natural disasters and other emergencies, in particular emergencies involving the supply of food, *medicines, shelter* and *health* care. The WHO is one of the agencies invited to take part in the Inter-Agency Standing Committee.

The resolution further requested the Secretary-General to report on ways and means to improve the United Nations capability in the areas of prevention and preparedness in relation to natural disasters and other

emergencies, in particular emergencies involving *food, medicines, shelter* and *health care*, as provided for in General Assembly resolution 46/182.

Also in this connection, the Secretary-General of the United Nations, in his report on humanitarian assistance and disaster relief, observed that a notable feature *in the humanitarian activities* of the United Nations is the increased involvement of the Security Council, which had accorded humanitarian assistance high priority and developed modalities to that effect (A/47/595).

Thus, in the light of the foregoing, while the principle of "speciality" governing international organizations is to be respected for reasons of effectiveness and co-ordination and to prevent duplication, it is wrong in my view to give an unduly restricted and narrow interpretation to that concept in relation to health matters and humanitarian affairs. As has been established, the use of nuclear weapons would precipitate an emergency situation involving tremendous suffering to the victims, loss in human lives, the outflow of refugees, mass displacement of people and destruction to the environment. These matters would involve not only the efforts of the WHO but those of the other functional agencies as well, with a common purpose of protecting human welfare and saving the lives of human beings. Not only can such co-operation not be regarded as an encroachment on the competence of the other organs or agencies of the United Nations system, but the case before the Court relates to the health and environmental effects of the use of nuclear weapons, matters which fall within the domain of the WHO and which would require such co-operation for effective action. However, the WHO is the only specialized agency that is assigned the study of public health. If too narrow an interpretation is given to the scope of activities, then because of its activities, even the Security Council could be regarded as encroaching in the fields of health and humanitarian affairs. It cannot, therefore, be sustained that the request violated the principle of "speciality" which also seemed to have inspired its rejection.

However, the foregoing should not be interpreted as a tacit acknowledgment of the correctness of the Court's opinion that the WHO's question transgressed the "speciality" rule or that the request itself constitutes an encroachment on the competence of other organs of the United Nations, or is *ultra vires* even the Organization's implied powers which the Court has acknowledged to be such as to be exercised by international organizations for reasons of effectiveness, with the implication that WHO could have done so by seising the Court with the request, if it were not acting *ultra vires*. On the contrary, the discourse was intended to demonstrate that in an emergency situation, involving the use of nuclear weapons, the functional agencies of the United Nations would have to undertake a co-operative endeavour; and if too narrow a construction were to be given to the concept of "the scope and activities" of the func-

tional agencies, such as the WHO, it would unnecessarily restrict and ultimately defeat their effectiveness.

I agree with the Court that because of the necessities of international life, it is accepted that international organizations can exercise implied powers, which are not in conflict with their constitution and are required to ensure their effectiveness. However, the implication that the WHO could not have intended to address "the legality of the use of nuclear weapons" even if it had relied on the exercise of such powers could only have been arrived at as a result of the interpretation given to the question by the Court which, as I have said, not only distorts the intention of the question to say the least, but cannot stand scrutiny when judged against the law or the facts. In the first place, as implied powers are those which may reasonably be deduced from the practice and functions of the organization in question, or, as the Court put it in the case concerning *Reparation for Injuries Suffered in the Service of the United Nations*, such powers are limited to those which, though not expressly provided for in the Statute of an organ, "are conferred upon it by necessary implication as being essential to the performance of its duties" (*I.C.J. Reports 1949*, p. 182), the question that arises is whether the WHO, by asking the question posed, could have been regarded as exercising its implied powers, deduced from its practice and functions or essential to the performance of its duties. The response to the question would have to be sought in both the Constitution and the practice of the Organization.

As has already been stressed, the objective of the WHO is "the attainment by all peoples of the highest possible level of health", and in order to achieve that objective it is assigned certain functions which have already been mentioned. Furthermore, the WHO over the years, as has been demonstrated, has been concerned with the health effects of nuclear weapons.

It has also been noted and demonstrated that the use of nuclear weapons in armed conflict would result in a catastrophe which would precipitate an emergency situation in relation to health and the environment. Thus, even if the Organization, in asking the question, were to claim to be exercising implied powers, this, in my view, it would be entitled to do in order to seek legal guidance for the performance of its function or for the attainment of its objectives of promoting the health of all peoples, and in order to ascertain whether States by using nuclear weapons with consequent health and environmental effects would be in breach of their obligations under international law including the WHO Constitution. In other words, the WHO is, in my view, entitled to request the Court to determine whether the effects of a certain activity by a State would be in breach of that State's obligations under international law including the WHO Constitution. The Court acknowledged this position when it stated in the *Reparation* case that "the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice" (*Reparation for Injuries Suffered in the Service of the United Nations, I.C.J.*

Reports 1949, p. 180). Earlier, the Permanent Court, in its Advisory Opinion on the *Nationality Decrees Issued in Tunis and Morocco*, had observed that the question whether a certain matter is or is not solely within the jurisdiction of a State is an entirely relative question and depends upon the "development of international relations" (*P.C.I.J., Series B, No. 4*).

In the *Namibia* case, this Court emphasized that in interpreting an instrument, the Court must take into consideration the changes which have occurred over the years as its interpretation cannot remain unaffected by the subsequent development of the law. The Court further emphasized,

> "Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation" (*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. 31).

The reference to the *Nationality Decrees* case is not intended to suggest that the WHO is a State let alone a super-State, as the Court put it in the *Reparation* case, nor is this the intention with respect to the reference to the *Namibia* case either. The point sought to be made is that both Courts when interpreting relevant documents have taken into consideration developments which had taken place or had done so within the framework of the entire legal system prevailing at the time of the interpretation.

In other words, in determining the competence or scope of activities of the WHO in the context of its Constitution and with reference to the health and environmental effects of the use of nuclear weapons, account must be taken of the Organization's role and practice in situations similar to those involving the use of similar nuclear devices. Evidence of this is the fact that the WHO has been concerned with the study of the health effects of the use of nuclear weapons for many years and in 1984 and 1987 presented detailed reports on the effects of nuclear war on health and health services. More recently the agency has been involved in the aftermath of the Chernobyl incident in which a nuclear power plant exploded in 1986 resulting in many deaths and fears of the threat of radiation. Immediately after that accident the WHO, in collaboration with the Government of the country concerned, took many initiatives which led to the establishment of the International Programme on the Health Effects of the Chernobyl Accident (IPHECA). At least 9 million people are said to have been directly or indirectly affected. Morbidity rates are reported to be 30 per cent higher in one of the affected countries for those who lived in the contaminated region, and more than 50 per cent higher for those in the immediate area of the reactor. Thyroid cancer had increased some 285-fold in one of the other affected countries, with children being mostly the victims, while the general health conditions of

the people in the area immediately affected continue to deteriorate. Ten years after the accident the WHO has continued to monitor the health effects and assist those affected to mitigate the health consequences of the nuclear accident. IPHECA's broad mandate is to support efforts to relieve the health consequences of the accident by assisting health authorities in the affected countries, especially in areas significantly contaminated by radiation.

Even though the Chernobyl accident did not take place in a theatre of war, the analogy resulting from the use of nuclear weapons is appropriate, as the health and environmental effects are similar to those of nuclear weapons, except that in a nuclear war, such effects would be far worse and the consequences far more serious. Nonetheless, the experience gained by the WHO from this accident should prove propitious and useful if the worst should ever happen. There is thus sufficient evidence of practice of what the role of the WHO would be in a conflict involving nuclear weapons to justify its legal interest and to make it clear that, in posing the question, it is legitimately exercising of its implied powers.

Thus far, my effort has been to demonstrate why the reasoning relied upon by the Court to reach its finding is unpersuasive and cannot be sustained. It is even more regrettable that the Court, having found that the WHO is entitled to bring the request and that the question is legal, chose to preclude itself from answering it for want of jurisdiction, when in fact if its jurisprudence had been followed and if adequate account had been taken of the functions and practice of the Organization, the Court would have found its authority to answer the question beyond a shadow of a doubt.

In considering a request for an advisory opinion, and in order to obviate what might appear to be an attempt not to engage a controversial or difficult issue for lack of jurisdiction, the Court has endeavoured to "ascertain what are the legal questions really in issue in questions formulated in a request" (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, I.C.J. Reports 1980*, p. 88); and whenever it has found it to be necessary, the Court has defined or reinterpreted the question posed in order to discover and provide an answer, dealing with what is crucial in the request. Judge Sir Hersch Lauterpacht, in the *Admissibility of Hearings of Petitioners by the Committee on South West Africa* case, stated as follows:

> "the Court enjoys considerable latitude in construing the question put to it or in formulating its answer in such a manner as to make its advisory function effective and useful. . . .
>
> Undoubtedly it is desirable that the request for an Advisory Opin-

> ion should not, through excess of brevity, make it necessary for the Court to go outside the question as formulated. . . . However, the absence of the requisite degree of precision or elaboration in the wording of the request does not absolve the Court of the duty to give an effective and accurate answer in conformity with the true purpose of its advisory function." (*I.C.J. Reports 1956*, pp. 37-38.)

The question put to the Court by the WHO is whether

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

The Court, as we have seen, not only interpreted the question as if it was about "the legality of the use by a State of nuclear weapons in armed conflict" *per se* — an interpretation which proved most unfortunate and provided the basis for the Court to reach its findings — but it also enabled the Court to take a decision to hear, during the same public sittings, oral statements relating to the request for an advisory opinion from the General Assembly of the United Nations as to whether "the threat or use of nuclear weapons in any circumstance [is] permitted under international law", a question which the Court sees as being intended to determine the *legality* or otherwise of the threat or use of nuclear weapons.

Apart from the fact that the two questions are posed by an organ and a specialized agency of the United Nations with primarily different functions, they are not identical, even though they are similar. Moreover, in spite of their having been directed to different issues, the Court nonetheless interpreted those questions in such a way as to have ascribed almost identical meanings to them. It was this interpretation which emasculated the meaning of the WHO's question as if it had asked about the legality of the use of nuclear weapons *per se*, as in the case of the question by the General Assembly, and led the Court to conclude that the request for an advisory opinion by the WHO does not relate to a question arising within the scope of its activities and that an essential condition for its jurisdiction is absent. This interpretation given to the WHO's question, as stated earlier, was not only fundamentally erroneous but proved fatal for the request.

The WHO's question is not about the illegality of the use of nuclear weapons *per se*. The question is not whether Article 2, paragraph 4, of the Charter prohibiting the use of force in international relations would be violated by the threat or use of nuclear weapons *per se* nor is it formulated in relation to Article 11 of the Charter as relating to questions of

maintenance of international peace including the principles governing disarmament and the regulation of armaments or primarily aimed at ascertaining whether a State would be in breach of its obligations under Article 39 of the Charter with respect to threat to the peace, breach of the peace or act of aggression. It was essentially against this background that the Court viewed the question and hence the Opinion is replete with references to the *legality* or *illegality* of such weapons. If only to recall some such references: in delineating the field of activity or area of competence of the WHO, the Court came to the conclusion that none of the functions attributed to the WHO in Article 2 of its Constitution expressly referred to the *legality of any activity* hazardous to health, and that none of the functions of WHO is dependent upon the *legality of the situations* upon which it must act. In interpreting the question the Court stated that it relates not to the effects of the use of nuclear weapons on health and the environment but to the *legality of the use of such weapons* and came to the conclusion that the responsibility of the WHO to deal with such effects does not depend on the *legality of the acts* which caused them. In paragraph 22, the Court stated that "in particular, the *legality* or *illegality* of the use of nuclear weapons in no way determines . . . specific measures, regarding health or otherwise" or that "whether nuclear weapons are used *legally or illegally*, their effects on health would be the same" (emphasis added). Further, in the same paragraph, the Court stated that while the use of nuclear weapons might seriously prejudice WHO's material capability, the question of the *legality or illegality* of the use of these weapons would be irrelevant in that respect. When considering the principle of "speciality" in paragraph 25, the Court stated that to ascribe to WHO the competence to deal with the *legality* of nuclear weapons — even in view of the health and environmental effects — would be tantamount to disregarding the principle of "speciality". It can thus be seen that the Court interpreted the question as meaning that what was at issue was whether it would be legal or illegal to use nuclear weapons *per se*, whereas what really was at issue was whether the obligations of States in relation to health and the environment would be engaged or be violated by the use of nuclear weapons. In other words, even though the origin of the breach of obligation is nuclear weapons, the WHO's question relates to the health and environmental consequences. The Court itself acknowledged this as a possible interpretation of the question when it stated in paragraph 21 of the Opinion that:

> "Interpreted in accordance with their ordinary meaning, in their context and in the light of the object and purpose of the WHO Constitution, as well as of the practice followed by the Organization, the provisions of its Article 2 may be read as authorizing the Organization to deal with the effects on health of the use of nuclear weapons,

> or of any other hazardous activity, and to take preventive measures aimed at protecting the health of populations in the event of such weapons being used or such activities engaged in."

But it chose not to adopt this interpretation and instead chose that which enabled it not to make a determination for want of jurisdiction.

Since, in my considered opinion, the request by the WHO is not about the legality or illegality of nuclear weapons *per se* — the interpretation given to the question by the Court — I shall now endeavour to interpret the question so as to bring out its true intention and thereby establish that it falls within the scope of the activities and functions of the Organization.

In the first place and as mentioned earlier, the Court, when exercising its advisory jurisdiction, has interpreted or reformulated requests for advisory opinions both to establish the object for which the question was posed and to be able to give a real and effective answer to the question. In so doing, the Court has had to take various factors into consideration, that is to say, *inter alia*, the circumstances in which the request was made, the terms of the resolution embodying the request, discussions of the request in the organ in which it was adopted prior to its adoption and the divergences between the different versions of the request. In reformulating or reinterpreting a question, the Court would seem to have been concerned to give such a meaning to the question as would bring out the particular issue in the light of the circumstances which had presented themselves to it within the scope of its judicial function. When doing so, the Court has invariably resorted to a less restrictive interpretation of the question in trying to determine its true intention or the critical issues in dispute or has interpreted it to coincide with the desire of the body making the request (*Free City of Danzig and ILO, P.C.I.J., Series C, No. 18 (II)*, pp. 145-146, 193).

In other words, and as pointed out earlier, it was open to the Court, given the importance of the issues raised in the request, to have reformulated the question in such a way so as to cover the area in which the WHO wanted an authoritative legal opinion. The Court, however, chose not to follow this approach, even though the facts produced were neither disputed nor unascertained.

Although the resolution containing the request is not itself a treaty, however, like the Court in its majority opinion, its interpretation can be guided by the relevant provisions of the 1969 Vienna Convention on the Law of Treaties so as to establish that the question formulated in the resolution falls within the competence or scope of activities of the Organization as defined in its Constitution.

Article 31 of the Convention provides as follows:

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

. . . . . .

3. There shall be taken into account, together with the context:

. . . . . .

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

Article 32 states that

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable."

These Articles thus embody the different approaches to treaty interpretation, that is, the textual and teleological approaches and the intention of the parties. Article 31 stipulates that in interpreting a treaty it must be given its ordinary meaning, and the context to be used in addition to the treaty includes its preamble. Subsequent practice may also be invoked in the application of the treaty, which clearly establishes the understanding of all the parties regarding its interpretation or its meaning.

In its jurisprudence, the Court has made considerable use of the subsequent practice of the organization in interpreting the Charter of the United Nations (*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; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 151). Moreover, where the interpretation of a treaty would seem to lead to a result which is manifestly absurd or unreasonable in the light of the objects and purposes of the treaty, the Court has interpreted the Charter as embodying implied powers so as to give effectiveness to the institution concerned. In the *Certain Expenses* case, the Court was asked to give an opinion on the question whether the expenditures authorized by the General Assembly resolutions for peace-keeping and separately accounted for were "expenses of the Organization" within the meaning of Article 17, paragraph 2, of the United Nations Charter. It was objected that the Court, under Article 62, paragraph 2, of its Statute could only

answer a request containing an exact statement of the question upon which an opinion is required, and that in this case the question actually before the Court could only be answered after considering whether the expenditures were undertaken in accordance with the provisions of the Charter in general, which was a consideration preliminary to the answer to the question whether they were consonant with Article 17, paragraph 2. The Court dismissed the objections on the grounds that the General Assembly had declined to ask the Court to give an opinion on the conformity of the expenditures with the Charter, and that the Court could answer the question by interpreting Article 17, paragraph 2, in the light of the whole Charter and stated that

> "when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization" (*I.C.J. Reports 1962*, p. 168).

It is also a rule of interpretation that a treaty is not to be given a restrictive interpretation if such an interpretation would be contrary to the text of the treaty itself.

Resolution WHA46.40 drew attention to the effects on health and on the environment of the use of nuclear weapons, and the long-term consequences connected therewith. It also noted that it had been established that no health service in the world could alleviate in any significant way a situation resulting from the use of even one single nuclear weapon. It further noted the concern of the world health community about the continued threat to the health and the environment resulting from the use of nuclear weapons and the role of the WHO which, as the agency charged with responsibilities for international public health, would have to take action of *primary prevention of the health hazards resulting from the use of such weapons*. The resolution requested clarity about the status in international law of the effects of the use of such weapons — about which, in the last 48 years, marked differences of opinion have been expressed by member States.

On the basis of the material presented to the Court, and as noted earlier, a single nuclear weapon exploded either intentionally or accidentally over a large city like Boston, United States, with a population of 2,844,000, the United States Arms Control and Disarmament Agency estimated there would result 695,000 direct fatalities and 735,000 surviving injured. Of the 5,186 physicians, 50 per cent (2,593) would be potentially available to treat the injured. This would result in some 284 injured persons for each available physician. Of the 12,816 hospital beds, since they are mostly in the urban target area, of the 48 acute case hospitals, 38 would be destroyed or badly damaged, thus 83 per cent of the beds would be destroyed leaving some 2,135 beds for the care of 735,000 seriously injured survivors. Clearly the numbers needing medical care would

overwhelm the medical facilities and resources of the entire country. In the event of actual hostilities the attack would not be limited to a single city.

A massive nuclear attack on the United Kingdom would kill or injure half the population, and 97 per cent of Londoners. Not only hospitals, physicians, nurses, all other health professionals and technicians would be in short supply, but antibiotics, parenteral fluids, bandages, surgical equipment and all the sophisticated medical technology would be similarly lacking. The problems facing surviving medical workers would be overwhelming. They would not only lack nearly all essential facilities for the care of the injured, but would need to find the injured among the debris of collapsed buildings and houses, transport them through streets clogged with fallen structures, raging fires, and contaminated with radioactivity, probably with little if any transportation available and without electricity or fuel, while having major worries about the fate of their own loved ones and themselves. Thus, if a larger number of weapons were to be exploded in warfare, the overall consequences would include not only short- and medium-term medical injuries, but also severe environmental effects, disruption of transport and delivery of food, fuel and basic medical supplies, possible famine and mass starvation on a global scale. It was also disclosed to the Court that more recent studies have indicated that the casualties are more likely to number a billion or more, and the very survival of human beings on earth has been doubted.

According to its Constitution, the WHO's functions include the collection and dissemination of information relating to epidemic diseases, dealing with emergency situations resulting from war, the carrying out of relief work and extensive international health programmes, taking sanitary and quarantine action to prevent epidemics following a war and aiding the reconstruction of national health services which may have been affected by war, and generally taking all necessary action to attain the objective of the Organization. The functions would seem to bring the health and environmental consequences of nuclear weapons within the scope and activities or competence of the Organization.

Furthermore, in terms of its past practice, the Organization has, over the years, been preoccupied with the health effects of weapons of mass destruction in general and nuclear weapons in particular. This practice, which had been accepted by all the States concerned and provides a superior and reliable evidence to be used in interpreting resolution WHA46.40 in the light of the Organization's Constitution. Since the 1960s the WHO has been co-operating with the United Nations on the prohibition of chemical and biological weapons and has submitted reports on the health

effects of those weapons. Beginning with resolution 34.38 and based on that resolution, the Director-General of the WHO, in 1983, set up an international commission of experts which submitted a report on the effects of nuclear weapons on health and health services. The Assembly of the Organization endorsed the conclusions of the Commission in resolution WHA36.28 and recommended that the work should continue. This recommendation formed the basis of the 1987 Report entitled *Effects of Nuclear Weapons on Health and Health Services*.

Furthermore, while the debate leading up to the adoption of resolution WHA46.40 proved controversial, there was no question but that the health effects of nuclear weapons were matters which fell within the ambit of the WHO. Even though such debates are not binding on the Court, the Court has in the past, when interpreting questions in a request and in order to get at the real issue in dispute, taken account of the debates in the organ in which the resolution containing the question was adopted. Also on this aspect of the matter, the Court chose not to follow its practice. As already mentioned, Article 31 of the Convention on the Law of Treaties presupposes that, in interpreting a treaty, subsequent practice may be used to establish the understanding of parties regarding that treaty. Judged against this background, to have found as the Court has done, that the question does not fall within the scope of activities or competence of the Organization, would suggest that no realistic appraisal of the material presented to the Court or of the practice of the Organization was carried out by the Court with a view to enabling itself to give an effective reply to the question posed.

It now remains to determine whether in light of the health and environmental effects, obligations undertaken by States will be violated by the use of nuclear weapons or, in other words, what principles of law, if any, would apply to the question. In this regard, it must first be pointed out that it is a principle of international law that obligations assumed by States are binding on them and that in their conduct or activities they are required to comply with such obligations. In accordance with the Charter of the United Nations, obligations arising from treaties and other sources of law are to be observed. Article 26 of the Vienna Convention on the Law of Treaties specifies that every treaty in force is binding upon the parties to it and must be performed by them in good faith. This requirement is also stipulated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV) of 1970, to the effect that every State has the duty to fulfil in good faith the obligations assumed by it:

(a) in accordance with the Charter of the United Nations;
(b) under the generally recognized principles and rules of international law; and

(c) under international agreements valid in accordance with the generally recognized principles and rules of international law.

The principle that obligations should be fulfilled in good faith requires States not only to implement obligations which they have undertaken, but that they should also refrain from acts which could defeat such obligations.

Such obligations may arise from treaties, customary international law rules and from general principles of international law. The non-fulfilment or violation of such obligations entails international responsibility. This assumes even greater significance in the case of obligations under the law of armed conflict and more particularly international humanitarian law, whose main purpose is the protection of human beings during warfare, as well as the mitigation of their physical and mental sufferings. Accordingly, belligerent States are under a duty to observe the principle of humanity during warfare.

The question asked by the WHO, therefore, also involves State responsibility — in other words, the question of whether a State would be in breach of its legal obligations assumed under international law by the detonation of a nuclear weapon in war or during armed conflict as a result of the effects on human health and the natural environment. The obligations in question may involve the breach of treaty or of a legal duty. The obligation could also arise as a result of an illegal act or from an event involving the use of prohibited weapons in an armed conflict. In the *Corfu Channel* case, the Court held that Albania was liable for the consequences of a mine-laying in her territorial water and the absence of a warning of the danger, finding that

> "These grave omissions involve the international responsibility of Albania.
>
> The Court therefore reaches the conclusion that Albania is responsible under international law for the explosions which occurred on October 22nd, 1946, in Albanian waters, and for the damage *and loss of human life which resulted from them . . .*" (*I.C.J. Reports 1949*, p. 23; emphasis added.)

Accordingly, the judicial task of the Court should have been to identify and apply the relevant international law including the WHO's Constitution relating to the question posed, identify the obligations, if any, that are prescribed in those rules and on the basis of the materials presented, and determine whether in view of the health and environmental effects those obligations would be breached by the use of nuclear weapons in war or any other armed conflict. Such had been the practice of both this Court and its predecessor in exercising their advisory jurisdiction. Both Courts have "regularly made simple findings of facts, established on the basis of documentation submitted to the Court" (Rosenne, *Law and*

Practice of the International Court, 2nd rev. ed., p. 701), or on the basis of testimony given. In the *Eastern Carelia* case (*P.C.I.J., Series B, No. 5*, p. 28), with regard to the enquiry as to the facts, the Court stated that if the facts upon which the opinion of the Court is desired are non-controversial and the Court does not have to ascertain what they are, it would be prepared to take such facts into consideration. This position was confirmed in the *Namibia* Opinion where the Court declared as follows:

> "In the view of the Court, the contingency that there may be factual issues underlying the question posed does not alter its character as a 'legal question' as envisaged in Article 96 of the Charter. The reference in this provision to legal questions cannot be interpreted as opposing legal to factual issues. *Normally, 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.* The limitation of the powers of the Court contended for by . . . South Africa has no basis in the Charter or the Statute." (*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; emphasis added.)

In accordance with Article 38 of its Statute, the Court is enjoined in deciding a dispute to apply international conventions, whether general or particular, establishing rules expressly recognized by States; international custom, as evidence of general practice accepted as law; the generally recognized principles and rules of international law; judicial decisions; and the teachings of the most highly qualified jurists.

But, before attempting to identify the applicable law, since that law would have to be applied to the effects of nuclear weapons, it would be appropriate to recall the definition of a nuclear weapon so as to provide the appropriate background against which that law is to be applied. The Paris Accords of 1954 defines atomic weapons as those which through nuclear explosion or analogous processes are "capable of causing massive destruction, generalized damage or massive poisoning". According to the 1967 Treaty of Tlatelolco on the Prohibition of Nuclear Weapons in Latin America, a nuclear weapon is defined as "any device which is capable of releasing nuclear energy in an uncontrolled manner and which has a group of characteristics that are appropriate for use for warlike purposes". Thus, nuclear weapons, like biological and chemical weapons, are regarded as weapons of mass destruction. However, the characteristics of nuclear weapons are unique. They release not only immense quantities of heat and energy but also powerful and prolonged radiation. Such radiation would affect human health, agriculture and demography over a vast area. Nuclear weapons when used also have serious effects on future gen-

erations, causing genetic and other similar defects. As the preamble to the Treaty of Tlatelolco proclaims,

> "nuclear weapons, whose terrible effects are suffered, indiscriminately and inexorably, by military forces and civilian populations 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".

It is against this background that an identification and application of the rules and principles of law which appear to be most pertinent, will now be undertaken. Of immediate and direct relevance is the international law of armed conflict, in particular international humanitarian law. Central to that law is the principle of humanity which imposes an obligation to mitigate the sufferings of war or to exercise constraints on the necessities of war. The preambles to the Hague Convention II of 1899 and IV of 1907 recognize the principles of humanity as an important source of the laws of war in situations where no specific international convention exists prohibiting a particular type of weapon or tactic.

The International Committee of the Red Cross, in its "Fundamental Rules of International Humanitarian Law Applicable in Armed Conflicts" published in 1978, stated, in its preamble, that:

> "International humanitarian law is made up of all the international legal provisions, whether of written or customary law, ensuring respect for the individual in armed conflict. Taking its inspiration from the sentiment of humanity, it postulates the principle that belligerents must not inflict harm on their adversaries out of proportion with the object of warfare, which is to destroy or weaken the military strength of the enemy."

International humanitarian law comprises the "Law of Geneva", which aims to safeguard military personnel *hors de combat* and persons who do not take part in the hostilities, and the "Law of The Hague", which determines the rights and duties of belligerents in the conduct of operations and limits the choice of the means of harming an enemy.

The four Geneva Conventions have come to be regarded as internationally binding upon all States, as virtually all States are parties to them. These are:

— Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I);
— Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II);
— Geneva Convention III relative to the Treatment of Prisoners of War (GC III); and

— Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (GC IV).

These Conventions have achieved almost universal acceptance and as of today are binding on 186 parties to each of the Conventions. They will therefore apply as treaties in almost any international armed conflict. Furthermore, most, if not all, of the provisions of the Conventions are now regarded as declaratory of customary international law.

Additional Protocols I and II of 1977 to the Geneva Conventions constitute a reaffirmation and development of the rules embodied in the Law of Geneva of 1949 and part of the Law of The Hague of 1907. As of date 143 States have become parties to Additional Protocol I and 134 to Additional Protocol II. The Protocols are accordingly binding upon a substantial majority of States of the international community. In addition, many of their provisions are declaratory of customary international law and are thus applicable in all international armed conflicts.

As regards the 1907 Hague Conventions, these are regarded as binding not only upon the contracting parties, but have largely become recognized as customary international law as well. Pertinent to the question before the Court are

— Hague Convention IV Respecting the Laws and Customs of War on Land, and Annex to the Convention: "Regulations Respecting the Laws and Customs of War on Land".
— Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land.

Hague Convention IV and the annexed Regulation directly apply to occupied territory and the treatment of property in such territory. Equally applicable are the provisions on methods and means of warfare which have now been codified in Additional Protocol I of 1977.

The International Military Tribunal at Nuremberg held that the provisions of the 1907 Regulations had become a part of customary international law and that accordingly they are binding on all States.

Accordingly, the obligations enshrined in these international legal instruments apply in virtually all armed conflicts including those involving the use of nuclear weapons. Prominent among such obligations are the following:

The right to choose methods and means of warfare is not unlimited, nor is the right to injure a belligerent. It is prohibited to use weapons which, by their nature, affect indiscriminately both military objectives and non-military objectives, or combatants and civilian population. Weapons whose destructive effects are so great that they cannot be limited to specific military objectives or are otherwise uncontrollable are particularly prohibited. This obligation is set forth in the Declaration of

St. Petersburg of 1868 and was the first to introduce limitations on means of waging war. The preamble to the Declaration specifically prohibits, and considers as contrary to the laws of humanity, the use of weapons that cause unnecessary and excessive suffering. Its preamble reads as follows:

> "Considering
>
> That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;
>
> That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;
>
> That for this purpose it is sufficient to disable the greatest possible number of men;
>
> That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;
>
> That the employment of such arms would therefore be contrary to the laws of humanity."

The Declaration places a specific ban on the use of "any projectile of a weight below 400 g, which is either explosive or charged with fulminating or inflammable substances". According to this principle, while international law recognizes that the object of warfare is to disable the belligerent enemy, it prohibits the use of weapons which cause gratuitous and unnecessary suffering. The principle was embodied in the following articles of Convention II of the First Hague Conference of 1899 which provide:

> "*Article 22.* The right of belligerents to adopt means of injuring the enemy is not unlimited.
>
> *Article 23.* Besides the prohibitions provided by special Conventions, it is especially prohibited:
>
> *(a)* To employ poison or poisoned arms;
>
> . . . . . .
>
> *(e)* To employ arms, projectiles or material of a nature calculated to cause superfluous injury;
>
> . . . . . .
>
> *Article 25.* The attack or bombardment of towns, villages, habitations or buildings which are not defended is prohibited."

That principle was subsequently articulated in the Hague Convention of 1907 in Articles 22, 23 and 25 and reaffirmed the rules of international law which had been enunciated in 1899. Its further development is to be found in the Geneva Gas Protocol of 1925, which prohibits not just

poisonous and other gases but also "analogous liquids, materials or devices" and extends the prohibition to bacteriological warfare as well.

The principle was codified in the Additional Protocols of 1977 to the Geneva Conventions of 1949. Article 35 — Basic Rules — provides that in any armed conflict:

> "1. . . ., the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
>
> 2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
>
> 3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment."

Furthermore, in warfare or during an armed conflict, States are under an obligation to observe the principle of discrimination between civilians and combatants and between military and non-military objects. The principle is recognized as one of the most fundamental principles of international humanitarian law. Civilians and non-military objects are not to be made the object of attack. Even where indirect injury may occur to civilians or civilian objectives by dint of military necessity, such losses if manifestly excessive, would violate the rule. The rule is embodied in Article 27 of the Hague Convention of 1907 and the annexed regulations concerning the laws and customs of war on land; Articles 22 and 24 of the Draft Hague Rules on Air Warfare of 1923 prohibit States from bombarding civilian targets and are accepted as customary international law. It is also codified in Articles 35, 36, 48, 51, 52, 54 and 55 of the First Additional Protocol of 1977. Article 35, as we have seen, limits the right of the Parties to a conflict to choose methods or means of warfare and prohibits the use of weapons which cause superfluous and unnecessary injury.

Article 48 of the Protocol provides that:

> "In order to ensure respect for and protection of the civilian population and the civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

This is regarded as a reaffirmation of the principle of distinction — that methods or means of warfare must make a distinction between combatants and non-combatants.

Article 51, paragraph 5, of the Protocol prohibits

> "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination

thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".

Article 51, paragraph 6, places a prohibition on reprisals against the civilian population or civilians. The provision is considered not to be subject to any conditions and has been considered to be of a peremptory character that does not allow for any derogation from the rule on the grounds of military necessity. Support for this position is to be found in Article 52, paragraph 1, which states that "civilian objects shall not be the object of attack or of reprisals".

Article 53 declares that

> "Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:
>
> . . . . . .
>
> *(c)* to make such objects the objects of reprisals."

Article 54 prohibits reprisals against objects indispensable to the survival of the civilian population, while Article 55, paragraph 2, prohibits attacks against the natural environment by way of reprisals.

Article 56, paragraph 4, prohibits the works, installations or military objectives mentioned in paragraph 1 from being made the object of reprisals.

Additional obligations are laid down by the Geneva Convention of 1949 according to which States assume responsibility for certain duties such as the collection of the wounded or dead, individual burial and the evacuation of prisoners and undertake not to expose prisoners to unnecessary danger. The duty regarding protected persons including the wounded and sick members of the armed forces, hospital ships, medical transport, would be difficult, if not impossible, to observe should nuclear weapons be used, *inter alia*, because of their radioactive effects and contamination.

In like manner, the radioactive fallout would violate territorial sovereignty and cause injury to the citizens of neutral territories in violation of Article 1 of the 1907 Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. Evidently the use of nuclear weapons would fail to observe or respect the principle of discrimination between civilians and combatants in the neutral territory as well, and could cause devastation involving innocent civilian neutrals as well as civilians of both belligerent parties.

Evidently, the use of such weapons would violate the obligations assumed by States under the Martens Clause according to which, even in the absence of an international convention,

> "civilians and combatants remain under the protection and authority of principles of international law derived from established custom, from principles of humanity and from the dictates of public conscience".

Thus, according to this formula, which is reflected in the Geneva Conventions of 1949 and in the Additional Protocols of 1977, warfare does not allow belligerents to cause unnecessary and excessive injury and suffering to one another, to fail to observe the rule of discrimination between civilians and non-civilians or to exercise an unlimited choice of means of injuring the enemy.

Environmental Obligations

As far as the environmental obligations assumed by States are concerned, these are to be found both in customary international law and in the provisions of treaties as well. Taken together, they impose legal restraints against environmental warfare *per se* or the means of waging it. Article 25 of the Hague Convention IV of 1907 prohibits, as we have seen, "*attack* or bombardment by *whatever* means of towns, villages, dwellings or buildings which are undefended" (emphasis added). Belligerent parties are prohibited, directly or indirectly, from inflicting unnecessary damage on the environment.

The Geneva Protocol of 1925 is also relevant in this connection as it prohibits the use in war of chemical or biological agents, and the Bacteriological and Toxin Weapons Convention of 1972 prohibits the possession of biological agents.

Articles 53 and 147 of the 1949 Fourth Geneva Convention also provide a degree of indirect protection for the environment, in the context of protecting property rights in occupied territories. Thus, an occupying Power which destroys, for example, industrial installations in an occupied territory, causing consequent damage to the environment, would be in breach of its obligations under the Convention, provided that such destruction was not justified by military necessity. If such destruction is extensive, it would constitute a grave breach of the Convention, or even a war crime, in accordance with Article 147.

Article 35 of Additional Protocol I of 1977 also prohibits the employment of methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment; Article 55, as we have seen, imposes an obligation upon States Parties to take care in warfare to protect the natural environment against such damage; Article 54 protects objects indispensable to the survival of the civilian population; while Article 56 protects certain installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations which are not to be made the object of

attack, even where those objects are military objectives, if such attack might cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations are not to be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.

Also considered applicable to the question under consideration is the 1977 Convention on the Modification of the Environment. The Convention prohibits the hostile use of environmental modification techniques having "widespread, long-lasting or severe effects 'as the means of damage'". An environmental modification technique is defined as any technique for changing — through the "deliberate manipulation" of natural processes — the dynamics, composition or structure of space or of the earth, including its atmosphere, lithosphere, hydrosphere and biota.

Also relevant, in this connection, is the principle of environmental security intended to secure the environment and given expression in Principle 24 of the Rio Declaration on Environment and Development to the effect that

> "Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and co-operate in its future development, as necessary."

It is thus in terms of these obligations that the health and environmental effects produced by the use of nuclear weapons are to be judged. According to the available material, nuclear weapons when used did, in an instant, take a tremendous toll of human lives. Estimates of the number of people who had died by the end of 1945 following the atomic bombing of Hiroshima and Nagasaki amounted to approximately 140,000 in Hiroshima and 74,000 in Nagasaki. Of the people who were exposed to thermal radiation, 90 to 100 per cent died within a week. In addition to direct injury from the bomb blasts, death was said to have been caused by several interrelated factors such as being crushed under buildings, injuries caused by splinters of glass, radiation damage, food shortages or shortages of doctors and medical personnel. Over 320,000 people who survived but were affected by radiation still suffer from various malignant tumours caused by radiation, including leukaemia, thyroid cancer, breast cancer, lung cancer, gastric cancer, cataracts and a variety of other after-effects.

From another source that had experienced the effects of the use of nuclear weapons, the Court learned that the explosion that took place on the island had caused what looked like a snowfall for the first time in its people's history. Such "snow", it was later discovered, was in fact radioactive fallout from the nuclear explosion. As a result of the contamination to which their bodies were exposed, the islanders experienced blisters and other sores over the weeks that followed. Their serious internal and external exposure to radioactivity caused them long-term health problems that have affected four generations of the island's inhabitants. Such effects are said to be indistinguishable from poison, a "substance which when introduced into the body can kill or cause injury to health". Uranium, a central component of nuclear weapons, is regarded as one of the most toxic substances. Accordingly, when used, nuclear weapons would expose human beings to effects indistinguishable from those of poison. Such use would be in breach of the obligations prohibiting the use of poison or poisonous weapons. The effects could also be both long-term, intergenerational and affect a wide area as well.

Yet, the detonations which took place in Hiroshima and Nagasaki, as well as the nuclear explosions in the Marshall Islands, have been considered relatively minor when compared to the destructive power of today's nuclear weapons. As we have seen, a massive nuclear attack on modern cities like Boston or London would result in the death of millions of people. The use of such weapons would produce delayed radioactive fallout across potentially great distances and over extended periods of time. The radiation effects, it is said, are not unlike effects produced by chemical and biological weapons. As opposed to conventional weapons, nuclear weapons, even those with fairly low yields, are capable of causing harm to non-combatants — including civilians — and neutral parties alike.

On the basis of the material before the Court, and in view of their health and environmental consequences, it is undeniable that nuclear weapons when used would be in breach of the obligations assumed by States under international law.

These obligations include:

(i) a limitation on the choice of methods and means of warfare;
(ii) the prohibition from using poison or poisonous weapons intended to cause unnecessary suffering;
(iii) the prohibition from causing unnecessary and superfluous suffering;
(iv) the requirement that belligerent parties respect the distinction between military objectives and non-military objects, as well as between persons participating in the hostilities and members of the civilian population;
(v) the prohibition of armed attacks against the civilian population;

(vi) the prohibition of wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(vii) the requirement not to attack, or bombard, by whatever means undefended towns, villages, dwellings or buildings;

(viii) the requirement not to employ methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment.

It is also clear that, because of their health and environmental effects, the use of nuclear weapons would be in breach of the provisions of the WHO Constitution, whose objective is the attainment by all peoples of the highest possible level of health. Health, it will be recalled, is defined as a state of complete physical, mental and social well-being, and the WHO is enjoined to promote and protect the health of all peoples, by, among other activities, directing and co-ordinating international health, assisting Governments upon request to strengthen health services, promoting material and child health and welfare and fostering the ability to live harmoniously in a changing environment.

Given the health and environmental effects of nuclear weapons, a State that is a party to the Constitution of the WHO and which uses nuclear weapons will be in breach of both the letter and spirit of that Constitution which, *inter alia*, calls for the co-operation of individuals and States for the attainment of health and peace by all peoples as well as the objective of the Organization itself.

The Court, in its Opinion, has stated that having found that it lacked jurisdiction in the present case, it could not examine the arguments which were expounded before it with regard to the propriety of giving such an Opinion. This position notwithstanding, it is my view that if the Court had allowed itself to consider the abundance of material at its disposal, it could have reached a different conclusion other than the one arrived at.

The Court was not persuaded by the argument advanced, that as resolution WHA46.40 was adopted by the requisite majority, it was proper and therefore must be presumed to have been validly adopted to serve as a basis of the Court's jurisdiction. Having taken this view the Court, after acknowledging that the World Health Assembly is entitled to decide on its competence and consequently that of the WHO to submit a request to the Court for an advisory opinion on the question under consideration, stated however that in exercising its functions under Article 65, paragraph 1, of its Statute, it had arrived at "different conclusions from those reached by the World Health Assembly when it adopted resolution WHA46.40". Regrettably, the Court did not explain nor offer reasons why it had arrived at a different conclusion from the one reached by the World Health Assembly. Here again, one cannot fail to discern a departure by the Court from its long-established jurisprudence in this regard.

On the question whether an international organization is entitled to determine its own competence or jurisdiction, the Court had this to say in its Advisory Opinion in the *Certain Expenses* case:

> "In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an *advisory* opinion. As anticipated in 1945, therefore, *each organ must, in the first place at least, determine its own jurisdiction.*" (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), I.C.J. Reports 1962*, p. 168; second emphasis added.)

In that same Opinion, the Court stated that

> "when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization" *(ibid.)*.

What this shows, in my view, is that prior to the present case and in accordance with its jurisprudence, the Court has held that international organizations are competent to determine their competence or jurisdiction. On this occasion, the Court decided to depart from this its jurisprudence, but with hardly any explanation or reason — but not only did the Court choose not to follow its jurisprudence on this occasion — in the past, while not denying itself the right to examine the competence of the body making the request, it rejected certain objections to its jurisdiction based on the claims that such bodies were not competent to make the request (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, I.C.J. Reports 1950*, pp. 72 *et seq.*, and *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, pp. 19-20).

The Court also rejected the argument that the United Nations General Assembly, as the source from which the WHO derives its power to request advisory opinions, had in its resolution 49/75 K confirmed the competence of the agency to request an opinion on the question submitted. The General Assembly, in resolution 49/75 K

> "[welcomed] resolution 46/40 of 14 May 1993 of the Assembly of the World Health Organization, in which the organization requested the International Court of Justice to give an advisory opinion on whether the use of nuclear weapons by a State in war or other armed conflict

> would be a breach of its obligations under international law, including the Constitution of the World Health Organization".

The Court interpreted such approval as political and did not consider that the Assembly had intended to operate in the legal sphere and make any kind of ruling whatsoever regarding the competence of the WHO to request an opinion on the question raised; it also found that the Assembly could not have intended to disregard the limits within which Article 96, paragraph 2, of the Charter allows it to authorize the specialized agency to request opinions from the Court.

While it is admitted that the Assembly could not have intended to disregard the limits of Article 96, paragraph 2, of the Charter, the conclusion reached by the Court that the Assembly, by that resolution, had not intended to operate and make any ruling whatsoever regarding the competence of the WHO to request the opinion sought turned on the particular construction which the Court had given to the question posed. But even then, the issue does not seem so clear-cut and dry as the Court would have it. According to Article 96, paragraph 2, of the Charter, the WHO is empowered to request opinions "on legal questions arising within the scope of its activities". This power is also provided for in Article 76 of the WHO Constitution which reads as follows:

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

Admittedly, the WHO can only ask a question which is not outside its ambit or competence, and the General Assembly can also restrict the power of the agency by limiting its competence or the scope of its activities. In other words, since it is the Assembly that originally granted the authorization to request an opinion for matters within the Organization's competence, the Assembly would, in my view, have been in a position — if it had considered that the agency, by adopting resolution WHA46.40, had acted *ultra vires* — to bring this to the attention of the agency or to exercise its discretionary powers and bring the irregularity to an end. Evidently, the Assembly exercised neither of those options but it rather welcomed resolution WHA46.40, with the implication that the agency had not acted *ultra vires*.

The WHO, in resolution WHA46.40, offered various reasons why it had requested the advisory opinion of the Court on this matter including, *inter alia*, the concern felt by the world health community about the con-

tinued threat to health and the environment by the use of nuclear weapons and the need for prevention. Also, as the agency primarily responsible for the promotion and protection of international health, it considered that the opinion of the Court would have acted as a guide in the performance of its functions. It is conceivable that, had the Court decided to render an opinion in accord with the manifest desire of the Organization, such an opinion would have put States on notice that in view of the health and environmental consequences that are bound to ensue from the use of nuclear weapons, they would be in breach of their obligations under international law, including the WHO Constitution were they to have recourse to such weapons. Regrettably, this potentially preventive effect of the Court's authoritative advice cannot now be realized in view of the Court's decision to decline the request.

CONCLUSION

To sum up, the Court, in order to reject the request by the WHO, had to ignore its established jurisprudence, for as the Court has repeatedly stated, only "compelling reasons" should lead it to refuse to render an advisory opinion requested of it. In my view, no such "compelling reasons" have been demonstrated to warrant the dismissal of the request. In the *Interpretation of Peace Treaties* case, the Court had said:

> "The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State . . . can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take." (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, I.C.J. Reports 1950*, p. 71.)

It is submitted that the considerations enunciated by the Court in that earlier case are equally applicable to the present case. The Court's decision on this matter has almost entirely turned on its interpretation of the question submitted for its consideration. That interpretation, with respect, not only distorted the intention of the question but also took too narrow and restrictive a view of the competence and scope of the activities of the WHO. Hitherto, the Court's purpose in interpreting or reformulating a question in a request for an advisory opinion had been to ascertain what were the legal questions really in issue in the question formulated, so as to be in a position to render an effective and useful opinion and not to provide a basis for the rejection of the request.

In my view, since the responsibility of the WHO includes the promotion and protection of international public health, including the taking of preventive measures, a question that seeks the opinion of the Court as to

whether in view of their health and environmental effects, a State using nuclear weapons would be in breach of its obligations under international law, including the WHO Constitution, relates to a matter eminently within the competence and scope of activities of the Organization. The legal question in the request is directed to the factual effects of the use of nuclear weapons and not to the legality or illegality of such weapons *per se*. Therefore, to find that such a question is outside the scope of activities of the Organization strikes me, with respect, as a classic case of overshooting a target and appears to be lacking in validity. The request cannot be considered as incompatible with the purpose and objective of WHO nor can it be considered as detrimental to the interests of member States in excess of what they had accepted as a basis of their membership. As mentioned earlier, the Court itself has said that "when the Organization takes action . . . appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization" (*I.C.J. Reports 1962*, p. 168). This statement is equally applicable to the action taken by the WHO in formulating the request. Accordingly, what appears to be a legal rebuke or an attempt to teach the WHO a lesson for asking the question seems to me to be both gratuitous and unwarranted. Indeed, denying the request for lack of jurisdiction leaves one wondering whether this is not one of those cases in which a former Member of this Court, Judge Sir Gerald Fitzmaurice, considered that a finding against jurisdiction might prove to be a solution "in those cases where the necessity of giving a decision on the merits would involve unusual difficulty or embarrassment for the tribunal" ("The Law and Procedure of the International Court of Justice, 1951-1954: Questions of Jurisdiction, Competence and Procedure", *British Year Book of International Law*, Vol. 34, 1958, pp. 11-12, footnote 3). The only thing is that, in this very important matter, a finding against jurisdiction will not prove to be a solution, as States would be in breach of their international obligations were they to use nuclear weapons. It is, moreover, not discernible to me why if a decision on the "merits" had been given, it would have involved any embarrassment for the Court; nor should the Court have allowed itself to be seen to have been swayed from performing its judicial functions by declining to enter into the merits of the case. It is undeniable that the question asked by the WHO is controversial, but the Court has never declined a request for the reason that it is controversial or might prove to be an embarrassment. Indeed, in the *Namibia* case, when it was suggested that the Court should not or could not give the advisory opinion requested because of political pressure to which the Court, it was suggested, had been or might be subjected, the Court responded as follows:

> "29. It would not be proper for the Court to entertain these observations, bearing as they do on the very nature of the Court as

> the principal judicial organ of the United Nations, an organ which, in that capacity, acts only on the basis of the law, independently of all outside influence or interventions whatsoever, in the exercise of the judicial function entrusted to it alone by the Charter and its Statute. A court functioning as a court of law can act in no other way." (*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. 23.)

Regarding the argument that because matters relating to nuclear weapons are being discussed in other fora, the Court should therefore not render an opinion, when a similar argument was advanced in the *Fisheries Jurisdiction* cases, the Court replied as follows:

> "The Court is also aware of present endeavours, pursued under the auspices of the United Nations, to achieve in a third Conference on the Law of the Sea the further codification and progressive development of this branch of the law . . . In the circumstances, the Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down." (*I.C.J. Reports 1974*, p. 192.)

As already mentioned, international organizations have regarded the instrument of an advisory opinion as a means of securing an authoritative legal opinion on thorny or difficult issues facing them. The Court has always responded positively to requests for advisory opinions, regarding its role as participation in the activities of the Organization while at the same time protecting its judicial character. That trust would now appear to have been broken. It is regrettable that the Court has chosen to vacate its positive record in this sphere on an issue of such vital importance, an issue that embraces not only a legal but a moral and humanitarian dimension as well. The Court considered these aspects in the case concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (*I.C.J. Reports 1951*, p. 23). It has been said that "medicine is one of the pillars of peace"; it can equally be said that "health is a pillar of peace" or as is stated in the Constitution of the WHO "the health of all peoples is fundamental to the attainment of peace and security".

On the basis of the aforesaid, I find that the Court's Opinion is inadequately reasoned, has failed to address the crucial issues raised and is inconsistent with its jurisprudence. I, therefore, find myself unable to concur with it. On the other hand, and on the basis of the material before the Court, applying the law to that material, I am of the firm conviction that a State would be in breach of its obligations under international law, including the WHO Constitution, were it to use nuclear weapons in war

or other armed conflict in view of the health and environmental consequences. To put a question of this kind to the Court is indeed within the competence and scope of the activities of the WHO.

(Signed) Abdul G. KOROMA.