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# The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice

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## Abstract

*The International Court of Justice's 1996 Nuclear Weapons Advisory opinions raise a number of questions relating to the competence of international organizations and the Court's own advisory jurisdiction. The author argues that actions of an international organization directed at achieving the fulfilment of the purposes of the organization and which would promote its effectiveness are within the implied powers of the organization. Thus, the decision that the WHO had no competence to deal with the legality of nuclear weapons (or other hazardous substances) departs from the established law, including the Court's previous jurisprudence. It is argued that a broad, rather than a narrow, competence for international organizations is more consistent with principle and practice as well as with the Court's jurisprudence. In relation to the Court's advisory jurisdiction, the author argues that (contrary to the implications in the WHO opinion) it is always within the competence of UN specialized agencies to seek opinions on the interpretation of their constitutions and that requests from the General Assembly do not have to relate to the work of that organ. The concluding section sets out the circumstances in which the Court ought to exercise its discretion to refuse to render an opinion requested of it. It is argued that the fact that a request relates to an abstract question, unrelated to any particular factual situation, ought not to debar the Court from exercising its jurisdiction. However, the Court ought to decline to provide an opinion where it does not have before it sufficient factual material to enable it to form an opinion or where it is in danger of giving an incomplete answer that can be misconstrued.*

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## 1 Introduction

It is perhaps trite to point out that the law of international organizations is mainly developed through the practice of those organizations. Questions relating to the powers and competence of these arise and are resolved in the day-to-day activities of persons involved in such organizations.<sup>1</sup> The fact that international organizations cannot have resort to the contentious jurisdiction of the International Court of Justice<sup>2</sup> means that the principal vehicle for obtaining judicial input into questions relating to their powers and competence is the advisory jurisdiction of the International Court.<sup>3</sup> It is thus by no means surprising that the key cases dealing with the law of international organizations are advisory opinions of the Court, and that these cases simultaneously develop the law concerning the advisory jurisdiction of the Court. As advisory opinions are not frequently requested by the United Nations and its specialized agencies, any opportunity given the Court to develop these aspects of the law is usually to be welcomed.

However, two recent opinions of the ICJ, dealing with the competence of international organizations and the extent of the Court's own advisory jurisdiction, have been greeted with more than usual controversy. In these opinions, the issue of the competence of international organizations arose only tangentially as the questions put to the Court concerned a matter of substantive law which was apparently not connected to any particular exercise of power by the organizations involved: the legality of the threat or use of nuclear weapons.<sup>4</sup>

In the first opinion, the Court was asked the following question by the World Health Organization (WHO):

<sup>1</sup> See, e.g., the various matters (especially the selected legal opinions) recorded in the volumes of the *United Nations Juridical Yearbook*.

<sup>2</sup> See Art. 34(1) of the Statute of the International Court of Justice: 'Only States may be parties in cases before the Court.'

<sup>3</sup> It should however be noted that questions relating to the competence of international organizations may arise 'incidentally' in contentious cases between states. This arises where a decision of that organization affects the rights and duties of the contending states and where one party requests that the Court refuse to apply that decision. The issue is, of course, that of judicial review and it has been most prominent recently in the international sphere in relation to decisions of the Security Council of the United Nations. The question whether the International Court of Justice has this power in contentious cases has been raised (but not as yet answered) before the Court. See *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.; Libya v. U.K.)*, Provisional Measures, ICJ Reports (1992) 3, at 114; Preliminary Objections, ICJ Reports (1998); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Yugoslavia (Serbia & Montenegro))*, Requests for Provisional Measures, ICJ Reports (1993), at 3 and 325; Preliminary Objections, ICJ Reports (1996). The literature on this subject is vast. See Akande, 'The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?', 46 *ICLQ* (1997) 309 and the works cited at note 2 of that article.

<sup>4</sup> *Legality of the Threat or Use of Nuclear Weapons* (Request by the General Assembly), ICJ Reports (1996), at 226; 35 *ILM* (1996) 809 and 1345 [hereinafter *General Assembly Opinion*] and *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Request by the World Health Organization), ICJ Reports (1996), at 66 [hereinafter *WHO Opinion*].

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

In the second request, the General Assembly of the United Nations asked the Court the following question:

Is the threat or use of nuclear weapons in any circumstance permitted under International law?

The Court decided by 11 votes to 3 not to render an advisory opinion in respect of the WHO request and decided by 14 votes to 1 to respond to the question put to it by the General Assembly. In the *General Assembly Opinion*, the Court considered the merits of the question put to it and came to the conclusion, *inter alia*, that:

the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake;<sup>5</sup>

The decision on the merits raises many interesting questions of substantive international law. These issues have been commented on elsewhere,<sup>6</sup> and this article does not intend to address them. The focus of our concern here is an examination of the issues, arising from the opinions, which relate to the competence of international organizations and the advisory jurisdiction of the International Court. The first of these two areas of discussion is significant because the ruling of the Court in the *WHO Opinion* constitutes the only decision to date in which the present ICJ has denied that an international organization has a power which it claims to possess. It will thus be instructive to examine the reasoning on which this decision is based, particularly as it seems to depart from previous jurisprudence of the Court in relation to the competence of international organizations. Discussion of the second area — the advisory jurisdiction of the ICJ — is important in the light of calls that have been made for a

<sup>5</sup> Operative paragraph 2E, *General Assembly Opinion*, ICJ Reports (1996), at 266. This paragraph was adopted by the casting vote of the President, the vote having been deadlocked seven to seven. Those in favour were President Bedjaoui and Judges Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin and Ferrari Bravo. Against were Vice President Schwebel and Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Koroma and Higgins.

<sup>6</sup> See Lowe, 'Shock Verdict: Nuclear War May or May Not be Unlawful', *CLJ* (1996) 415; Clark, 'The Laws of Armed Conflict and the Use or Threat of Use of Nuclear Weapons', 7 *Crim. LF* (1996) 265; Falk, 'Nuclear Weapons, International Law and the World Court: A Historic Encounter', 91 *AJIL* (1997) 64; Bekker, 'Legality of the Threat or Use of Nuclear Weapons', 91 *AJIL* (1997) 126; Matheson, 'The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons', 91 *AJIL* (1997) 418; Grief, 'Legality of the Threat or Use of Nuclear Weapons', 46 *ICLQ* (1997) 681; Kohen, 'L'avis consultatif de la CIJ sur la Licéité de la menace ou de l'emploi d'arme nucléaires et la fonction judiciaire', 8 *EJIL* (1997) 337; Scobbie, 'The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function', 8 *EJIL* (1997) 264, at 285–298; Weil, 'The Court Cannot Conclude Definitely . . . *Non Liquet* Revisited', 36 *Colum. J. Transnat'l L.* (1997) 109; and Akande, 'Nuclear Weapons, Unclear Law? Deciphering the *Nuclear Weapons Advisory Opinion*', 68 *BYBIL* (1997) 165.

greater use of advisory opinions by those bodies authorized to request opinions.<sup>7</sup> In addition, there have also been proposals to extend the number of bodies that can make use of the advisory facilities of the Court. It has been suggested, for instance, that the Secretary General of the United Nations should be able to request opinions of the Court.<sup>8</sup> Arguments have also been put forward for individual states and national courts to be able to have recourse to the Court's advisory jurisdiction.<sup>9</sup> If these proposals are successful, it will be all the more important to have an understanding of the extent of the advisory jurisdiction of the Court and of how the Court exercises this competence. This article does not intend to cover the entire breadth of issues concerning the advisory function of the Court, but will concentrate on the questions raised by the *Nuclear Weapons* opinions about the Court's advisory jurisdiction. These include the issue of whether any and all matters are suitable for submission to the Court in advisory proceedings, the extent of the competence of specialized agencies of the United Nations to request advisory opinions of the Court and the Court's discretion to decline a request to provide an opinion.

The *WHO Opinion* is particularly significant because it denotes the first time that the ICJ has refused to render an advisory opinion requested of it.<sup>10</sup> Similarly, the decision of the Court in *General Assembly Opinion* is significant because it is the first advisory opinion delivered by the Court to deal with a question not relating to institutional matters currently before the requesting organ or to a particular factual situation constituting the subject of dispute in the relevant organ.

In the oral and written statements presented to the Court in respect of the two requests, a number of states (including four of the five declared nuclear weapons states) raised objections to the admissibility of the requests before the Court. These states objected to the admissibility of the request by the WHO on the ground that the

<sup>7</sup> In 1988, the General Assembly called on the Security Council to consider making use of its power to request advisory opinions in cases where such an exercise would be appropriate for dispute resolution. See GA Res. 43/51, Annex, para. 15 (5 December 1988). A similar appeal has also been made by the then President of the International Court, Sir Robert Jennings, in his statements to the Sixth Committee (Legal) of the General Assembly in 1991 and 1992. *ICJ Yearbook* (1991-1992) 205 at 210-211; and *ICJ Yearbook* (1992-1993) 249, at 252. See further, Koskenniemi, 'Advisory Opinions of the International Court of Justice as an Instrument of Preventive Diplomacy', in N. Al-Naulmi and R. Meese (eds), *International Legal Issues Arising under the United Nations Decade of International Law* (1995) 599, at 600-601; and Higgins, 'A Comment on the Current Health of Advisory Opinions', in V. Lowe and M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings*, (1996) 567, at 570.

<sup>8</sup> See the proposals of the Secretary General in his 1990 and 1991 *Annual Reports*, UN Doc. A/45/1, part III, at 7 and UN Doc. A/46/1, Part V, at 8 and also in his *Agenda for Peace*, A/47/277; S/24111, para. 38. See also Koskenniemi, *supra* note 7, and Higgins, *supra* note 7.

<sup>9</sup> See Schwebel, 'Preliminary Rulings by the International Court of Justice at the Instance of National Courts', 28 *Virginia J. of Int'l L.* (1987-88) 495; Cf. Rosenne, 'Preliminary Rulings by the International Court of Justice at the Instance of National Courts: A Reply', 29 *Virginia J. of Int'l L.* (1988-89) 401.

<sup>10</sup> In the *Eastern Carelia* case, 1923 PCIJ Series B, No. 5, the Permanent Court of International Justice refused to render an opinion on the ground that the question put to it related to a dispute between two states, one of which was neither a member of the League of Nations nor a party to the Statute of the Court. As that State had not given its consent to the settlement of the dispute by the Council of the League, the Court could not give an opinion on a reference from that body.

question of the legality of the use of nuclear weapons did not come within the competence of that Organization. This was therefore the first question addressed by the Court in the *WHO Opinion*. Relying on Article 65(1) of its Statute and Article 96(2) of the Charter, the Court held that

three conditions must be satisfied in order to found the jurisdiction of the Court when a request for an advisory opinion is submitted to it by a specialized agency: [1] the agency requesting the opinion must be duly authorized, under the Charter, to request opinions from the Court; [2] the opinion requested must be on a legal question; and [3] this question must be one arising within the scope of the activities of the requesting agency.<sup>11</sup>

The WHO clearly satisfied the first condition,<sup>12</sup> but the second and third conditions proved to be more controversial.

## 2 Did the Questions Put to the Court Have a Legal Character?

The question whether the second condition (i.e. whether the questions put to the Court were of a legal nature) could be satisfied arose in relation to both the General Assembly and the WHO requests. In both proceedings a number of states argued that the question before the Court was political, not legal, and that the matter would be better dealt with in diplomatic fora.<sup>13</sup> It was argued that the question was not only of a political nature, but that the request was politically motivated and that the Court should not be tempted to enter into political debates (in this case the overall issue of nuclear disarmament).<sup>14</sup> Other states took a different view, arguing that the question

<sup>11</sup> *WHO Opinion*, ICJ Reports (1996), at 71–72, para. 10.

<sup>12</sup> The WHO is a specialized agency within the meaning of Articles 57 and 63 of the United Nations Charter and is authorized by Article X, para. 2 of its agreement with the United Nations (which was approved by GA Res.124 (II) and World Health Assembly Resolution WHA 1. 102), to request advisory opinions from the Court 'on legal questions arising within the scope of its competence'. See the *WHO Opinion*, ICJ Reports (1996), at 72, paras 11–12.

<sup>13</sup> See, for example, the statement of Professor Pellet, Counsel for France, Oral Pleadings, *Legality of the Threat or Use of Nuclear Weapons*, CR95/23 (translation), at 53 *et seq.* See also the statement of Mr Hillgenberg, Counsel for Germany: 'in the view of my Government the question before the Court is basically of a political nature'. *Ibid.*, CR95/24, at 35 *et seq.*, para. 12. Earlier Mr Hillgenberg had said: 'Mr President, we are aware that many highly respected experts believe that progress to date in the field of nuclear arms control and disarmament is still not sufficient, and that a judicial ruling on the legality or illegality of the use of nuclear weapons may help expedite the process. This Court, however, according to the Charter of the United Nations and its own Statute, is called upon to give advisory opinions on legal questions. It should not enter the political field of promoting disarmament through opinions on political matters pending in various international political fora.' (Emphasis added), CR95/24, at 35, para. 7.

<sup>14</sup> See the Written Statement of the United Kingdom, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Request by the WHO), at 53–58. The UK argued, with respect to the WHO request, that an advisory opinion ought not to be given where 'the motivation behind the request is essentially political and extraneous to the proper aim of seeking guidance as to the legitimate functions of the organ or organisation'. On the arguments put to the Court in this regard see *Responses by the Republic of Nauru to Submissions of Other States*, Written Comments on the Written Statements of Other States, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Request by the WHO), at para. 2.1. Here Nauru sets out the arguments of various states to the effect that the question put to the Court is political. See further

was a legal one,<sup>15</sup> and that an advisory opinion from the Court would clarify the legal position for states and could contribute to the ultimate goal of nuclear disarmament.<sup>16</sup>

The Court had no problem in ruling that both of the questions submitted to it were of a legal nature. It relied on its dictum in the *Western Sahara Advisory Opinion*, in which it had stated that questions ‘framed in terms of law and rais[ing] problems of international law . . . are by their very nature susceptible of a reply based on law . . . [and] appear . . . to be questions of a legal character’.<sup>17</sup> With respect to the questions before it, the Court held that it would have to identify existing rules and principles, interpret them and apply them to the threat or use of nuclear weapons. It would have to identify the obligations of states under rules of law and assess whether the use of nuclear weapons would conform to those obligations. The reply given would thus be based on law.<sup>18</sup> The Court further held, consistently with its previous jurisprudence,<sup>19</sup> that the fact that the question also had political overtones or that the request for the opinion was politically motivated did not deprive the Court of its jurisdiction.<sup>20</sup>

Clearly this part of the Court’s decision (dealing with the Court’s *jurisdiction*<sup>21</sup>) was correct. The Court’s duty in deciding cases brought before it (including advisory opinions) is to apply the sources of law laid down in Article 38(1) of the Statute. In so far as a question before the Court raises issues covered by those principles, that question has a legal nature within the competence of the Court. Thus, it is only in cases where the law provides no basis for decision that the Court’s competence would be excluded. Indeed, this point may be considered so basic now that it has been

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Akande, ‘The Role of the International Court of Justice in the Maintenance of International Peace’, 8 *African J. Int’l & Comp. L.* (1996) 592, at 599–601.

<sup>15</sup> See, e.g., the statement of Dr Al-Nauimi, Minister of Justice of Qatar, that ‘while the question may have a political background, or political implications, the nature of the question before the Court today is not a political one.’ Oral Pleadings, *Legality of the Threat or Use of Nuclear Weapons*, CR95/29, at 29, para. 14.

<sup>16</sup> See, e.g., the statement of Professor Georges Abl-Saab, Counsel for Egypt: ‘it would be too presumptuous to assume that an advisory opinion would settle once and for all the problems of nuclear weapons for the international community. But it can clarify all or part of the legalities of this problem.’ Oral Pleadings, *Legality of the Threat or Use of Nuclear Weapons*, CR95/32, at 32. He went on to say that ‘an advisory opinion on the legalities of the threat or use of nuclear weapons [would] be a building block in the legal regime of a future nuclear safe and reconciled world.’ *Ibid.*, at 34. Also, Senator Gareth Evans, the Australian Foreign Minister argued that if the members of the Court were ‘minded to answer the question before [them, their] advice can and will materially effect the achievement of that nuclear disarmament’, *ibid.*, CR95/22, at 73, para. 73.

<sup>17</sup> ICJ Reports (1975), at 18, para. 15.

<sup>18</sup> *General Assembly Opinion*, ICJ Reports (1996) at 233–234, para. 13; and the *WHO Opinion*, *ibid.*, at 73–74, para. 16.

<sup>19</sup> See *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, ICJ Reports (1948) at 61–62; *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, ICJ Reports (1950), at 6–7; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, ICJ Reports (1962), at 155.

<sup>20</sup> *General Assembly Opinion*, ICJ Reports (1996), at 233–234, para. 13; and the *WHO Opinion*, *ibid.*, at 73–74, paras 16–17.

<sup>21</sup> See later for the argument that the Court had the power of discretion to refuse to give an answer to a question which it had jurisdiction to deal with.

described as one of the few problems concerning the Court's advisory jurisdiction that has finally been resolved.<sup>22</sup>

### 3 The Competence of the WHO to Deal with the Legality of the Use of Nuclear Weapons

The main question raised in the WHO proceedings was whether the WHO was competent to deal with the legality of the use of nuclear weapons. Arguments put to the Court by various states differed greatly on this issue. The Court, by 11 votes to 3,<sup>23</sup> held that the WHO did not have the competence to request an advisory opinion on the question and thus refused to respond to it.<sup>24</sup> According to the Court, the question of the *legality* of the use of nuclear weapons did not fall within the mandate of the WHO. It held that the Organization was only authorized to 'deal with the effects on health of the use of nuclear weapons, or of any 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.'<sup>25</sup> The question put to the Court did not relate to the 'effects of the use of nuclear weapons on health, but to the *legality* of the use of such weapons *in view of their health and environmental effects*.'<sup>26</sup>

According to the Court, the competence of the WHO to deal with health matters is not dependent on the legal or illegal nature of the acts that gave rise to the situation. The WHO has a mandate to deal with human health and it must carry out its tasks whatever the cause of a deterioration of health. The Court pointed out that the competence of international organizations is governed by 'the principle of speciality': 'That is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.'<sup>27</sup> Thus, unlike states, which have a general competence to act, an international organization can only act where it has been entrusted by the states with the power to act.<sup>28</sup> The grant of the power to act may either be express or it may be implied from the constituent instrument of the organization, but such an implication

<sup>22</sup> See Higgins, *supra* note 7, at 568. The approach of the ICJ is similar to that adopted by the Canadian Supreme Court in the exercise of its advisory function. See *Reference re. Secession of Quebec*, decision of 20 August 1998, paras 24–28. For further comment on the question of a legal/political distinction, see Gowlland-Debbas, 'The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case', 88 *AJIL* (1994) 643, at 648–653; Akande, *supra* note 14, at 592–603; Sugihara, 'The Judicial Function of the International Court of Justice with Respect to Disputes Involving Highly Political Issues', in Muller, Rait and Thuránszky (eds), *The International Court of Justice: Its Future Role after Fifty Years* (1997), at 117.

<sup>23</sup> The three dissenting judges were Judges Shahabuddeen, Weeramantry and Koroma.

<sup>24</sup> *WHO Opinion*, ICJ Reports (1996), at 84, para. 32.

<sup>25</sup> *Ibid.*, at 76, at para. 21.

<sup>26</sup> *Ibid.* emphasis in original.

<sup>27</sup> *Ibid.*, at 78–89, para. 25.

<sup>28</sup> *Ibid.*

may only be made where such powers are necessary for the fulfilment of duties entrusted to the organization.<sup>29</sup>

In addition to the 'principle of speciality', the Court also relied on the fact that the WHO is a specialized agency within the United Nations 'system'. It held that in determining the powers conferred on the WHO by its Constitution, 'due account [must be taken] of the logic of the overall system contemplated by the Charter'.<sup>30</sup> According to the Court, the functions of the WHO, within that system, are 'necessarily restricted to the sphere of public "health" and cannot encroach on the responsibilities of other parts of the United Nations system'.<sup>31</sup> The Court further stated that:

there is no doubt that questions concerning the use of force, the regulation of armaments and disarmament are within the competence of the United Nations and lie outside that of the specialized agencies. Besides, any other conclusion would render virtually meaningless the notion of a specialized agency; it is difficult to imagine what other meaning that notion could have if such an organization need only show that the use of certain weapons could affect its objectives in order to be empowered to concern itself with the legality of such use.<sup>32</sup>

Thus, it was held that the WHO was not competent to deal with the legality of the use of nuclear weapons and could not request an opinion from the Court on the point.

A number of comments can be made about this position of the Court and the reasoning on which it is based. Firstly, the Court's narrow construction of the implied powers of the WHO and of international organizations departs from the Court's own previous jurisprudence. It should be noted that while the jurisprudence of the Court had established that implied powers can only arise by necessary implication and must be essential to the performance of the organization's duties,<sup>33</sup> the requirement of what is essential has been widely interpreted in previous advisory opinions. Eli Lauterpacht has observed that the Court, in determining what is essential to the performance of the functions of the UN for the purpose of implying a power, has not regarded the criterion of essentiality as meaning 'absolutely essential' or 'indispensable'.<sup>34</sup> What the Court has usually looked for is evidence that the power to be implied would enable the Organization to function to its full capacity as expressed in its objects and purposes; in other words that the implied power would promote the efficiency of the Organization.

<sup>29</sup> See *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports (1949), at 182–183: 'Under international law, the Organisation must be deemed to have those powers, which though not expressly provided for in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.'

<sup>30</sup> *WHO Opinion*, ICJ Reports (1996), at 79–81, para. 26.

<sup>31</sup> *Ibid.*, at 80.

<sup>32</sup> *Ibid.*, at 80–81.

<sup>33</sup> See *supra* note 29; see also *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports (1954), at 56.

<sup>34</sup> E. Lauterpacht, 'The Development of the Law of International Organizations by the Decision of International Tribunals', 152 *RdC* (1976, IV) 387 at 430–432, drawing on the differences in the approach of the majority and of Judge Hackworth in the *Reparation for Injuries Advisory Opinion*. See, however, P. H. F. Bekker, *The Legal Position of InterGovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (1994) 82–83, who argues that the words 'necessary' and 'essential' as used by the Court should be applied literally and strictly.



Thus, in the *Reparations for Injuries Opinion*, the Court did not seek to decide whether the UN would be unable to perform its functions if it could not bring a claim on behalf of its agents; rather the Court stated that 'to ensure efficient and independent performance of these missions and to afford effective support to its agents, the Organization must provide them with adequate protection'.<sup>35</sup> In the *Certain Expenses* advisory opinion, the Court stated, in relation to the UN, 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'.<sup>36</sup> In the *Effect of Award of Compensation Made by the United Administrative Tribunal Opinion*, the Court relied on the need to ensure the efficient working of the Secretariat<sup>37</sup> as justifying the power of the General Assembly to set up an Administrative Tribunal, albeit in the context of a provision in the Charter referring to the paramount consideration of securing the highest standards of efficiency, competence and integrity in the employment of staff.<sup>38</sup>

Thus the Court has been rather liberal in implying powers for the UN.<sup>39</sup> It has done so where it can be shown that the power claimed relates to and is directed at achieving the purposes and functions given to the Organization by its constituent instrument. The Court has not sought to imply powers only from expressly given powers or from particular stated provisions of the constituent instrument, but has implied powers by taking into account the general purposes of the Organization and the conditions of international life.<sup>40</sup> Some have even argued that the consequence of this approach is to suggest that international organizations have *inherent powers* to perform any acts which are directed at attaining the aims of the organization.<sup>41</sup> According to this school of thought, the only restrictions on the powers of an international organization are, firstly, to act within their aims and purposes; secondly, to not perform acts which they are expressly precluded from performing; thirdly, to act through the proper organs; and fourthly, the principle that these organizations do not have general inherent jurisdiction over the Member States. Although this *inherent powers* school has been the subject of some criticism,<sup>42</sup> it can be observed that the effect of the theory is in practice

<sup>35</sup> ICJ Reports (1949), at 183.

<sup>36</sup> ICJ Reports (1962), at 168.

<sup>37</sup> ICJ Reports (1954), at 57.

<sup>38</sup> Art. 101(3) of the Charter.

<sup>39</sup> See N. D. White, *The Law of International Organisations* (1996), at 128–131; D. Bowett, *The Law of International Institutions* (1982, 4th ed.), at 338.

<sup>40</sup> Contra, Tunkin, 'Legal Bases of International Organization Action', in R. J. Dupuy (ed.), *A Handbook of International Organizations* (1988), at 265–269, who argues that one cannot imply powers from 'institutional effectiveness' or the objects and purposes of an organization but only from concrete provisions of its constituent instrument.

<sup>41</sup> Seyersted, 'International Personality of Intergovernmental Organizations: Do Their Capacities Really Depend Upon Their Constitutions?', 4 *Indian J. Int'l Law*, (1964) 1, at 19–25; Seyersted, 'United Nations Forces: Some Legal Problems', (1961) 37 *BYbIL* 351 at 453–460; P. Seyersted, *United Nations Forces in the Law of Peace and War* (1966), at 155.

<sup>42</sup> Criticism has been made on the basis that this theory fails to distinguish between those powers which are necessary consequences of international legal personality (and thus possessed by all international organizations) and those powers which must be implied because they are necessary to implement the

the same as the principle utilized by the Court:<sup>43</sup> the purposes of the organization and the effectiveness of its operations in carrying out its functions are the main limiting factors. Action which can be shown to contribute to the fulfilment of those purposes or which would promote the effectiveness of the organization in carrying out its given functions is within the competence of the organization as long as it is not expressly excluded.

The liberality with which the Court has treated the powers of international organizations has not been evident only in relation to implied powers but also in the construction of the express powers of those organizations. As the Permanent Court of International Justice held in the *Jurisdiction of the European Commission of the Danube Advisory Opinion* (referred to in the *Nuclear Weapons Opinion*): '[an international organization] only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of [its given] purpose, but it has power to exercise those functions to their full extent, in so far as the Statute does not impose restrictions on it'.<sup>44</sup>

The wording of the *WHO Opinion* might lead to the conclusion that the Court was applying the same principles as those just referred to. The Court cited some of the cases mentioned above, stated that the powers of international organizations are only limited by the common interests whose promotion the Member States entrust to the organization, and acknowledged that those organizations may exercise their functions to the fullest extent as long as there is no restriction on that exercise.<sup>45</sup> In truth, however, the Court has not been faithful to the established principles. Whilst the Court stated that none of the express functions of the WHO has 'a sufficient connection with the question before it',<sup>46</sup> it is clear that it took a restrictive view of those functions and the level of connection required. By stating that the competence of the WHO is confined to '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',<sup>47</sup> the Court took a restrictive view of the competence of the organization and was not satisfied that the exercise of the power under consideration (to consider the legality of the use of nuclear weapons) would promote the objectives of the organization. The Court confined the competence of the organization to matters that arise *after* an act with debilitating effects on health has occurred. A truly preventive role of the organization is thus ignored by the words emphasized in the quotation above. The organization is apparently debarred from engaging in activity that might lead to the non-occurrence of acts (including the use of nuclear weapons) certain to damage health and can only respond in the light of such events happening. The Court thus

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functions provided for in a particular organization's constitution. See Rama Montaldo, 'International Legal Personality and Implied Powers of International Organizations', 44 *BYIL* (1970) 111, esp. at 118–124.

<sup>43</sup> See White, *supra* note 39, at 133.

<sup>44</sup> PCIJ, Series B, No. 14, at 64, emphasis added.

<sup>45</sup> *WHO Opinion*, ICJ Reports (1996), at 76–79, paras 21–25.

<sup>46</sup> *Ibid.*, at 77, para. 22.

<sup>47</sup> *Ibid.*, at 76, para. 21, emphasis added.

ignores or denies the WHO the possibility of acting to control the use of nuclear weapons. The Court's conclusion would seem to undermine Article 1 of the WHO Constitution, which states that 'the objective of the World Health Organization ... shall be the attainment by all peoples of the highest possible level of health', and Article 2(v), which provides that the organization may 'generally ... take all necessary action to attain the objective of the Organization'. A *full exercise* of the function of the WHO would surely allow it to take action to prevent the occurrence of acts known to be damaging to health. Such action would clearly be taken in furtherance of the objectives of the organization.

Whilst there may be a certain intuitive feeling that the WHO should not be used to engage in political action and that the prevention of the use of nuclear weapons is political, it must be remembered that the ruling of the Court is not only confined to the use of nuclear weapons but extends to 'all hazardous activity'.<sup>48</sup> Thus, the WHO is prevented from dealing with the *legality* of any activity that is dangerous to health. Would this have been the holding of the Court if the question had been whether the WHO is competent to propose a convention banning or restricting the use of narcotic substances or tobacco<sup>49</sup> or outlawing the use of asbestos building materials or prohibiting the use of infected blood in transplants?<sup>50</sup> These examples would suggest that the WHO can engage in activity which 'deals with' the *legality* of hazardous activity where the focus is the prevention of harm to human health. More specifically, it must be remembered that Article 2(k) of the WHO Constitution empowers it 'to propose conventions, agreements and regulations, and make recommendations with respect to international health matters ...'.<sup>51</sup> Can it be said that a convention dealing with the use of a substance or thing that is known to cause significant damage to human health does not deal with a health matter? Such a convention would certainly be action taken for the purpose of attaining the highest possible level of health.<sup>52</sup> The

<sup>48</sup> *Ibid.*

<sup>49</sup> In May 1996, the 49th World Health Assembly adopted a resolution calling on the Director-General of the World Health Organization to initiate the development of an international framework convention for tobacco control. WHA 49.17, *International Framework Convention for Tobacco Control*, The 49th World Health Assembly, 1996. This resolution of the Health Assembly arose out of a recommendation of the Executive Board of the World Health Organization contained in a feasibility study carried out by that body, EB97/INF.DOC./4, *The Feasibility of Developing an International Instrument For Tobacco Control: Report by the Director-General, Executive Board, 97th Session, 30 November 1995*. The feasibility study was requested by the Health Assembly, WHA48.11, *An International Strategy for Tobacco Control*, The 48th World Health Assembly, 1995. The proposed convention would be the first WHO convention. See generally:

<http://www.who.org/programmes/psa/toh/Alert/jul96/E/11.html>

<sup>50</sup> I am grateful to Professor Crawford for raising and discussing this point with me.

<sup>51</sup> Article 19 of the WHO Constitution describes the procedures by which WHO conventions are to be adopted. As at the time of writing, no convention has been adopted under this article.

<sup>52</sup> Of course, it is another question whether the organization, in proposing such a convention, has properly balanced the detrimental health effects of the substance outlawed with other considerations (such as any beneficial effects, the feasibility of achieving prohibition, etc.). These issues would not affect the competence of the organization but would influence the success of the efforts of the organization in terms of whether the proposed convention is adhered to by states.

point, therefore, is that in the sense that the WHO has the capacity to propose treaties dealing with such activity it has the competence to engage in action affecting the *legality* of such activity. The Court would thus appear to be wrong in stating that the organization can only deal with *effects* on health and not with *legality*.

To say that the WHO has some competence to deal with matters touching on the legality of the use of nuclear weapons is not, however, to say that it can deal with all matters relating to the legality of the use of such weapons. The competence argued for here is a limited one: it relates only to the ability to promote treaties directed at controlling the use of nuclear weapons. The WHO would thus not be competent to examine whether a particular state has acted in contravention of international law in using nuclear weapons (unless any treaty specifically gave it that power) or should not be particularly concerned with whether any threatened use or posture is compatible with international humanitarian law. In this respect, the Court is right to state that the competence of the WHO is to address the negative effects of the use (or potential use) of nuclear weapons and that in this task it need not concern itself with whether such use would be lawful or not. However, as a general matter, the organization would not be acting outside its remit in seeking to bring about legal controls on conduct which would have a significant, widespread and direct effect on human health.

The question that may then be asked is whether nuclear weapons are within the same class as other activities detrimental to health, such as those considered above (tobacco smoking, narcotic abuse, use of asbestos materials or infected blood). Would a convention dealing with the legality of nuclear weapons really be a convention dealing with a health matter? It may be asserted that the *raison d'être* of nuclear weapons is defence and that the effect on health is secondary. Weapons are primarily a defence matter and not a health concern. However, a similar assertion would be true of any other human activity affecting health. These activities serve other purposes but are found to have harmful health effects. It is those harmful effects that make those activities also a health concern.

It may also be argued that if it is agreed that the presence of harmful effects on health brings a matter within the competence of the WHO, then an unduly large and inappropriate number of activities would be considered health matters and would thus be subject to WHO regulation.<sup>53</sup> However, it is clear that the WHO has responsibilities in the area of health (including that of proposing conventions) and if a matter is known to have a significant bearing on human health, it is difficult to see how the matter is legally excluded from its scope of consideration. Whether a matter is

<sup>53</sup> See Matheson, *supra* note 6, at 419: 'If the WHO were held to have competence over the legality of nuclear weapons because their use could adversely affect human health, it could also assert the same competence over a wide range of other activities that could affect human health, from the initiation and conduct of conventional wars to the operation of industries that might cause air and water pollution. WHO might just as well have asserted competence to inquire into the legality of the Iraqi invasion of Kuwait because Iraq's conduct of the war caused serious health hazards, or the legality of transfers of nuclear materials of possible proliferation concern because their misuse could cause damage to human health.'

a 'health matter' within the meaning of Article 2(k) should be dependent on whether it has a significant and direct effect on public health. It is clear that the use of many (if not most) nuclear weapons would have a long-lasting effect on human health in a general (i.e. not isolated) manner. Nuclear weapons are different from other weapons in that their use would create a situation (after the event) which directly and significantly threatens the health of those in the area. This threat arises directly from the use of those weapons, not from the resulting destruction. In this sense, it can be said that the use of nuclear weapons is a health matter, even if it is also a matter of great political weight. The WHO would therefore appear competent to propose conventions (under Article 2(k)) concerning nuclear weapons in the same way that it may propose a convention on, say, tobacco control.

Nevertheless, it may be argued that, given that the WHO's focus on the issue is only from one perspective (i.e. health), the question of the use of nuclear weapons may more appropriately be dealt with by other international bodies and should thus not be held to be within the competence of the WHO.<sup>54</sup> This reasoning was supported by the Court when it stated that the competence of the WHO must also be interpreted in the light of the system created by the UN Charter.<sup>55</sup> Whilst it is evidently correct to proceed on the basis of the 'logic of the overall system contemplated by the Charter',<sup>56</sup> one must be clear as to what this logic is. The Court proceeded on the assumption that each specialized agency of the UN has a discrete area of operation separate from that of the other agencies. For the Court, the essence of having specialized agencies is that they each have specialized functions which differ from those of the others. The Court thus assumed that once a function falls within the competence of one specialized agency, it is therefore excluded from the functions of the others. This is evident from the Court's statement that the responsibilities of the WHO are necessarily restricted to the sphere of public health 'and cannot encroach on the responsibilities of other parts of the United Nations system'. The Court continued, '[a]nd there is no doubt that questions concerning the use of force, the regulation of armaments and disarmament are within the competence of the United Nations and lie outside that of the specialised agencies. Besides, any other conclusion would render virtually meaningless the notion of specialised agency ...'<sup>57</sup>

It cannot be correct to suggest that there can be no overlap of functions among specialized agencies or between the UN and the specialized agencies.<sup>58</sup> That legitimate overlap does exist is evident from the constitutions of the specialized agencies as well

<sup>54</sup> See Matheson, *supra* note 6, at 419: '... the WHO request in the *Nuclear Weapons* case disregarded that fact that the main political organs of the United Nations have a far stronger mandate and far greater expertise to deal with the legality of the use of nuclear weapons'.

<sup>55</sup> *WHO Opinion*, ICJ Reports (1996), at 79–81, para. 26.

<sup>56</sup> *Ibid.*, at 80.

<sup>57</sup> *Ibid.*

<sup>58</sup> This point was appreciated by Judge Weeramantry in Part V(2) of his dissenting opinion in the *WHO Opinion*, *ibid.*, at 149–151. For a discussion of this overlap of functions in the health field, see Lee, Collinson, Wolf and Gilson, 'Who Should be Doing What in International Health: A Confusion of Mandates in the United Nations?', 312 *British Medical Journal* (1996) 302.

as from their practice. The Preamble to the Constitution of the International Labour Organisation (ILO) includes among its objectives 'the protection of the worker against sickness, disease and injury arising out of his employment'. This objective takes the ILO into the area of health and overlaps with the competence of the WHO. For its part, the WHO's mandate also seems to fall within that of the ILO in that Article 2(i) of its Constitution states that the functions of the organization include the promotion 'in cooperation with other specialised agencies where necessary, [of] the improvement of nutrition, housing, sanitation, recreation, economic or working conditions and other aspects of environmental hygiene' (emphasis added). There is thus clear overlap in the functions and objectives of the two organizations. In practice, the ILO has proposed various conventions and recommendations dealing with the health of workers.<sup>59</sup> This cannot mean that the WHO is incompetent to deal with health issues affecting workers. Similar overlaps can be found in the work of the International Maritime Organization (IMO) and the United Nations Environment Programme (UNEP, a subsidiary organ of the UN General Assembly) or in the activities of these organizations and the International Atomic Energy Agency (IAEA) in respect of the transport of nuclear fuel by sea. The IMO has formulated a Code for the Safe Carriage of Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Waste in Flasks on Board Ships (INF Code) and the IAEA has also promulgated regulations for the transportation of radioactive material.<sup>60</sup> While it is true that work in this area is being carried out in cooperation by the three organizations, it cannot be said that any one of these organizations could be deprived of competence over this issue solely because it is within the competence of another organization. Care must therefore be taken in construing the powers of one organization based on the powers of another. To do this would be a reversal of the principle that an organization can exercise its function to the full extent as long as its statute does not impose restrictions on it.<sup>61</sup> It would also negate the principle that the limits of the powers of an international organization are a function of the common interests entrusted to that organization.<sup>62</sup>

Indeed, to suggest that one specialized agency cannot encroach on the responsibilities of others might even discourage cooperation among agencies. This would be an unfortunate situation: cooperation among agencies can only enrich their work as it brings different perspectives to the issues. However, the desirability of cooperation should not be taken to affect the legal competence of these organizations. While cooperation should be encouraged in all areas, *legal* competence to address an issue should not be denied an organization on the ground that it would benefit from

<sup>59</sup> See, for example, Convention No. 13: White Lead (Painting), 1921; Convention No. 115: Radiation Protection, 1960, reproduced (with other examples) in *International Labour Conventions and Recommendations: 1918–1981* (1982).

<sup>60</sup> See Fiddell, 'Maritime Transportation of Plutonium and Spent Nuclear Fuel', 31 *International Lawyer*, (1997) 757, referring to *General Conference Resolution on Code of Practice on the International Transboundary Movement of Radioactive Waste*, IAEA (21 September 1990), 30 *ILM* (1991) 556.

<sup>61</sup> *Jurisdiction of the European Commission of the Danube*, Advisory Opinion, PCIJ Series B, No. 14, at 64, quoted in the *WHO Opinion*, ICJ Reports (1996), at 79, para. 26.

<sup>62</sup> *WHO Opinion*, ICJ Reports (1996), at 78, para. 25.

consulting another agency or even that another agency would be better placed to address the question. This is a concern which needs to be taken into account at the political, administrative and technical levels. An organization which does not engage in such necessary consultations might well find itself engaging in activities which remain ineffective. Likewise, an organization which performs acts that are within its competence but which are more squarely within the competence of another organization and would be better handled by that organization is likely to find itself subject to the criticism of Member States.<sup>63</sup> However, this is not to say that the organization is acting *ultra vires*.<sup>64</sup>

The underlying point is that it is wiser to adopt a broad, rather than narrow, construction of the competence of each international organization. Such an approach would allow for a more complete attack on international problems. This broad competence is particularly apposite in a situation where the work of the organization is subject to the approval of Member States (for instance, where the relevant work is the formulation of conventions). In such a situation, the organization's work is still subject to review and the organization cannot adversely affect the rights of a member.

In the *WHO Opinion*, the Court signalled that it will narrowly construe the competence of specialized agencies of the UN, particularly in cases where other organizations are better placed to perform the task sought to be undertaken by the agency in question. The Court seems to have been enticed by the argument that the WHO, in considering the issue of the legality of the use of nuclear weapons, was engaging in 'political' matters lying within the remit of the UN and therefore outside the competence of a specialized agency. That such a matter would have ramifications for the achievement of the objectives of the WHO was not sufficient argument to justify the organization having competence over it. In short, the Court seemed to be saying that specialized agencies should confine their attention to technical and functional matters. As has been noted above, this is a departure from previous cases where the notion of giving full effect to objects and purposes of the organization was paramount. However, those previous opinions of the Court dealt with the UN itself and might thus, in the opinion of some, be distinguishable from the principles that ought to apply to the competence of specialized agencies. This distinction notwithstanding, this writer would argue that the same test ought to be applied to the competence of international organizations and that such test should be one which gives those organizations room to achieve their goals.

To return to the question of whether the WHO was acting within its competence in putting this question to the Court, if one accepts that the WHO has some competence to engage in acts dealing with the legality of nuclear weapons, the issue ought to be whether the question asked was directed at those acts within its competence, for

<sup>63</sup> See White, *supra* note 39, at 148–151, for a discussion of the withdrawal of the US from ILO and the US and UK from UNESCO on the ground that those organizations were engaging in 'political' activity beyond their mandate. See Lee *et al.*, *supra* note 58 for suggestions as to how UN agencies with similar 'formal mandates' (i.e. legal competence) may best sort out who does what in practice.

<sup>64</sup> See *ibid.*, at 150 for the argument that the ILO and UNESCO had not acted *ultra vires* in considering issues considered by some states to be 'political'.

instance promotion of a convention. Thus, if the opinion was requested because it would have helped the WHO develop a strategy for the control of nuclear weapons, it was admissible. On the other hand, if the request was directed at some other purpose unrelated to any actual WHO programme, the request could have been considered inadmissible.

#### 4 Do Organizations Authorized to Request Advisory Opinions Always Have the Competence to Seek Opinions on the Interpretation of their Constituent Instruments?

An equally difficult issue, and one not satisfactorily dealt with by the Court, concerns the competence of the WHO to request an advisory opinion on whether the use of nuclear weapons would be a breach of the WHO Constitution. It is arguable that even if the WHO was not competent to deal with the legality of the use of nuclear weapons under general international law, it was entitled to discuss, and thus to seek an opinion on, whether certain obligations arise for states in relation to such use under its Constitution. Arguably, the interpretation of the constituent instrument of an international organization is always a matter within the functions of that organization; it is thus always entitled to request an advisory opinion from the Court on the point. Of course, this is not to suggest that the Constitution of the WHO does contain obligations for states in relation to the use of nuclear weapons. It is simply to say that the WHO, and indeed its members, were entitled to know whether there were such obligations for Member States. One might go further to argue that the WHO is entitled to seek an interpretation of its Constitution even if the interpretation given would not materially affect the concrete functions to be carried out by the organization. It is clear that if obligations arise for states under the constituent instrument of an international organization, these are still treaty obligations, though their fulfilment might not materially affect the organization's functioning.

The Court, however, took a different view. It held that 'the WHO is not empowered to seek an opinion on the interpretation of its Constitution in relation to matters outside the scope of its functions'.<sup>65</sup> This ruling can prompt a number of possible interpretations. The first is that the Court was implying that interpretation of the constituent instrument of an international organization *does not always lie* within the scope of the functions of the organization. Thus, an organization is not automatically entitled to request an advisory opinion on this matter unless such interpretation would materially affect its work. This construction of the Court's position flows from the fact that Article 96(2) empowers an authorized specialized agency to request opinions on legal questions 'arising within the scope of their activities'. If one takes the view that an international organization is always entitled to interpret its constituent

<sup>65</sup> ICJ Reports (1996), at 82, para. 28. Contra, the statement of Judge Weeramantry in his dissenting opinion: 'I find it difficult also to accept that an organ of the United Nations, empowered to seek an advisory opinion on a question of law, has no competence to seek an interpretation of its own Constitution.' *Ibid.*, at 128–129.



instrument, then this in itself is a matter which validly arises within the scope of its activities. It therefore follows that it may legitimately seek an opinion on the point. Thus, for the Court to deny an organization the power to request an advisory opinion on the matter is to say that interpretation of the constitution *in respect of the question asked* does not validly or properly come within the activities of the organization.

Another construction that can be given to this ruling is that the Court did not dismiss the WHO's request in so far as it related to the WHO Constitution, but rather answered the question in the negative. This is the view of at least two of the dissenting judges. Judge Shahabuddeen stated that, in holding that the WHO has no competence to address the question of the legality of the use of nuclear weapons, the Court

implies a finding that, under the Constitution of the WHO, a Member State has no obligation not to use weapons, such as nuclear weapons, which could result in health and environmental effects, for, if a Member State had such an obligation, the WHO would have had some competence to address a question of the legality of a use of weapons which might have occurred in breach of the constitutional obligation.<sup>66</sup>

This construction of the Court's opinion is based on the view that the interpretation of an international organization's constituent instrument is *always* a matter falling within the activities or within the functions of that organization and that the organization always has *some competence* to address in some way the breach of its constitution. In this view, to say that an organization does not have the competence to address the legality of a particular situation is to say that its constitution has nothing to say on the matter.

The third interpretation that can be given to the Court's opinion is that, whether or not an international organization may be (or is) entitled to interpret its own constitution, this is not the sort of activity referred to in Article 96(2). The activities indicated there are material activities of the organization; activities that have a bearing on the organization's work. Thus, if the legal question that has arisen in the organization does not have a bearing on its work, the organization is not entitled to request an advisory opinion on the matter. According to this interpretation, the mere fact that a legal question may arise as to whether a course of conduct followed by one of its members is consistent with the organization's constituent instrument is not sufficient if the legality of that conduct will not affect the character of action to be undertaken by or within the organization. This interpretation starts from a presumption that the advisory function of the Court in relation to specialized agencies is intended as a means to assist them in the resolution of legal questions which affect

<sup>66</sup> See the dissenting opinion of Judge Shahabuddeen, *ibid.* at 99 and also Judge Weeramantry. "The finding that the matter is "outside the scope of its functions" is itself an interpretation of WHO's Constitution and, in reaching this conclusion, the Court is in effect interpreting WHO's Constitution in response to WHO's request." *Ibid.* at 128. Note that the UK, in addressing the question whether the Court should respond to the WHO request in so far as it dealt with the WHO Constitution, focused its arguments on the fact that the WHO Constitution did not contain any obligations for states with respect to the use of nuclear weapons. In reality, this was an argument on the merits of the request and not on its admissibility. See *Written Statement of the Government of the United Kingdom (WHO Request)*, at 35-40.

their work. The implication is that the advisory function is there to provide those organizations with a means of resolving legal questions on which concrete aspects of their work depend. The question should not be a fanciful one, and it should be one whose answer will materially affect decisions to be taken within the organization. The Court held that the question put by the WHO did not meet these requirements and it was for this reason that the request for an advisory opinion was dismissed. Thus interpreted, the Court's opinion says nothing on the general competence of international organizations to interpret their constitutions. Rather, it only addresses the issue of when they can seek assistance from the Court in the task of such interpretation.

While this third interpretation is probably the one that the Court intended to give, the questions raised by the other two cannot be lightly dismissed. These questions may not have been in the minds of the judges in the majority, but they do nonetheless emerge from the logic of the opinion. Firstly, it is submitted that an international organization is always entitled to interpret its own constitution and that this is itself a valid activity of international organizations. When states create an international institution and accept certain obligations in its regard, it must be assumed that a forum will be established for discussing matters arising in the context of that institution and that the functions of the institution will include discussion of the obligations they have undertaken. The proposition that interpretation of the constituent instrument will first arise within the organization itself was accepted by the International Conference that drew up the United Nations Charter<sup>67</sup> and has been accepted by writers in relation to other international organizations.<sup>68</sup> In particular, Article 75 of the WHO Constitution makes it clear that the Health Assembly is competent to interpret that document.<sup>69</sup> Secondly, it is arguable that an organization always has some competence to deal with breaches of its constitution. This competence may be limited and the steps the organization may take in the event of such breaches may have limited practical effect, but one can say that the breach of an organization's constitution is always a matter within the scope of concern of that organization and always a matter on which the organization can take some action (whatever that action may be).<sup>70</sup> The Court seems to have ignored this possibility. By so doing, the Court's opinion may well have limited the prospect of international organizations obtaining assistance from the Court on a matter (the breach of their constitution) they are entitled to discuss.

The drafting history of the Charter and Statute does not shed any light on the

<sup>67</sup> See 13 UNCTAD, 709–710.

<sup>68</sup> See C. F. Amerasinghe, *Principles of the Institutional Law of International Organisations*, (1996), at. 24–25; H. G. Schermers and N. M. Blokker, *International Institutional Law*, (1995, 3rd ed.), at 845, § 1360.

<sup>69</sup> Art. 75 provides that 'Any question or dispute concerning the interpretation or application of this Constitution which is not settled by negotiation or by the Health Assembly shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement.' 14 UNTS 185, at 202.

<sup>70</sup> The organization may at the very least be competent to call on its Member State to observe the treaty obligation it has under the constitution of the organization.

question whether international organizations are always entitled to request advisory opinions on the interpretation of their constituent instruments. No specific reference is made to the constituent instruments of these organizations in Articles 96(2) of the Charter and 65(1) of the Statute. Indeed, wording which would have expressly referred to the constitutions of these organizations was removed at the San Francisco Conference which drew up the United Nations Charter and the Statute of the Court.

It will be remembered that only the Council and the Assembly of the League of Nations were permitted, by Article 14 of the Covenant of the League, to request advisory opinions; nor did the Statute of the Permanent Court of International Justice contain a provision permitting other international organizations to request advisory opinions of the International Court.<sup>71</sup> At the San Francisco Conference (and even before then<sup>72</sup>) various proposals were therefore made to include a provision in the Charter and Statute which would permit international organizations to request advisory opinions from the Court.<sup>73</sup> The most vigorous advocate of such a provision was the United Kingdom, which proposed that 'suitable provision be made to enable such international organizations as the General Assembly may authorize for the purpose to request advisory opinions on questions of a *constitutional or juridical character arising within the scope of their activities*'.<sup>74</sup> When this proposal was finally accepted in principle by Committee 2 of Commission II of the Conference, the language was the same as in the UK proposal.<sup>75</sup> However by the time the UK draft<sup>76</sup> was approved by the relevant Committee of the Commission on Judicial Organization (Commission IV/1) the language had been slightly modified and the words

<sup>71</sup> Despite the lack of such a provision a number of international organizations (especially the International Labour Organisation) placed requests for advisory opinions of the Court before the Council of the League, which in turn debated the requests and then transmitted them to the Court. See Schwebel, 'Was the Capacity to Request Advisory Opinions Wider in the Permanent Court of International Justice than It Is in the International Court of Justice?', in S. M. Schwebel, *Justice in International Law* (1994), at 27, esp. 32–41.

<sup>72</sup> See the Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice, 10 Feb. 1944, 39 *AJIL* (1945) *supp.*, at 20 *et seq.* See also the proposals made in the United Nations Committee of Jurists, 1945 (also called the Washington Committee of Jurists: this Committee met before the San Francisco Conference): 14 *UNCIO*, at 373, 447 (proposal of Venezuela); *ibid.*, at 182, 319 (proposal of the United Kingdom). See also *ibid.*, at 183, 850. For a fuller treatment of the history of international organizations winning the right to request advisory opinions see, Schwebel, *supra* note 71; S. Rosenne, *The Law and Practice of the International Court* (1965), at 655–658; D. Pratap, *The Advisory Jurisdiction of the International Court* (1972), at 37–44.

<sup>73</sup> See 13 *UNCIO*, at 235, 496 (proposal of Venezuela); 9 *UNCIO*, at 358–359; 12 *UNCIO*, at 88–90 (proposal of the United Kingdom). For discussion of how these proposals were received at the Conference and the eventual adoption of Article 96(2) of the Charter, see Rosenne, *supra* note 72, and Pratap, *supra* note 72.

<sup>74</sup> 9 *UNCIO* 357, at 359; also at 12 *UNCIO* 80, at 90 (emphasis added).

<sup>75</sup> 9 *UNCIO*, at 246–247.

<sup>76</sup> For the formal draft proposed by the UK delegation to carry out the decision reached by Committee II/2 see 13 *UNCIO*, 512. The draft read as follows: 'Such other organs of the Organization, and such specialized agencies brought into relationship with it, as may at any time be authorized thereto by the General Assembly, may also request advisory opinions of the Court on questions of a *constitutional or juridical character arising within the scope of their activities*' (emphasis added).

'constitutional or' had been dropped so that the provision provided that the General Assembly may authorize organs of the UN and specialized agencies to request advisory opinions on 'questions of a juridical character arising within the scope of their activities'.<sup>77</sup> Why this was done is not indicated in the records of the San Francisco Conference.

Nevertheless, the removal of specific reference to the constituent instruments of specialized agencies does not appear to have materially affected the interpretation to be given to Article 96(2). Firstly, there had always been the condition that the question should arise within the scope of the activities of the agency concerned and it is that requirement that would have been most important. Thus, there would still have been the issue of whether the matter arose within the scope of activities of the organization and the question would still have arisen whether all questions of interpretation of an organization's constitution necessarily lay within the scope of that organization's activities.<sup>78</sup> Secondly, the words 'legal questions' include constitutional questions and it might well be for this reason that the specific reference to constitutional questions was removed.

The *WHO Opinion* thus seems to establish that in deciding on the admissibility of a request for an advisory opinion from a specialized agency the Court will not regard as sufficient the fact that such request is for an interpretation of the agency's constituent instrument. The key question here is whether the Court's determination of the question will have a bearing on the work entrusted to that agency (i.e. if any particular function of that agency is dependent on such determination) and whether consideration of the question has been entrusted to the agency. The answer to be given must have some practical effect on what the organization is mandated to do. The Court appears to have excluded from its consideration the proposition that the interpretation of an organization's constitution is part of the organization's mandate. Perhaps it would have been better to make express what Judge Shahabuddeen thought was implied. Perhaps the Court ought to have accepted that the WHO had the competence to request an opinion in so far as it relates to its Constitution, but then hold that the WHO Constitution does not address the legality of the use of nuclear weapons and that the Member States thus have no obligations in that regard under that particular instrument. This would have avoided the unfortunate inference that it is possible for an organization to have no competence to determine whether a certain act would constitute a breach of its constituent instrument.

Alternatively, the Court may have dealt with the request by admitting the competence of the WHO to request an advisory opinion on the interpretation of its Constitution, but then used its discretion to decline provision of the requested opinion. In this case, the ground for rejection of the request would have been that it was not

<sup>77</sup> 13 UNCTAD, 298. The words 'question of a juridical character' were later changed to 'legal questions' (which is what appears in Article 96(2) of the Charter); see *ibid.* at 395.

<sup>78</sup> It might be argued that the words 'arising within the scope of their activities' appears to qualify both constitutional questions and other legal questions, thus suggesting that it was felt that some constitutional questions might not be within the scope of activities of the organization. However, no records can be found of any debates on the wording of this provision.

*bona fide* related to the organization's work, but was instead 'directed to some ulterior purpose'.<sup>79</sup> It is perhaps too early to determine the implications that the Court's holding on this point may have for subsequent requests for advisory opinions brought before the Court or even for the law of international organizations in general.

## 5 Do Requests from the General Assembly Have to Relate to the Work of That Organ?

In the proceedings before the Court a number of states argued that the Court should not respond to the General Assembly's request on the ground that, although Article 96(1) states that the General Assembly and the Security Council are entitled to request advisory opinions on 'any legal question', these organs are not entitled to request advisory opinions on matters unrelated to their work.<sup>80</sup> The argument made was that despite the difference of wording in Articles 96(1) and 96(2), the General Assembly and the Security Council are bound by the requirement in Article 96(2) that requests for advisory opinions may only be on matters within the scope of activities of the requesting organ. This argument was put forward by Kelsen many years ago:

The determination of any organ's jurisdiction implies the norm not to act beyond the scope of its activity as determined by the legal instrument instituting the organ. It is not very likely that it was intended to enlarge, by Article 96, paragraph 1, the scope of the activity of the General Assembly and the Security Council determined by other Articles of the Charter. Hence the words 'arising within the scope of their activities' in paragraph 2 of Article 96 are redundant.<sup>81</sup>

Kelsen's view finds some support,<sup>82</sup> but Judge Rosalyn Higgins<sup>83</sup> has noted that a request for an opinion on a matter outside the scope of activities of the General Assembly or Security Council 'entails no substantive enlargement of the scope of the activity of the requesting organ — merely the seeking of advice'. Indeed, there is no

<sup>79</sup> See G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (1986), at 122. Fitzmaurice states that 'The Court does not consider itself to be directly concerned with the motives and considerations which have inspired any request, but clearly attaches importance to the request being *bona fide* required by the requesting organ for the purposes of its work.' He suggests that 'if the request related to something which had nothing to do with the work of the organ requesting it, and appeared to be directed to some ulterior motive', the Court may consider that 'it would not be acting conformably with its essentially judicial role in answering it'. *Ibid.*, at 122.

<sup>80</sup> *General Assembly Opinion*, ICJ Reports (1996), at 232–233, para. 11. Article 96 of the Charter reads thus:  
1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.  
2. Other organs of the United Nations and 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.

<sup>81</sup> H. Kelsen, *The Law of the United Nations* (1951), at 546.

<sup>82</sup> Prata, *supra* note 72, at 61 and Rosenne, *supra* note 72, at 660. Schwebel mentions this view of Kelsen without expressing disapproval in 'Authorizing the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice', in Schwebel, *supra* note 71 (1994), at 79.

<sup>83</sup> Higgins, *supra* note 7, at 577.

question of 'enlargement' of the competence of these organs if the Charter expressly gives them the right to seek opinions on 'any legal question'. The view against permitting the General Assembly and the Security Council to seek opinions on matters outside the scope of their activities seems to be based on the supposition that those organs would have to discuss the matter in respect of which the advice is sought, and they may not be competent to do so.<sup>84</sup> However, it is possible to separate the request for an advisory opinion from the action to be taken as a result of that opinion. It is quite possible that, as occurred during the period of the League<sup>85</sup> and as has been subsequently advocated, the General Assembly or the Security Council may seek an opinion from the Court at the request of other international organizations. While the General Assembly or the Security Council may not have the competence to discuss the substance of the request, Article 96(1) gives them the right to seek advice which may then simply be passed on to the organ or organization with competence to act on it.

However, this issue proved to be unimportant in the present opinion. The Court avoided this debate altogether by holding that 'the question put to the Court has a relevance to many aspects of the activities and concerns of the General Assembly including those relating to the threat or use of force in international relations, the disarmament process, and the progressive development of international law'.<sup>86</sup> The Court found that the General Assembly had been given responsibility for all these matters by the Charter and the question was one that arose within the scope of the legitimate activities of the General Assembly. In addition, the Court noted that the General Assembly 'has a long standing-interest in these matters'.<sup>87</sup>

## 6 In What Circumstances Should the Court Exercise Its Discretion to Refuse to Render an Opinion Requested of It?

It has long been recognized that even when the Court has jurisdiction to render an advisory opinion, it is not compelled to do so.<sup>88</sup> It lies within the Court's discretion whether or not it will give an opinion asked of it.<sup>89</sup> This discretion is provided for in

<sup>84</sup> However, it may be argued that because Article 13 of the Charter gives the General Assembly the competence to 'initiate studies and make recommendations for the purpose of ... the progressive development of international law and its codification', there is no international legal question that can be outside the purview of the legitimate functions of the Assembly.

<sup>85</sup> See Schwebel, *supra* note 71, at 27, esp. 32–41.

<sup>86</sup> *General Assembly Opinion*, ICJ Reports (1996), at 233, para. 12.

<sup>87</sup> *Ibid.*

<sup>88</sup> See Fitzmaurice, *supra* note 79, at 119–123, 565; Pratap, *supra* note 37, at 142 *et seq.*; Rosenne, *supra* note 72, at 708; K. J. Keith, *The Extent of the Advisory Jurisdiction of the International Court of Justice* (1971), at 142 *et seq.*

<sup>89</sup> It should be pointed out that other courts with power to give advisory (or similar) opinions have similarly held that they have a discretion to refuse to render an opinion in circumstances when it would be inconsistent with the judicial character of the court to render the opinion or where the question is too vague to permit a response. For example, the European Court of Justice has held that it will not answer preliminary references under Article 177 of the EC Treaty where the reference contains an inadequate statement of facts (Joined Cases C-320 to C-322/90, *Telemarsicabruzzo SpA v. Circostel*, [1993] ECR I-393), or where there is no genuine dispute between the parties (Case 104/79, *Foglia v. Novello* (1)

Article 65(1) of the Court's Statute, which provides that 'The Court *may* give an advisory opinion . . .' (emphasis added) and it has been confirmed in the jurisprudence of the Court.<sup>90</sup> Despite this discretion, the Court has also noted that a request for an advisory opinion should not, in principle, be refused.<sup>91</sup> The reason given is that the Court is itself an organ of the United Nations and its response 'represents its participation in the activities of the Organization'.<sup>92</sup> The constitutional relationship between the Court and the United Nations thus ensures that there must be 'compelling reasons' for it not to render an advisory opinion requested of it.

Though the Court had never exercised its discretion to refuse to render an advisory opinion, scholars have suggested circumstances in which the Court should make such a decision. In the opinion of Sir Gerald Fitzmaurice, the Court should refuse to render an opinion:

- i. if the Court felt that it could not do substantial justice in the matter, e.g. because essential facts were lacking which could not be made available to the court by the means at its disposal, or because the question was framed in an ambiguous or tendentious way;
- ii. if the question, though in a sense legal, involved an essentially legislative and non-judicial task, e.g. to make proposals for altering the law on some subject, or for amending a treaty instrument;
- iii. if the request related to something which had nothing to do with the work of the organ requesting it, and appeared to be directed to some ulterior purpose.<sup>93</sup>

No doubt some would have felt that the current request met all these conditions. It was suggested that the circumstances in which nuclear weapons might be used were unclear, that the Court was being asked to play the role of legislator and that it was being asked to involve itself in the political process of disarmament. The Court adopted the following summary of the objections presented to it:

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[1980] ECR 745 and Case 244/80, *Foglia v. Novello* (2) [1981] ECR 3045), or where the interpretation of Community law sought bears no relation to the facts of the main case (Case 126-80, *Salonia v. Poidomani and Giglio* [1981] ECR 1563). See generally, Anderson, 'The Admissibility of Preliminary References', 14 *Yearbook of European Law* (1994) 179, at 189-194 and Barnard and Sharpston, 'The Changing Face of Article 177 References', 34 *CMLR* (1997) 1113, at 1119-1157. For summaries of cases where the Missouri Supreme Court has refused to render advisory opinions requested of it, see Hudson, 'Advisory Opinions of National and International Courts', in M. O. Hudson, *The Permanent Court of International Justice* (1925) 136, at 145-149. The Supreme Court of Canada has likewise exercised a similar discretion to refuse, in certain circumstances, to respond to references made to it, *Reference re Goods and Services Tax*, [1992] 2 SCR 445; *Reference re Legislative Authority of Parliament to Alter or Replace the Senate*, (1979) 102 D.L.R. (3d) 1 at 16-17; *McEvoy v. Attorney General of New Brunswick and Attorney General of Canada* (1983) 148 D.R. (3d) 25, at 27-34.

<sup>90</sup> See, e.g., *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase*, Advisory Opinion, ICJ Reports (1950), at 71-72, where the Court noted that 'Article 65 of the Statute is permissive. It gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request.'

<sup>91</sup> See *The Peace Treaties Advisory Opinion, First Phase*, ICJ Reports (1950), at 71; Fitzmaurice, *supra* note 79, at 565.

<sup>92</sup> *Peace Treaties Case*, ICJ Reports (1950), at 71.

<sup>93</sup> Fitzmaurice, *supra* note 79, at 122.

The question presented is vague and abstract, addressing complex issues which are the subject of consideration among interested States and within other bodies of the United Nations which have an express mandate to address these matters. An opinion by the Court in regard to the question presented would provide no practical assistance to the General Assembly in carrying out its functions under the Charter. Such an opinion has the potential of undermining the progress already made or being made on this sensitive subject and, therefore is contrary to the interest of the United Nations Organization.<sup>94</sup>

#### A. *The Contention That the Question Was Vague and Abstract*

In previous cases, the Court had stated that the contention that it should not respond to a request for an advisory opinion on the ground that the question posed was abstract was 'a mere affirmation devoid of any justification'.<sup>95</sup> The Court had noted the abstract nature of the questions put to it in these cases and held itself entitled to render an opinion. Indeed, in some of those cases the Court seems to have preferred the fact that the questions were abstract and not related to particular facts.<sup>96</sup> As Rosenne noted, the Court seems to have shown a marked tendency 'to treat questions submitted to it for advisory opinions as abstract questions'.<sup>97</sup> With this jurisprudence, it was therefore unlikely that the same contention would in itself be held to prevent the Court from rendering an opinion in the case under consideration.

Nonetheless, there are discernible differences between the questions put before the Court in the present case and those the Court had previously dealt with. This was the first case in which the Court was asked to render an opinion on a legal question that was unconnected to any already existing situation under consideration by the requesting organ. The issue thus arises whether this is the sort of abstract question that the Court had in mind in its prior jurisprudence.

As has been noted on a number of occasions, there are ambiguities in the term 'abstract'.<sup>98</sup> The term may be taken to mean that the question before the Court is unrelated to any present factual situation (i.e. the question is hypothetical). Alternatively, it may be taken to signify that the question is couched in general terms, although relating to an existing situation, and is not specifically directed to that particular matter. In its previous decisions referred to above, the Court seems to have used the term 'abstract' in the latter sense.<sup>99</sup> The questions dealt with by the Court in

<sup>94</sup> *General Assembly Opinion*, ICJ Reports (1996), at 236, para. 15. The Court was quoting from the Written Statement of one of the states that presented arguments to the Court.

<sup>95</sup> *Conditions of Admission of a State to Membership of the United Nations (Article 4 of the Charter)*, Advisory Opinion, ICJ Reports (1947–1948), at 61. This statement was approved in other advisory opinions of the Court: see *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports (1954), at 51; *Namibia Advisory Opinion*, ICJ Reports (1971), at 26, para. 40.

<sup>96</sup> Indeed, the suggestion has even been put forward by some that all requests for advisory opinions ought to be couched in abstract terms. See, Judge Azevedo in the *Admissions Advisory Opinion*, ICJ Reports (1948), at 73–75 and the *Peace Treaties Advisory Opinion*, ICJ Reports (1950), at 79. However, others have noted that problems are likely to arise from such a requirement. See Fitzmaurice, *supra* note 79, at 574–575, Keith, *supra* note 88, at 62–74.

<sup>97</sup> Rosenne, *supra* note 72, at 705.

<sup>98</sup> See Fitzmaurice, *supra* note 79, at 574; Pratap, *supra* note 88, at 172.

<sup>99</sup> *Ibid.*



those proceedings were certainly related to factual matters then under examination in the requesting organ. Nevertheless, the questions put to the Court did not specifically refer to those matters. They were couched in general terms. The Court therefore did not have to comment on the specific factual situations leading to the request (though it sometimes interpreted those questions in such a way as to bring them closer to the necessities of the situation<sup>100</sup>) but could give general advice which was nonetheless applicable to those situations.

Despite this difference, the Court simply applied its prior jurisprudence and thus dismissed the objection advanced.<sup>101</sup> In my view, this is unobjectionable. If the Court deals with a request framed in abstract terms, though related to an existing situation, and in doing so does not even comment on the situation itself, there seems to be no reason why it should not respond to a request relating to a potentially factual situation. To decide otherwise would be to presume that the sole function of the advisory jurisdiction of the Court is the settlement of specific disputes that have arisen in the requesting organ. This is not the case, the function of the advisory jurisdiction is the provision of legal advice to the requesting organ.<sup>102</sup> The Court should not generally inquire into the purpose of that advice as long as — in the case of organs other than the General Assembly and Security Council — the advice relates to a matter within the competence of the requesting organ.<sup>103</sup> With respect to the General Assembly, this is particularly inappropriate as that organ is responsible for the progressive development of international law. In relation to the present opinion, the Court stated that:

<sup>100</sup> See Keith, *supra* note 88, at 62–68.

<sup>101</sup> *General Assembly Opinion*, ICJ Reports (1996), at 236–237, para. 15.

<sup>102</sup> It should be noted that when the Statute of the Permanent Court of International Justice was being drafted it was clearly envisaged that some of the advisory opinions that would be requested of the Court would pertain to questions which do not relate to a dispute that had already arisen. Indeed, the Advisory Committee of Jurists that initially prepared the Statute sought to make special provision for such a request. See Art. 36 of the Committee's draft Statute:

The Court shall give an advisory opinion upon any question or dispute of an international nature referred to it by the Council or Assembly.

When the Court shall give an opinion on a question of an international nature which does not refer to any dispute that may have arisen, it shall appoint a special Commission of from three to five members.

When it shall give an opinion upon a question which forms the subject of an existing dispute, it shall do so under the same conditions as if the case had been actually submitted to it for decision.

The reason given for the special provision for opinions on abstract questions was that in such cases 'the Court must be so constituted that the opinion given in the abstract upon the theoretical question, does not restrict the freedom of its decision, should the question come before it later in practice and no longer as a theoretical problem, as a concrete case and not merely in the abstract.' Report of the Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee*, 693, at 730–731. Article 36 was deleted from the Statute in its entirety when the Statute was considered by the Assembly of the League. See Hudson, 'Advisory Opinions of National and International Courts', 37 *Harvard Law Review* (1924) 970, at 986–988, reprinted in Hudson, *supra* note 89, at 154–155.

<sup>103</sup> Of course, if the provision of advice were to contravene some other principle, such as that laid down in the *Eastern Carelia* case, PCIJ Series B, No. 5, the Court ought to refuse to render the opinion. See *supra* note 10.

It is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs.<sup>104</sup>

The Court went further to say that it 'will not have regard to the origins, or to the political history of the request or to the distribution of votes in respect of the adopted resolution'.<sup>105</sup> Furthermore, it is not for the Court to decide upon the effects that an advisory opinion will produce in the international community. That is essentially a political assessment which is up to the requesting organ to make. In all probability, the Court will not be in a position to make such assessment. Thus, the argument that the opinion to be rendered by the Court would adversely affect disarmament negotiations was dismissed by the Court.<sup>106</sup> The Court noted that there are varying views on the effect its conclusions might have and 'the effect of the opinion is a matter of appreciation'.<sup>107</sup>

Notwithstanding these comments, there might be situations where the Court should exercise its discretion not to render an advisory opinion on an abstract question. This would be the case where the nature of the matter is such that the opinion to be given is dependent on certain facts, and the facts available to the Court are insufficient for the proper formulation of a legal opinion. There may also be cases where the legal answer to a question may be dependent on the circumstances of the case. In providing an opinion in such cases, the Court is bound to consider the *types of situations* (as opposed to specific situations) in which the legal question might arise. If these are reasonably within the perception of the Court there seems to be nothing to prevent the Court from examining the matter. Thus the fact that the Court might have to speculate on potential situations does not in itself appear to be a bar to the exercise of the advisory jurisdiction of the Court.

However, for situations where it may not be possible to foresee all the circumstances that may arise or where material facts are not available to the Court, the Court may decide whether to refuse to render an opinion.<sup>108</sup> In contentious cases, the Court has stated that the responsibility of establishing a fact lies with the party that is relying on

<sup>104</sup> *General Assembly Opinion*, ICJ Reports (1996), at 237, para. 16.

<sup>105</sup> *Ibid.* Judge Oda, the only dissenting judge on the question whether the Court should respond to the request of the General Assembly, took the view that it was permissible to inquire into the motives of the General Assembly in requesting the opinion and the political history of the request. In his view, the General Assembly was in fact seeking the endorsement of a position (that the use of nuclear weapons was illegal in all circumstances) and not asking a genuine question, *ibid.*, at 330 *et seq.*, esp. paras 3, 25 and 43 of his opinion. Also, there was no consensus in the Assembly on the adoption of the opinion. He held that these circumstances, together with the fact that the question was unrelated to any concrete dispute or concrete problem awaiting a practical solution (paras 50–51) and the fact that, in his view, the question was vague (paras 2, 4 and 43) should have led the Court to exercise its discretion to refuse to answer the question put to it.

<sup>106</sup> *Ibid.*, at 237, para. 17.

<sup>107</sup> *Ibid.*

<sup>108</sup> See Frankfurter, 'A Note on Advisory Opinions', 37 *Harvard Law Review* (1924) 1002, who argued against proposals to allow the United States Supreme Court to render advisory opinions on constitutional questions (in advance of legislation). Frankfurter argued that such advisory opinions were unsuitable for

it. In the event that the party is unable to do so, its contention fails.<sup>109</sup> However, the advisory procedure is not adversarial and the Court is not seeking to vindicate one position or the other. Rather, it is only trying to ascertain what the law is. Where it cannot do so 'because essential facts were lacking which could not be made available to the Court by means at its disposal',<sup>110</sup> the Court is perfectly entitled to refuse to render an opinion, or at least to refuse to speculate on what the law might be in those particular areas. The Permanent Court of International Justice stated as much in the *Eastern Carelia Opinion*. In that case, the probability that essential facts would not be brought before the Court, on account of Russia's non-participation in the proceedings, was one of the reasons (in addition to the lack of Russian consent) why the Permanent Court refused to render the opinion sought.<sup>111</sup>

It was argued that the present case fell into this category. The Court, it was held, would have to contemplate various scenarios in which nuclear weapons might be used, study various types of nuclear weapons and evaluate complex and controversial technological, scientific and strategic information. The Court, however, held that this would not be necessary. It would 'simply address the issues arising in all their aspects by applying the legal rules relevant to the situation'.<sup>112</sup> It therefore dismissed this objection. But this holding of the Court assumes what it had been asked to decide. The Court speaks of addressing the issues *in all their aspects* and applying rules *relevant to the situation*, though the contention is precisely that it would be difficult to identify all the aspects of the situation. In its conclusion, however, the Court seemed to suggest that it could not deal with all the aspects of the case; in operative paragraph E it held that 'in view of the current state of international law, and of the element of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake'.

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constitutional questions because in his view the interpretation of many constitutional phrases (such as 'due process' and 'liberty') are dependent on the facts to which such phrases are to be applied. 'They derive meaning only if referred to adequate human facts. Facts and facts again are decisive' (at 1005). Since there would not be (and cannot be) adequate consideration of particular facts in the advisory opinions under consideration, the danger arises that the Court would be forced to make a decision based on considerations which may later be proved wrong in the light of later known facts. For him it would be better to hammer out these constitutional issues on a case-by-case basis. 'The accidents of litigation may give time for the vindication of laws which *a priori* may run counter to deep prepossessions or speculative claims of injustice' (at 1005).

<sup>109</sup> See *Military and Paramilitary Activities in and against Nicaragua (Jurisdiction and Admissibility) Nicaragua v. United States of America*, ICJ Reports (1984), at 437, para. 101: 'Ultimately, however, it is the litigant seeking to establish a fact who bears the burden of proving it; and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved ...'

<sup>110</sup> Fitzmaurice, *supra* note 93. In *Reference Re Legislative Authority of Parliament to Alter or Replace the Senate*, (1979) 102 D.L.R. (3d) 1, at 16-17, the Supreme Court of Canada declined to answer certain questions put to it because those questions could not be properly answered in the absence of a factual context. In *McEvoy v. Attorney General of New Brunswick and Attorney General of Canada*, (1983) 148 D.L.R. (3d) 25, at 27-24 (Supreme Court of Canada) that Court examined the circumstances in which it may decline to answer questions referred to it. See also *Reference re Secession of Quebec*, *supra* note 22, paras 30-31.

<sup>111</sup> PCIJ, Series B, No. 5, at 28.

<sup>112</sup> *General Assembly Opinion*, ICJ Reports (1996), at 237, para. 15.

To conclude on this point, it is permissible for the Court to speculate on various ‘scenarios’ in its advisory jurisdiction if this is necessary for an elucidation of the applicable legal rules. However, where it is not possible to foresee all the situations that may arise and the Court is in danger of giving an incomplete answer which could be misconstrued, the Court may decide not to render an opinion. Alternatively, the Court may render an opinion on the points which are clear and decline to give an opinion on those aspects which remain unclear; this is in fact the approach that the Court took in relation to the General Assembly’s request when it stated that the factual elements at the Court’s disposal prevented it from reaching a definitive conclusion. Where the facts to be taken into account by the Court do exist (such as the complex technological, strategic or scientific information that the Court was said to have needed to consider in the present case) but are not placed before the Court, the Court may similarly be compelled to decline to render an opinion.

### ***B The Contention That the Court Would Be Going beyond Its Judicial Role***

In the proceedings before the Court, it had been contended that the Court would have to play a legislative role.<sup>113</sup> It was argued that any decision made by the Court under the circumstances would be one that made the law rather than interpreted it. It is no doubt true that even when engaged in its advisory procedure, the Court remains a judicial organ and is bound by general rules as to its judicial character. This has been emphasized both by the Permanent Court and by the present Court. In the *Eastern Carelia* case, the Permanent Court stated that:

The Court, being a Court of justice, cannot, even in advisory opinions, depart from the essential rules guiding their [*sic*] activity as a Court.<sup>114</sup>

So too the ICJ stated in the *ILO Administrative Tribunal Opinion* that:

The Court is a judicial body and, in the exercise of its advisory functions, it is bound to remain faithful to the requirements of its judicial character.<sup>115</sup>

Nevertheless, it must be borne in mind that even though it is often maintained that the judicial function is to interpret and apply rather than to make the law, it does to some extent encompass a law-making function.<sup>116</sup> The ascertainment, interpretation and application of a legal rule to particular facts require a certain amount of creativity,

<sup>113</sup> See, e.g., the *Written Statement of the Government of the Federal Republic of Germany* (General Assembly Request), where it was contended that ‘The Court would be forced to overstep the bounds of its function as the “principal judicial organ” of the United Nations (Article 92 of the Charter). Because of its judicial function, the Court is obliged to respect the law-making, in a sense “legislative” prerogative of States’ (at 4).

<sup>114</sup> PCIJ, Series B, No. 5, at 29.

<sup>115</sup> ICJ Reports (1956) 77, at 84.

<sup>116</sup> See Cappelletti, ‘The Law-Making Power of the Judges and Its Limits’, 8 *Monash Univ. L. Rev.* (1981) 15, reprinted in M. Cappelletti, P. J. Kollmer and J. M. Olson, *The Judicial Process in Comparative Perspective*, (1989), at 3. See also H. J. Abraham, *The Judicial Process*, (1993, 6th ed.), at 316–323.

which in itself justifies the assertion that judges are also law-makers.<sup>117</sup> The judicial function includes the ascertainment of general principles, the elucidation of the meaning of those principles and the circumstances in which they apply, and even the refinement and development of these principles in the light of societal circumstances. In so doing, the judge may legitimately be said to be fashioning (or making) the law that he or she is applying. This is particularly true in a system of customary law where it is precisely the function of the judge to evaluate the conduct of the relevant players in society and to attempt to construct a legal norm that has developed from that conduct.

However, despite this creative role assumed by judges in constructing legal norms and interpreting them, there are differences between judges and legislators. In the first place, it is usually the case that a court is constrained to reach a decision on the basis of particular sources that are recognized as authoritative. Thus, the judge can use discretion in weighing those sources and extracting principles and rules from them, but it is a limited discretion. In contrast, the legislator is entitled to create legal rules without basing them on any prior recognized sources. Some, including Cappelletti, have pointed out that this substantive limit to the judicial power is not a *conditio sine qua non* for the judicial process and judges are at times allowed to reach decisions that are not based on pre-existing substantive law.<sup>118</sup> In relation to the International Court, however, this limitation is present as Article 38 of its Statute emphasizes that the Court's 'function is to decide in accordance with international law' and the provision sets out the sources it may look to.<sup>119</sup> The Court may only give decisions *ex aequo et bono* where the parties agree.<sup>120</sup>

Cappelletti has also identified three differences of a procedural character between the judge as law-maker and the legislator. The judicial process is characterized by (i) its connection with cases and controversies, hence with 'parties'; (ii) the impartiality of the judge and; (iii) the fact that the judicial process is not initiated by the judge.<sup>121</sup> While the first criterion is not present in advisory proceedings, the other two clearly are. Furthermore, the Court is bound to use the same techniques in ascertaining the law in its advisory function as it uses in its contentious jurisdiction. Thus, the Court will be acting as legislator no more than when it acts in its contentious jurisdiction. It

<sup>117</sup> Lord Diplock (of the British House of Lords) once stated that 'Courts by the very nature of their functions are compelled to act as legislators', see 'The Courts as Legislators', in B. W. Harvey (ed.), *The Lawyer and Justice* (1978) 263, at 279 quoted by Cappelletti, *supra* note 116, at 31. See also Justice Holmes (of the United States Supreme Court) in *Southern Pacific Company v. Jensen*, 244 US 205; 61 L. ed 1086, 'I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.' *Ibid.* at 221 and 1100 respectively. Quoted in Abraham, *supra* note 116. Note that in Cappelletti's opinion, courts can be *law-makers* but they are not *legislators*. See later for this distinction.

<sup>118</sup> Cappelletti, *supra* note 116, at 7.

<sup>119</sup> Note that this provision is specifically directed at contentious cases. However, Article 68 of the Statute provides that 'In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognises them to be applicable.'

<sup>120</sup> Article 38(2) of the Statute.

<sup>121</sup> Cappelletti, *supra* note 116, at 31-32.

will be remembered that Fitzmaurice regarded the fact that the Court might be asked to act in a legislative capacity as one of the circumstances in which the Court ought not to render an opinion.<sup>122</sup> However, his concern seemed to be that the Court should not be asked to involve itself in an explicit act of law reform, such as ‘to make proposals for altering the law on some subject, or for amending a treaty instrument’.

In the present case, the Court was not required to do anything other than it would otherwise do in its normal processes of ascertaining what the law is. It had to base its conclusions on the recognized sources of international law. It could not suggest what an ideal rule would be, but was bound to use its usual analytical processes to ascertain what the law is. Thus the Court held that:

It is clear that the Court cannot legislate, and, in the circumstances of the present case, it is not called upon to do so. Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons. The contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present *corpus juris* is devoid of relevant rules in this matter. The Court could not accede to this argument; it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.<sup>123</sup>

## 7 Conclusion

The *Nuclear Weapons* opinions go some way toward clarifying the extent of the advisory jurisdiction of the International Court. In deciding to respond to the request of the General Assembly, the Court has shown that the most important factor relating to a request from that body is whether the Court is able to furnish an answer to the request on the basis of rules and principles of law that can be derived from admittedly authoritative sources. Whenever a request emanates from the General Assembly, it is not up to the Court to judge the political significance of the issue or to seek to examine the political effect that the opinion of the Court might have. Furthermore, it must be recognized that while the General Assembly does not possess coercive powers, it has a broad mandate to deliberate on matters of international concern and it also has a mandate in relation to the codification and progressive development of international law. A request from this body should only be dismissed in very exceptional circumstances. However, the Court must be careful that the circumstances permit it to provide an answer to the question asked. By this, I do not refer to the political circumstances but to the nature of the question posed and the issue of whether the question is one that the Court is able to answer in the light of the information before it. Thus, while the Court is able to respond to requests for advisory opinions on abstract

<sup>122</sup> *Supra* note 93.

<sup>123</sup> *General Assembly Opinion*, ICJ Reports (1996), at 237, para. 18. See also the *Fisheries Jurisdiction Case (U.K. v. Iceland)*, ICJ Reports (1974), 3 at 23–24, para. 53; and *Fisheries Jurisdiction Case (Fed. Rep. of Germany v. Iceland)*, ICJ Reports (1974) 175, at 192, para. 45, ‘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’.

questions, the Court has a duty, before delivering such an opinion, to ensure that it has sufficient facts at its disposal and that the nature of the question is such that it can be answered in the abstract.

With respect to the request from the WHO, the Court has reaffirmed that requests from specialized agencies must relate to matters within the mandate of those organizations. However, in assessing what is within the competence of international organizations, the Court has adopted a very restrictive test. It has departed from its previous jurisprudence and is no longer satisfied only on the basis of proof that the power being claimed is related to the purposes of the organization and would allow a full achievement of its objectives. In addition, the Court appears to have unduly limited the right of specialized agencies to request opinions on the interpretation of the constituent instruments of those organizations.

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