

# **Advisory Jurisdiction of the ICJ**

## **The WHO Case: Implications for Specialized Agencies**

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## INTRODUCTION

On 8<sup>th</sup> of July, 1996 the International Court of Justice<sup>1</sup> handed down long awaited decisions<sup>2</sup> in the requests from the World Health Organization<sup>3</sup> and the United Nations General Assembly<sup>4</sup> for '**advisory opinions**' on the legality of the use of nuclear weapons. In its 'Advisory Opinion' on the request from the General Assembly, the ICJ ruled, by the narrowest of majorities, that the threat or use of nuclear weapons '*would generally be contrary to the rules of international law applicable in armed conflict*' subject to one apparent exception.<sup>5</sup> However, the ICJ declined to give the 'Advisory Opinion' requested by the WHO Assembly.

The opinion of the ICJ refusing the request of the WHO Assembly has understandably attracted less interest than the Court's 'Advisory Opinion' in reply to the request of the General Assembly, as it is limited to the question of the competence of the WHO to request an advisory opinion. Nevertheless, the ICJ's opinion in the WHO case raises a number of important issues regarding the interpretation of the constitution of international organizations and the role of specialized agencies within the UN system. This paper mainly examines the 'Advisory Jurisdiction' of the ICJ, the competence of the WHO to request for an 'Advisory Opinion', the ICJ's decision to reject the WHO's request and the possible repercussions of the ICJ's decision.

## 'WHO' COMPETENCE TO REQUEST ADVISORY OPINIONS

The following question was put forth by the WHO to the International Court of Justice:

- **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?**

It is imperative to examine the WHO's competency for any request to the ICJ in order to specifically understand the '*legal position*' in reference to the aforementioned WHO's request for an advisory opinion from the ICJ.

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<sup>1</sup> Hereinafter referred to as 'ICJ'.

<sup>2</sup> See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports, 1996.

<sup>3</sup> Hereinafter referred to as 'WHO'.

<sup>4</sup> Hereinafter referred to as 'UN General Assembly'.

<sup>5</sup> *International Law, The International Court of Justice and Nuclear Weapons*, Laurence Boisson De Chazournes and Philippe Sands (Ed.), 1999 at 1.

## **A. ARTICLE 96, PARAGRAPH 2 OF THE UNITED NATIONS CHARTER**

Article 96, paragraph 2 of the United Nations Charter states:

**"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."**

The wording of the paragraph has been viewed to give the specialized agencies a "general" authorization to ask for advisory opinions from the court at any time, as long as the request falls within the scope of the activities of the specialized agencies. In order to clarify the "general" authorization conferred on the specialized agencies by the General Assembly, a resolution was adopted authorizing the Economic and Social Council (ECOSOC) "*to request advisory opinio<sup>6</sup>ns of the International Court of Justice on legal questions arising within the scope of the activities of the Council.*"<sup>7</sup>

Agreements between the ECOSOC and the specialized agencies granted the WHO authority to ask for advisory opinions from the ICJ.<sup>8</sup> The WHO has previously used this power only once, concerning the interpretation of the 1951 WHO-Egypt Treaty.<sup>9</sup> In that case, the WHO wanted to move its Eastern Mediterranean Regional Office from Alexandria, Egypt, to Amman, Jordan, due to the Accords Egypt had signed with Israel at Camp David. The ICJ advised that the Eastern Mediterranean Regional Office could be transferred regardless of the Accord, but the WHO had to give Egypt reasonable notice of the transfer and negotiate in good faith to minimize Egypt's resulting damages. In 1981, as a result of the advisory opinion, the WHO adopted a resolution and moved its office.<sup>10</sup>

## **B. THE AGREEMENT BETWEEN THE UNITED NATIONS AND THE WHO**

Article X, Paragraph 2 of the '**Agreement between the United Nations and the**

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<sup>6</sup> Strahan, Martin M., "Nuclear Weapons, The World Health Organization, And The International Court Of Justice: Should An Advisory Opinion Bring Them Together?", *Tulsa Journal of Comparative and International Law*, 1995.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> The advisory opinion, requested by the WHO in 1980, was only the third advisory opinion ever requested by a United Nations specialized agency and the first one requested by the WHO. See generally Wintermeyer, Charles A., Jr., "ICJ Advisory Opinion: 1951 WHO-Egypt Treaty", *10 DENV. J. INT'L L. & POL'Y*, 1980.

<sup>10</sup> Wintermeyer, Charles A., Jr., "ICJ Advisory Opinion: 1951 WHO-Egypt Treaty", *10 DENV. J. INT'L L. & POL'Y*, 1980.

WHO',<sup>11</sup> which was approved by the United Nations General Assembly on November 15, 1947, and by the Health Assembly on July 10, 1948<sup>12</sup>, addresses the relationship between the United Nations and the WHO.

Article X, Paragraph 2 of the Agreement contains authorization from the General Assembly allowing the WHO to request advisory opinions from the ICJ on "**legal questions arising within the scope of its competence other than questions concerning mutual relationships of the Organization and the United Nations or other specialized agencies.**"

Although Article X, paragraph 2 of the Agreement appears to be a restatement of Article 96, paragraph 2 of the United Nations Charter, there is an important distinction. While the UN Charter expressly allows specialized agencies to request advisory opinions arising within the "*scope of their activities*", the Agreement limits requests for advisory opinions from the WHO to questions arising within the "*scope of its competence*".

Though the distinction may to be seemed small but it is of much significance as "*scope of their activities*" may be viewed as a much broader description than "*scope of its competence*."<sup>13</sup> Thus, while the United Nations Charter allows specialized agencies to request advisory opinions regarding any pursuit in which the agency is active, the Agreement limits the WHO's request to areas in which it is duly qualified<sup>14</sup>.

### **C. ARTICLE 76 OF THE WHO CONSTITUTION**

The final authority that must be reviewed to determine the competence of the WHO is Article 76 of the WHO Constitution. Article 76 of the WHO Constitution is a simple restatement of the Agreement between the United Nations and the WHO governing the WHO's ability to ask for an advisory opinion from the ICJ.<sup>15</sup>

*'However, the Constitutional version of the ability to request an advisory opinion is based on the wording of the Agreement not on the wording of the Charter.'*<sup>16</sup> Thus, requests for advisory opinions are limited to legal questions arising within the "*competence*" of the WHO.

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<sup>11</sup> Hereinafter referred to as the 'Agreement'.

<sup>12</sup> See Agreement Between the United Nations and the World Health Organization, Nov. 12, 1948, U.N.-W.H.O., 19 U.N.T.S. 193.

<sup>13</sup> See The *Black's Law Dictionary* which defines the word "*Competent*" as: "Duly qualified; answering all requirements; having sufficient capacity, ability or authority.." and the word "*Activity*" as "An occupation or pursuit in which [a] person is active."

<sup>14</sup> *Supra* note 6.

<sup>15</sup> *Supra* note 10.

## DISCRETIONARY FUNCTION OF THE ICJ AND ADVISORY OPINIONS

While the ability of the WHO to request an advisory opinion is unquestionable, it is not absolute with respect to the kinds of questions it may pose.<sup>17</sup> Furthermore, it must also be noted that the ICJ, which heard its first dispute in 1947, retains the discretion to decide whether it will give an advisory opinion.<sup>18</sup>

There are several factors that the ICJ considers while deciding to give an advisory opinion. **First**, it is necessary to consider the circumstances under which the ICJ will refuse to give an advisory opinion. The relevant grounds for refusal are: "**the 'political' nature of the question posed, . . . the 'abstract' nature of the question, . . . [And] the absence of consent on the part of a state immediately concerned.**"<sup>19</sup>

The ICJ is seldom asked for advisory opinions<sup>20</sup> and has seldom refused to give an advisory opinion. However, the *Permanent International Court of Justice* set the precedent for refusing to give an advisory opinion. In the case of *Eastern Carelia*, the PCIJ refused to give an advisory opinion due to "*non membership in the League of one of the disputants and that disputant's failure to agree to, or be represented in, the proceedings of the Court.*"<sup>21</sup>

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<sup>16</sup> *Supra* note 10.

<sup>17</sup> The WHO may ask the ICJ for advisory opinions "arising within the scope of its competence other than questions concerning mutual relationships of the Organization and the United Nations or other specialized agencies." See the Article X, Paragraph 2 of the Agreement Between the United Nations and the World Health Organization.

<sup>18</sup> Pomerance, Michla, *The Advisory Function Of The International Court In The League And U.N. Eras*, 1973 at 281 **cited in** Liz Heffernan, "The Nuclear Weapons Opinions: Reflections On The Advisory Procedure Of The International Court Of Justice", *Stetson Law Review*, 1998.

<sup>19</sup> *Id.*

<sup>20</sup> Schwebel, Stephen M., "Widening the Advisory Jurisdiction of the International Court of Justice Without Amending Its Statute", 33 *CATH. U. L. REV.*, 1984. **Stephen M. Schwebel** states that "*It is a reflection of the intensely political character of the Security Council and the General Assembly that they have resorted to the Court under paragraph one of article 96 only fourteen times between 1946 and 1983 and that, for their part, the numerous specialized agencies of the United Nations have had recourse to the Court only three times in all. In contrast, the Council of the League of Nations has made requests to the Permanent Court of International Justice, which, in about half that period, resulted in twenty-seven advisory opinions.*"

<sup>21</sup> See *The Status of East Carelia* (Fin. v. U.S.S.R.), 1923 P.C.I.J. (Ser. B), No. 5, July 23 as **cited in** Schwebel, Stephen M., "Widening the Advisory Jurisdiction of the International Court of Justice Without Amending Its Statute", 33 *CATH. U. L. REV.*, 1984. In *Eastern Carelia*, the League of Nations Council requested an advisory opinion from the Permanent Court of International Justice as to whether the 1920 Peace Treaty between Finland and Russia, and an annexed Russian Declaration regarding the autonomy of Eastern Carelia, placed Russia under an obligation to Finland to carry out the provisions contained therein. Russia, then not a member of the League of Nations, refused to participate when the matter came before the PCIJ. The Court, reasoning that no nation could be required without its consent to submit to a specific settlement found it "impossible to give its opinion on a dispute of this kind."

## THE WHO CASE AND THE DECISION OF THE ICJ

As has been outlined earlier, in the past the ICJ had identified certain conditions which must be satisfied in order to exercise its advisory jurisdiction upon a request submitted by a specialized agency, namely, the agency had to be authorized to request opinions in general; the question on which the opinion was to be based must be a legal one; and the question must be one arising within the scope of the requesting agency's activities.

Applying these conditions to the WHO request, the ICJ found that while the first two conditions had been met, the third had not been satisfied. The ICJ found that, as a general matter, the WHO is empowered by its Constitution to request opinions of the ICJ.<sup>22</sup> In addition, the actual question posed by the WHO was deemed to be a legal one. Nevertheless, the ICJ determined that the question did not come within the WHO's area of competence.<sup>23</sup> On this basis, it declined to render an advisory opinion.

The field of activity or the area of competence of an international organization is determined principally by reference to its constituent instruments,<sup>24</sup> in this case, the WHO Constitution. While acknowledging the special characteristics of the constituent instruments of international organizations, the ICJ noted that such instruments are subject to the well-established rules of treaty interpretation as expressed in *Article 31* of the *1969 Vienna Convention on the Law of Treaties*.<sup>25</sup> Applying such rules, the ICJ concluded that although the subject of nuclear weapons implicated the WHO mandate in a general sense, the actual request fell outside the scope of its activities.<sup>26</sup> The WHO is authorized to deal with the effects hazardous activities have on health.<sup>27</sup> However, the WHO's request for an advisory opinion did not relate to the effects of the use of nuclear weapons on health, it related to the legality of such use, merely taking into account health and environmental effects.<sup>28</sup> The ICJ concluded that, regardless of the effects of the use of nuclear weapons, the WHO's competence to deal with those effects is not dependent on the legality of the precipitating acts.<sup>29</sup>

The ICJ bolstered its conclusion by considering the WHO's role in the UN family. It

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<sup>22</sup>See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Request of the World Health Organization), Advisory Opinion, ICJ Reports, 1996. (See Appendix).

<sup>23</sup>*Id.*

<sup>24</sup>*Supra* note 6.

<sup>25</sup>*Supra* note 22.

<sup>26</sup>*Supra* note 22.

<sup>27</sup>*Supra* note 22.

<sup>28</sup>*Supra* note 22.

<sup>29</sup>*Supra* note 22.

recalled the principle of '*speciality*' to underscore the fact that, as a specialized agency, the WHO is an organization of a particular kind, invested with sectoral power within the UN system. Restricted to the sphere of public health, the WHO's responsibilities do not extend to questions concerning the use of force and the regulation of armaments and disarmament which lie within the competence of the UN.<sup>30</sup>

## CRITIQUE OF THE ICJ'S DECISION

The decision of the ICJ in the WHO case, which has been perceived to be of a broader interest, has generated a lot of debate in the academic circles. While some international scholars have considered the Court's decision to be a positive result<sup>31</sup> others have considered the same to be backward step in the development of international law in relation to specialized agencies.<sup>32</sup> The Court's decision has been mainly criticized on two grounds, namely the '*static interpretation*' given to the WHO Constitution and restricted interpretation given to the scope of the WHO activities.

### A. '*STATIC INTERPRETATION*' OF THE WHO CONSTITUTION

In determining whether the WHO had the competence to ask for an advisory opinion, the ICJ had considered whether the issue was within the scope of WHO activities and referred to a number of provisions of the WHO Constitution relating to the objectives and functions of the Organizations, stating:

**“None of these subparagraphs expressly refers to the legality of any activity hazardous to health, and none of the functions of the WHO is dependant upon the legality of the situation upon which it must act.”<sup>33</sup>**

However, as has been pointed out by some scholars, many of the activities, which the WHO has pursued over the years, are not expressly mentioned in the list of WHO constitutional functions.<sup>34</sup>

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<sup>30</sup> *Supra* note 22.

<sup>31</sup> See Heffernan, Liz, “The Nuclear Weapons Opinions: Reflections On The Advisory Procedure Of The International Court Of Justice”, *Stetson Law Review*, 1998.

<sup>32</sup> See Virginia Leary, “The WHO Case: Implications for Specialized Agencies”, *International Law, The International Court of Justice and Nuclear Weapons*, Laurence Boisson De Chazournes and Philippe Sands (Ed.), 1999 at 112.

<sup>33</sup> *Supra* note 22.

As Osieke has pointed out in commenting on the ILO Constitution:

**“But no Constitution can foresee and make express provisions for all the future developments and vicissitudes in any international organization and, so, these bodies are normally left some flexibility and freedom to take related measures which they consider essential for the effective fulfillment of their Objects and Purposes... within the general framework of their constitutions, international organizations are permitted, and this is recognized in international law, to take measures which are not expressly provided for in the constitution, but which they consider essential or necessary for the effective discharge of their mandates.”<sup>35</sup>**

In fact, many activities are currently being undertaken by the WHO which are not listed in the functions prescribed in Article 2 of the Constitution.<sup>36</sup> In fact, the Health Assembly has not limited its interpretation of the WHO constitution to the listed functions in Article 2, but has related its activities to the objectives of the Organization.

### ***B. THE RESTRICTED INTERPRETATION OF THE SCOPE OF WHO ACTIVITIES***

While delivering its judgment in the '*WHO case*' ICJ had stated that the WHO competence is '*necessarily restricted to the sphere of public health*' and had found that the WHO had only limited sectoral powers.

However, the field of 'health' is scarcely a narrow one, and protecting and promoting health requires the collaboration of many UN organizations, as evidenced by WHO agreements with numerous other international organizations.<sup>37</sup> In fact, coherence and coordination are the main jurisdictional concerns within the UN system and the WHO work in the health field cannot be isolated from the concerns of many other UN branches and organizations.<sup>38</sup>

Thus, it has been stated that the '*scope*' of the activities of the WHO is not a narrow one, but in fact, touches on numerous aspects not always considered as part of the health agenda.

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<sup>34</sup> *Supra* note 32.

<sup>35</sup> E. Osieke, *Constitutional Law and Practice in the International Labour Organization*, 1985 at 9.

<sup>36</sup> The Health Assembly, for example, adopted in 1981, with only one negative vote, an International Code of Marketing of Breast-milk Substitutes, in the form of a recommendation, and urged all member states to translate into national legislation or other suitable measures.

<sup>37</sup> In 1995 Basic Safety Standards for Protection against Ionising Radiation and for the Safety of Radiation Sources were drafted through the collaboration of seven international organizations (ILO, FAO, WHO, PAHO, IAEA, NEA of OECD and ICAO).

<sup>38</sup> Virginia Leary, "The WHO Case: Implications for Specialized Agencies", *International Law, The International Court of Justice and Nuclear Weapons*, Laurence Boisson De Chazournes and Philippe Sands (Ed.), 1999 at 114.

## IMPLICATIONS FOR SPECIALIZED AGENCIES

The Court's approach as regards the request of the WHO is concerned seems to imply that the activities of international organizations, and the WHO in particular, can be neatly categorized as concerning separate and distinct fields.<sup>39</sup> In fact, the Court has stated that the WHO competence is 'necessarily restricted to the sphere of public health'.

While it is recognized that specialized agencies and branches of the UN system have mandates in particular fields to which they give special attention, and that they should not arbitrarily interpret those mandates, it has become increasingly evident that most of the mandates overlap with other agencies or branches and that the clear lines of demarcation are becoming increasingly difficult to maintain. Inter-agency agreements and joint projects abound, resulting from the realization that major international problems have multiple social, political and technical implications and cannot be resolved by one specialized agency or organ alone.<sup>40</sup>

In the present day world there are many examples of overlapping jurisdiction. For example, intellectual property issues and environmental issues are now on the agenda of the World Trade Organization, although they are the primary responsibility of WIPO and UNEP. Also, the ILO is debating issues of links between trade and labor rights, although trade is the domain of the WTO.

In fact, in his dissent, Judge Weeramantry cites many examples and concludes:

**“The family of United Nations organizations was not set up in a fretwork pattern of neatly dovetailing components, each with a precisely carved outline of its own. These organizations deal with human activities and human interrelationships, and it is of their very nature that they should have overlapping areas of concern. Their broad contours are of course defined, but different aspects of the self same question may well fall within the ambit of two or more organizations.”<sup>41</sup>**

More importantly for the WHO, it has obtained from an authoritative source a restrictive and static interpretation of its Constitution. Nevertheless, *“it is to be expected that the World Health Assembly, exercising its prerogative of interpreting the WHO constitution in the first instance, will continue to interpret the Constitution in accordance with the*

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<sup>39</sup> *Ibid* at 124.

<sup>40</sup> See the Dissenting Opinion of Judge Weeramantry in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Request of the World Health Organization), Advisory Opinion, ICJ Reports, 1996.

*objective of the Organization: 'the attainment by all peoples of the highest possible level of health' and will not hesitate to adopt appropriate methods to do so, whether or not they are specifically listed as 'functions' in the Constitution".*<sup>42</sup>

Lastly, the effect of the ICJ's decision may be increased caution in the future on the part of specialized agencies which are considering requesting advisory opinions concerning the interpretation of their constitutions. In fact, it has been stated that the Court's restrictive interpretation of the WHO constitution as well as its reference to the 1927 PCIJ opinion on *European Commission on the Danube*,<sup>43</sup> emphasizing a narrow application of the principle of specialty are backward steps in the development of the law of international organizations - and hence, a matter of concern to all organs and branches of the UN system and to the international legal scholars.<sup>44</sup>

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<sup>41</sup> *Id.*

<sup>42</sup> *Supra* note 38 at 126-127.

<sup>43</sup> *Jurisdiction of the European Commission on the Danube*, Advisory Opinion, PCIJ Series B, No. 14, at 64.

<sup>44</sup> *Supra* note 38 at 126-127.

## CONCLUSION/ABSTRACT

The ICJ proceedings in the case concerning '*legality of the use by a state of nuclear weapons in armed conflict*' are indicative of the sharp differences of view held by different states as to the proper role and function of international organizations.

On the one hand there were some states, which proposed the view that organizations such as the WHO are established solely to fulfill those tasks which have been expressly spelled out in their constituent instruments, subject to construction of any implied powers which are absolutely necessary for achieving those objectives. In this context, and particularly with respect to the organizations of the United Nations system, reference was largely made to the *origins of their creation* and to '*functionalist theory*'. This approach stressed the need for an appropriate division of responsibilities between the United Nations organization, on the one hand, and the UN specialized agencies, on the other. It would leave powers of general scope to former and specialized sectoral powers to the latter. This view was supplemented by the belief that questions with strong political flavor should not be dealt with by the specialized agencies at all.

The alternative view did not deny the need for an appropriate division of responsibilities among the various international organizations. Rather, it suggested that today's issues are increasingly complex and will often cut across the institutional competencies envisaged in the 1940s and 1950s. According to this approach, international organizations can use different and often more wide-ranging tools and techniques to achieve their general objectives. This implies an expanded view of their roles and activities.

The two approaches can be compared. The first takes a '*restrictive approach*' to recourse to international law as an instrument of policy development. Some states considered that Article 2 of the WHO Constitution does not allow resort to the development of international law as a way to achieve WHO objectives.<sup>45</sup> The International Court endorsed this view. The second approach indicates a more '*purposive function*' when the organization becomes an actor in its own right, determining for itself the scope of its competence and the extent to which it may resort to tools, which have not been granted to it in express terms at its inception.

In the case in question, in application of the principle of 'specialty', the Court declined to

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<sup>45</sup> *Supra* note 38 at 122.

accede to the WHO request. Some of the international jurists consider this conclusion to be backward step in the development of the law of international organizations, while others consider that the Court acted correctly.

Perhaps the ICJ's rebuff to the WHO can be best understood in the context of the Court's decision to accede to the request from the General Assembly. Since the General Assembly had submitted a similar request, the ICJ could reject the WHO request without losing an opportunity to address the substantive issue of the legality of nuclear weapons. In effect, this two-track request enabled the ICJ to be legally exact and politically pragmatic at the same time.

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