

DISSENTING OPINION OF JUDGE SHAHABUDDEN

The reason for my dissent is that, in my respectful view, the Court's decision proceeds on a mistaken appreciation of the question presented by the World Health Organization (WHO). In the result, due effect has not been given to the distinction between preliminary issues and the merits, as the distinction applies in relation to the question which has been asked: the ground of the Court's preliminary holding which led to its decision not to give the requested advisory opinion belongs to the merits. That ground is less a reason for not answering the question than an answer to it; no further finding needs to be made in order to provide an answer.

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First, as to the meaning of the WHO's question. Contrary to an impression which could be created by the title of the case, it has not been contended that it is "within the scope of [its] activities", within the meaning of Article 96, paragraph 2, of the Charter, for the Organization to address the question of the legality of the use of nuclear weapons as a matter standing by itself, or, as the Court puts it, to seek "an opinion on the legality of the use of nuclear weapons in general" (Advisory Opinion, para. 28). The reference in the question to "international law" does not suffice to suggest an intention to raise an issue unconnected with the responsibilities of the WHO.

The Court could, I think, place a more reasonable interpretation on the question. As is indicated by the opening reference to "the health and environmental effects", the WHO is not asking whether the use by a State of nuclear weapons in war or other armed conflict would be a breach of its obligations under some branch of international law unrelated to the scope of the Organization's activities, but only whether such use would be a breach of the obligations of the State under international law in so far as it would also be a breach of its obligations under the Constitution of the Organization. The Court has, I think, too lightly dismissed the references in the question to "the health and environmental effects" and to "the WHO Constitution".

In essence, the WHO's question is grounded in the specific issue whether the use of nuclear weapons by a member State would give rise to a breach of its obligations both under international law and under the Constitution of the WHO, and not, as the Court considers, in the more general issue of the legality of the use of nuclear weapons considered

apart from the question whether such use would also constitute a breach of the State's obligations under the Constitution of the WHO.

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Second, as to the competence of the WHO to ask for an advisory opinion as to whether some specified conduct of a member State (in this case, the use of nuclear weapons) would breach its obligations under the Constitution of the WHO.

The Court correctly holds that the duties of the WHO in relation to any situation do not depend on the legality of the causes producing that situation. Thus, in order to determine what are its functions in relation to a given situation, the WHO is not justified in requesting an advisory opinion on the subject of the legality of the causes which produced the situation. The WHO would have to deal with the resulting situation regardless of whether or not the State which produced it did so in breach of its obligations under the Constitution of the Organization. A different question is whether, in order to determine what are the rights and obligations between itself and a member State, the WHO has competence to request an advisory opinion as to whether, in producing a situation calling for action by the WHO, that member State may have breached its obligations under the Constitution of the WHO. Is the WHO competent to request an advisory opinion as to whether there is such a breach?

In the course of carrying out its activities, the WHO can be confronted with the constraining effects of the conduct of a member State. If that conduct constitutes a breach by that State of its obligations under the Constitution of the WHO, the latter could take or initiate appropriate remedial measures to remove any resulting impediment to the carrying out of its activities. Hence, a legal question as to whether there has been such a breach can arise "within the scope of [WHO's] activities".

The WHO can consequently present a question to the Court, as it is doing, as to whether some specified conduct of a State (in this case, the use of nuclear weapons) would be a breach of its obligations under the Constitution of the Organization.

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Third, as to the proposition that the Court's holding concerns the merits.

A question whether some specified conduct of a State would be a breach of its obligations under the Constitution of the WHO raises two issues: (i) Does the obligation exist? (ii) If the obligation exists, does the specified conduct constitute a breach of it?

If the obligation exists, the answer to the question will be in the affirmative or in the negative depending on whether the specified conduct is or is not found to be a breach of the obligation.

However, if the Court finds that the obligation itself does not exist, then *ex hypothesi* the specified conduct could not be a breach of any obligation under the Constitution of the WHO. This alone suffices to yield an answer to the question — a negative answer, but an answer all the same.

From its analysis of the Constitution of the WHO, the Court concludes that the Organization has no competence to address the question of the legality of the use of nuclear weapons. That 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 that constitutional obligation.

If a member State has no obligation under the Constitution of the WHO not to use weapons (such as nuclear weapons) which could result in health and environmental effects, it follows that, in using such weapons, it is not in breach of any obligation under that Constitution. This is an answer to the WHO's question. The Court's holding therefore concerns the merits of the question which is actually asked.

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Obviously, this approach is based on a certain view of the distinction between merits and preliminary issues. What might be a general criterion for identifying the merits? To borrow from the field of contentious litigation,

“the merits of a dispute consist of the issues of fact and law which give rise to a cause of action, and which an applicant State must establish in order to be entitled to the relief claimed” (*Anglo-Iranian Oil Co., Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 148, Judge Read, dissenting).

The case at bar is, of course, a case within the Court's advisory jurisdiction, and caution is appropriate; but that basic approach appears transposable. It is implicit in paragraph 16 of the Court's decision. This, in my opinion, recognizes that to give an affirmative answer to the question in this case the Court would have to be satisfied that, as a matter of law, member States have an obligation under the WHO Constitution not to create health and environmental effects through the use of weapons in war or other armed conflict, and that, as a matter of fact, the use of nuclear weapons would create such effects. The issue whether a State has such an obligation would therefore form part of the merits (see the gen-

eral reasoning in *Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77*, pp. 82-83; *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, pp. 44-46, and Judge Morelli, dissenting, at pp. 110-112; *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, pp. 226 ff., Judge Morelli, concurring; and *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 19, para. 7).

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The conclusion reached above is that the WHO can present a question to the Court, as it is doing, as to whether some specified conduct of a State would be a breach of its obligations under the Constitution of the Organization. The suggested obligations may not exist and thus there may not be a breach of any obligations. This would mean that, on the merits, the answer to the question is "No"; but this would not affect the competence of the WHO to ask the question.

The implication of the Court's decision is that member States do not have an obligation under the Constitution of the WHO not to use nuclear weapons. It follows that the use of such weapons by a member State would not "be a breach of its obligations under international law including the WHO Constitution", to use the terms of the question as construed above.

This means that the Court is giving an answer to the question asked by the WHO; it is not really declining to answer the question. The reader of the Court's decision would not think that the Court needs to do anything more in order to provide an answer. Whether the Court answers in the negative or in the affirmative, expressly or impliedly, correctly or incorrectly, it can only answer by presupposing that the WHO has the competence to ask the question. This is what the Court denies. I am respectfully of another view.

(Signed) Mohamed SHAHABUDDEN.