

3-1-1995

Nuclear Weapons, the World Health Organization, and the International Court of Justice: Should an Advisory Opinion Bring Them Together

Martin M. Strahan

Follow this and additional works at: <http://digitalcommons.law.utulsa.edu/tjcil>



Part of the [Law Commons](#)

Recommended Citation

Martin M. Strahan, *Nuclear Weapons, the World Health Organization, and the International Court of Justice: Should an Advisory Opinion Bring Them Together*, 2 *Tulsa J. Comp. & Int'l L.* 395 (1994).

Available at: <http://digitalcommons.law.utulsa.edu/tjcil/vol2/iss2/11>

This Casenote/Comment is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in *Tulsa Journal of Comparative and International Law* by an authorized administrator of TU Law Digital Commons. For more information, please contact daniel-bell@utulsa.edu.



NUCLEAR WEAPONS, THE WORLD HEALTH ORGANIZATION, AND THE INTERNATIONAL COURT OF JUSTICE: SHOULD AN ADVISORY OPINION BRING THEM TOGETHER?

I. INTRODUCTION

In its press release of September 3, 1993, the International Court of Justice (ICJ)¹ announced that the World Health Organization (WHO)² had requested an advisory opinion³ from the ICJ concerning the legality of nuclear weapons.⁴ The WHO is a specialized United Nations agency⁵ under the auspices of

1. "The *International Court of Justice*, which has its seat in The Hague, is the principal judicial organ of the United Nations." *Introduction*, 1991-1992 ICJ Y.B. No. 46, at 1 (1992). The ICJ was preceded by the Permanent Court of International Justice which "began its work on December 15, 1922 in The Hague and ceased to exist formally on December 31, 1945." THE ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL RELATIONS 688 (Edmund Jan Osmańczyk ed., 2d ed. 1990).

"Article 92 [of the United Nations Charter] states that the Court shall be the principal judicial organ of the United Nations, and that it shall function in accordance with" the provision of the Statute. SHABTAI ROSENNE, *THE WORLD COURT; WHAT IT IS AND HOW IT WORKS* 27 (1973).

2. The World Health Organization is:

the largest of all the organisations in terms of staff and budget. It coordinates research in a very large number of areas; it runs a system for the notification of various especially infectious diseases such as cholera, and for preventing their transmission, once notified; it helps developing countries organise their own health services and to train doctors and nurses and especially to improve their public health facilities; it launches world-wide campaigns against particular diseases, such as smallpox (now almost eliminated) and malaria (successful in some areas but often recurring unless public health standards have been sufficiently raised first).

EVAN LUARD, *THE UNITED NATIONS: HOW IT WORKS AND WHAT IT DOES* 70 (1979).

3. The WHO had asked for only one advisory opinion prior to the present one. In May of 1980, the WHO asked the ICJ for an advisory opinion concerning the interpretation of an agreement between Egypt and the WHO. Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, 1980 ICJ Pleadings VII.

4. ICJ Communiqué No. 93/26 (1993).

5. "[T]he Contracting Parties agree to the present Constitution and hereby establish the World Health Organization as a specialized agency within the terms of art. 57 of the Charter of the United Nations." WHO CONST. pmbl. reprinted in THE ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL RELATIONS 1035 (Edmund Jan Osmańczyk ed., 2d ed. 1990).

Under Article 62, paragraph 1, of the United Nations Charter,

the Economic and Social Council.⁶ The WHO's main objective is "the attainment by all peoples of the highest possible level of health."⁷ Functions of the WHO include acting as the directing and co-ordinating authority on international health work;⁸ establishing and maintaining effective collaboration with the United Nations, specialized agencies, governmental health administrations, professional groups, and such other organizations as may be deemed appropriate.⁹ Other functions of the WHO involve stimulating and advancing work to eradicate epidemic, endemic, and other diseases;¹⁰ and providing information, counsel, and assistance in the field of health.¹¹ The WHO performs its function via resolutions passed by the World Health Assembly (Health Assembly), the governing body of the WHO.¹² While the list of the WHO's accomplishments in furtherance of its objective¹³ is impressive, it is the WHO's work regarding nuclear weapons, culminating with its request for an advisory opinion¹⁴ from the ICJ, that is the focus of this comment. To justify its request, the WHO has published several reports and cited numerous authorities. This comment will examine the events leading to the WHO's request, the WHO's competence to make such a request, and the possible repercussions of the ICJ's pending decision on whether to grant the request.

[t]he Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly, to the Members of the United Nations, and to the specialized agencies concerned.

U.N. CHARTER art. 62, para. 1, *reprinted in* LELAND M. GOODRICH & EDVARD HAMBRO, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 370 (2d & rev. ed. 1949).

6. The Economic and Social Council (ECOSOC) "comprises fifty-four states elected by the General Assembly. Many non-governmental organizations also participate in its proceedings. It supervises the work of numerous commissions, committees, and expert bodies in the economic and social fields, and endeavours to coordinate the efforts of the U.N. specialized agencies in this area." ADAM ROBERTS & BENEDICT KINGSBURY, UNITED NATIONS, DIVIDED WORLD; THE U.N.'s ROLES IN INTERNATIONAL RELATIONS 7 (1988).

7. WHO CONST. art. 1, *reprinted in* THE ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL RELATIONS 1035 (Edmund Jan Osmańczyk ed., 2d ed. 1990).

8. *Id.* art. 2(a), at 1035.

9. *Id.* art. 2(b), at 1035.

10. *Id.* art. 2(g), at 1035.

11. *Id.* art. 2(q), at 1035.

12. *Id.* arts. 9, 24, at 1035, 1036.

13. LUARD, *supra* note 2, at 169.

14. There are actually two types of advisory opinions the ICJ may give, depending upon the active participants in the advisory opinion process.

The objective of the procedure can be purely advisory, which in fact is the only possibility foreseen in the Statute. But under certain provisions, designed for the purpose, that are contained in instruments other than the Charter and the Statute and were adopted separately by the United Nations itself or other institutions within the U.N. system, resort to the procedure may pursue a more ambitious aim, namely, to settle a dispute to which one of those institutions is a party.

Roberto Ago, *Binding Advisory Opinions of the International Court of Justice*, 85 AM. J. INT'L L. 439 (1991).

However, the reply the ICJ gives when asked to give an advisory opinion is that the advisory opinion has no binding force because of its advisory character. *Id.* at 441. With regard to the WHO's request for an advisory opinion on the legality of the use of nuclear weapons, there are no other named parties to the request who have agreed to be bound by the opinion; therefore, the opinion will not be binding.

II. THE WHO REPORTS ON NUCLEAR WAR

A. *Report of The International Committee of Experts in Medical Sciences and Public Health To Implement Resolution WHA34.38*

In 1984, the WHO published a report on "The Effects of Nuclear War on Health and Health Services pursuant to WHA34.38."¹⁵ As a basis for the report, the Committee of Experts in Medical Sciences and Public Health (Committee) considered three hypothetical scenarios:

- (1) The detonation of a 1-megaton bomb over a large city would kill more than 1.5 million people and injure as many.
- (2) "Limited" nuclear war with smaller tactical nuclear weapons totalling 20 megatons, aimed at military targets in a relatively densely populated area, would exact a toll of about 9 million dead and seriously injured, of whom more than 8 million would be civilians.
- (3) An all-out nuclear war using at least half of the estimated present stockpiles of nuclear weapons (an approximate total of 10,000 megatons) would result in more than 1000 million deaths and 1000 million injured people.¹⁶

After completing staggering amounts of research, the Committee reported that "no health service in any area of the world would be capable of dealing adequately with the hundreds of thousands of people seriously injured by blast, heat, or radiation from even a single 1-megaton bomb" (first scenario).¹⁷ Further, the Committee found that "[i]t is difficult to comprehend the catastrophic consequences and the human suffering that would result from the effects of nuclear explosions in the second and third scenarios. . ." and that "[w]hatever remained of the medical services in the world could not alleviate the disaster in any significant way."¹⁸

The Committee concluded that the only approach to prevent nuclear explosions and their devastating consequences was the prevention of nuclear war.¹⁹ The Committee also found that the political steps towards this end were not within the purview of the Committee or the WHO. Specifically, the

15. WORLD HEALTH ORGANIZATION, EFFECTS OF NUCLEAR WAR ON HEALTH AND HEALTH SERVICES: REPORT OF THE WHO MANAGEMENT GROUP ON FOLLOW-UP OF RESOLUTION WHA36.28: "THE ROLE OF PHYSICIANS AND OTHER HEALTH WORKERS IN THE PRESERVATION AND PROMOTION OF PEACE . . ." 1 (2d ed. 1987) [hereinafter WHO MANAGEMENT GROUP REPORT].

In resolution WHA34.38 the World Health Assembly requested the Director-General of WHO to create a committee to study the contribution WHO could make to implementation of the United Nations resolutions on strengthening peace, détente, and disarmament, and preventing thermonuclear conflict. In response to that resolution the Director-General set up an international committee of experts in medical sciences and public health, which met in 1982 and 1983 and submitted a report on the effects of nuclear war on health and health services that was presented to the World Health Assembly in 1983 and later published [EFFECTS OF NUCLEAR WAR ON HEALTH AND HEALTH SERVICES].

Id.

16. WORLD HEALTH ORGANIZATION, EFFECTS OF NUCLEAR WAR ON HEALTH AND HEALTH SERVICES: REPORT OF THE INTERNATIONAL COMMITTEE OF EXPERTS IN MEDICAL SCIENCES AND PUBLIC HEALTH TO IMPLEMENT RESOLUTION WHA34.38 at 5, ¶ 3 (1st ed. 1984) [hereinafter WHO EXPERTS REPORT].

17. *Id.* at 5, ¶ 4.

18. *Id.* at 6, ¶ 3.

19. *Id.* at 6, ¶ 7.

Committee stated that "it is not for the group to outline the political steps by which this threat can be removed or the preventive therapy implemented."²⁰ The Committee did, however, outline the proper involvement of the WHO in preventing nuclear warfare as "systematically distributing information on the health consequences of atomic warfare and by continuing and expanding international cooperation in the field of health."²¹

B. Report of the WHO Management Group on Follow-up of Resolution WHA36.28: "The Role of Physicians and Other Health Workers in the Preservation and Promotion of Peace. . . ."

In WHA36.28, the WHA endorsed the Committee's conclusions in the 1983 report and recommended ongoing studies on the effects of nuclear war.²² The result of WHA36.28 was an update of the 1983 report compiled and published by the WHO Management Group in 1987.²³ In the 1987 report, the Management Group revisited the devastating effects of nuclear war and added new studies on both the short and long term effects of radiation and fallout.²⁴ The Management Group found that "[t]he many individual fires caused by the heat wave would result in huge superfires that could spread widely" and "[i]n such a conflagration no one would survive, even in underground shelters."²⁵ Finally, the Management Group concluded that famine and disease would be widespread and the world's health services would be unable to alleviate the situation.²⁶ The Management Group, using the same language as the Committee in the 1983 report, reiterated that the political steps towards the prevention of nuclear war were not within the province of the Management Group.²⁷

The Management Group, however, made a highly significant change to the role the WHO should take in the sphere of nuclear war prevention.²⁸ The change was grammatical in nature but had an extremely far-reaching purpose. In the 1987 report, the clause "and intensifying" was added before "international cooperation" for an intentionally prescribed effect.²⁹ Can it be supposed that between the reports of 1983 and 1987 the WHO's function changed from a

20. WHO MANAGEMENT GROUP REPORT, *supra* note 15, at 5, ¶ 8.

21. *Id.*

22. "The Health Assembly endorsed the committee's conclusions in resolution WHA36.28 and recommended that WHO should continue to collect, analyse, and regularly publish accounts of activities and further studies of the effects of nuclear war on health and health services, and keep the Health Assembly periodically informed." *Id.*

23. "Rather than present fragmentary information on the new studies that have been carried out, the Group considered it preferable to submit a revised version of the 1983 report [published in 1984], incorporating the results of the new studies carried out since that date." *Id.*

24. WHO MANAGEMENT GROUP REPORT, *supra* note 15, at 5, ¶ 2.

25. *Id.* at 5, ¶ 3.

26. *Id.* at 5, ¶¶ 5, 6.

27. The only difference between the language in the first and second reports is that the word "Committee" in the first report was replaced by the word "Group" in the second report. Compare WHO EXPERTS REPORT, *supra* note 16, at 6, ¶ 8 with WHO MANAGEMENT GROUP REPORT, *supra* note 15, at 5, ¶ 9.

28. The substitution of the word "nuclear" in the second report for the word "atomic" has no effect on the substantive meaning of the sentence as alluded to here. Compare WHO EXPERTS REPORT, *supra* note 16, at 6, ¶ 8 with WHO MANAGEMENT GROUP REPORT, *supra* note 15, at 5, ¶ 9.

29. WHO MANAGEMENT GROUP REPORT, *supra* note 15, at 6, ¶ 9.

“health organization” in charge of distributing information to a “political organization” in charge of “intensifying international cooperation” in the health field?

The language indicates that the WHO’s new role in preventing nuclear war was to go beyond the limits of the 1983 report and work to intensify international cooperation for the prevention of nuclear war. While this language could arguably be restricted to health matters, the WHO has necessarily identified the possibility of nuclear war as a health matter in both reports.

III. THE WORLD HEALTH ORGANIZATION AND WHA46.40

The World Health Assembly (Health Assembly) is divided into committees which meet separately and report back to the Health Assembly. The future of the WHO’s continued involvement in the issue of nuclear war, among other issues, was assigned to Committee B at the Forty-Sixth World Health Assembly in May of 1993 in Geneva.³⁰

A. *The Eighth Meeting of Committee B*

During its eighth meeting of 1993, Committee B was given a draft resolution for a proposed WHO request to the ICJ for an advisory opinion.³¹ The meeting was addressed by Dr. Piel (Legal Counsel for the WHO) who recapitulated the findings of the two reports on nuclear war.³² In his report to the Committee, Dr. Piel emphasized the following:

The United Nations General Assembly had already dealt with the question [of the legality of the use of nuclear weapons] and had provided the following answer in its resolution 33/71B (1978), where it declared that “the use of nuclear weapons [would] be a violation of the Charter of the United Nations and a crime against humanity.”³³

Dr. Piel apparently felt that the General Assembly’s answer was not enough, standing alone, to curtail the tide of increasing nuclear arsenals. Dr. Piel proposed a WHO declaration condemning the use of nuclear weapons in an armed conflict as a violation of the spirit and objective of the WHO and the WHO Constitution.³⁴ He then concluded that a declaration of that nature, in conjunction with a United Nations General Assembly Resolution, might negate the need for referring the issue to the ICJ.³⁵ Dr. Piel then posed the question: “Should not the task of deciding whether an advisory opinion on the ‘illegality’ issue was needed be that of the United Nations General Assembly, rather than the Health Assembly?”³⁶ This proved to be quite an intriguing question.

30. FORTY-SIXTH WORLD HEALTH ASSEMBLY: SUMMARY RECORDS AND REPORTS OF COMMITTEES, Doc. a46/30, Geneva, 257-69 (1993) [hereinafter FORTY-SIXTH WORLD HEALTH ASSEMBLY].

31. *Id.* at 257-58.

32. *Id.* at 258. See also *supra* notes 15 & 16.

33. FORTY-SIXTH WORLD HEALTH ASSEMBLY, *supra* note 30, at 258.

34. *Id.* The proposed declaration stated: “In view of the health and environmental effects, the unjustified use of nuclear weapons by a State in armed conflict would be contrary to the spirit and health objective of WHO and, as such, a violation of the Constitution of WHO.” *Id.*

35. *Id.*

36. *Id.*

Later in the eighth meeting, opposing members were concerned that asking for an advisory opinion from the ICJ involving the legality of nuclear weapons could be damaging to the WHO. It could be seen as "a political act outside the mandate of the WHO."³⁷ Mr. Boyer, the U.S. delegate to the meeting, was one of those opposing the adoption of the resolution requesting an advisory opinion.³⁸ Mr. Boyer indicated that by asking for an advisory opinion, the WHO would be abandoning its right to come to a conclusion on nuclear weapons. He also contended that the draft resolution was not within the competence of the WHO.³⁹

The right to "come to a conclusion," referred to by Mr. Boyer, parallels Dr. Piel's proposal of a declaration by the WHO condemning the use of nuclear weapons. Dr. Piel suggested that a WHO declaration, condemning the use of nuclear weapons as a violation of the spirit and health objective of the WHO and its Constitution, would have been the appropriate action to take as opposed to the request for an advisory opinion.⁴⁰

B. *The Ninth and Tenth Meetings of Committee B*

On May 12, 1993, Committee B convened for their ninth meeting which began with the issue of the draft resolution discussed in the eighth meeting.⁴¹ Mr. Boyer, as he had done in the eighth meeting, made a motion against the draft resolution insisting that it was not within the WHO's competence. The motion was rejected after a vote by secret ballot.⁴²

Dr. Piel attended the tenth meeting of Committee B as Legal Counsel for the WHO. He responded to questions that were asked in earlier meetings and concluded that while the WHO was entitled to ask the ICJ for advisory opinions,⁴³ it was restricted to requesting advisory opinions on issues falling within the WHO's competence.⁴⁴ Dr. Piel previously concluded at the eighth meeting that the United Nations had already considered the issue in resolution

37. FORTY-SIXTH WORLD HEALTH ASSEMBLY, *supra* note 30, at 259.

38. *Id.* at 260. It is surprising Mr. Boyer did not have a greater effect in blocking the draft resolution considering the strong economic power of the United States in the WHO.

In specialized agencies, as in the United Nations itself, the United States used its financial clout to block programs it opposed. In the World Health Organization (W.H.O.), the U.S. threatened to withhold its dues if Palestine were admitted as a member state. Yassir Arafat, the Chairman of the PLO, called the threat 'blackmail,' as the U.S. then contributed one fourth of W.H.O.'s budget. The W.H.O. Director General, fearful over the loss of revenue, asked the PLO to withdraw its application. Ultimately the W.H.O. voted to postpone the application, primarily because of the United States pressure.

John Quigley, *The New World Order and the Rule of Law*, 18 SYRACUSE J. INT'L L. & COM. 75, 85 (1992).

39. FORTY-SIXTH WORLD HEALTH ASSEMBLY, *supra* note 30, at 260.

40. *Id.* at 258.

41. *Id.* at 263.

42. *Id.* at 264.

43. Dr. Piel cited Article 76 of the World Health Organization Constitution, Article 92 of the United Nations Charter, and Article X of the Agreement between the United Nations and the WHO as authority for the WHO's legal authorization to ask for advisory opinions from the ICJ. FORTY-SIXTH WORLD HEALTH ASSEMBLY, *supra* note 30, at 265.

44. *Id.*

33/71B (1978) and decided that nuclear weapons were illegal.⁴⁵ Finally, Dr. Piel advised: (1) the determination of the legality or illegality of nuclear weapons was squarely within the mandate of the United Nations; (2) it was not legally within the mandate of the WHO to refer the "illegality" issue to the ICJ; and (3) the proper approach was for the Health Assembly to consider the question and refer it, via the General Assembly, to the ICJ.⁴⁶ Therefore, according to Dr. Piel, the Health Assembly had two *legal* avenues to pursue with regard to the legality of nuclear weapons.

The first alternative would be for the Health Assembly to declare the use of nuclear weapons a clear violation of the WHO Constitution as contrary to the spirit of its health objective. Pursuing this alternative would require no outside contact with the United Nations from a procedural point of view. In other words, the Health Assembly could make this declaration independently.⁴⁷ The second alternative would be for the Health Assembly to refer the question of the legality of nuclear weapons, through the General Assembly, to the ICJ, "thus respecting the legal mandate of the United Nations. . . ."⁴⁸

The only other alternative was not considered legal by Dr. Piel. This would be for the WHO to *directly* ask the ICJ for an advisory opinion on the legality of the use of nuclear weapons. Once again, as in the eighth meeting, this idea was met with opposition. Mrs. Lini, a delegate from Vanuatu,⁴⁹ stated that the "relevant United Nations General Assembly resolution on the use of nuclear weapons had not been widely respected."⁵⁰ Further, Mrs. Lini took notice of Great Britain's position that there was no need for an advisory opinion from the ICJ because the Non-Proliferation Treaty explicitly allowed the possession of nuclear weapons by countries already possessing them.⁵¹

As expected, Mr. Boyer reiterated the United States' position that it was not within the mandate of the WHO to ask for such an advisory opinion. Notwithstanding the positions taken by Mrs. Lini and Mr. Boyer, the resolution was approved.⁵² Once the draft resolution was approved, it was sent to the Health Assembly where it was adopted⁵³ and forwarded to the ICJ on August 27, 1993.⁵⁴

The request was directed to the Registrar of the International Court of Justice from the Director-General of the World Health Organization and read as follows:

45. *Id.* at 258.

46. *Id.* at 265.

47. *Id.*

48. *Id.*

49. Mrs. Lini was an original sponsor of the draft resolution; however, she felt that the proposed amendments to the draft should not have been accepted. FORTY-SIXTH WORLD HEALTH ASSEMBLY, *supra* note 30, at 266.

50. *Id.*

51. *Id.* at 268.

52. The vote count was as follows: Members entitled to vote- 164; absent- 54; abstentions- 6; papers null and void- 0; votes in favor- 73; votes against- 31; simple majority- 53. *Id.*

53. *Id.* at n.1.

54. ICJ Communiqué No. 93/26 (1993).

Pursuant to resolution WHA46.40 adopted by the World Health Assembly on 14 May 1993, and in accordance with Article 96, paragraph 2, of the Charter of the United Nations, Article 76 of the Constitution of the World Health Organization, and Article X, paragraph 2, of the agreement between the United Nations and the World Health Organization, I have the honour to lay before the International Court of Justice for its advisory opinion the following question:

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?⁵⁵

IV. WHO COMPETENCE TO REQUEST ADVISORY OPINIONS

To better understand the legal position of the WHO regarding this specific request to the ICJ, an examination of the WHO's competency for *any* request to the ICJ is necessary. To do this, each authority cited by the Director-General in the previous request must be reviewed.

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*."⁵⁶ 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.⁵⁷ 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 opinions of the International Court of Justice on legal questions arising within the scope of the activities of the Council."⁵⁸

Agreements between the ECOSOC and the specialized agencies granted the WHO authority to ask for advisory opinions from the ICJ.⁵⁹ The WHO has previously used this power only once, concerning the interpretation of the 1951 WHO-Egypt Treaty.⁶⁰ In that case, the WHO wanted to move its Eastern

55. The request for the advisory opinion was supported by materials including: WHA46.40, Article 96, ¶ 2 of the United Nations Charter, Article 76 of the WHO Constitution, Article X of the Agreement between the United Nations and the WHO, and the documents and records of the Forty-Sixth World Health Assembly (including the records of Committee B). *Id.*

56. U.N. CHARTER art. 96, para. 2 (emphasis added).

57. GOODRICH, *supra* note 5, at 489.

The text does not make it clear whether the authorization is to be specific or general. The logic of experience would seem to indicate that the authorization should be general. Committee action at San Francisco supports this interpretation. . . . In practice, the authorizations that have been given have been general in nature.

Id.

58. *Id.*

59. *Id.*

60. 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. Charles A. Wintermeyer, Jr., *ICJ Advisory Opinion: 1951 WHO-Egypt Treaty*, 10 DENV. J. INT'L L. & POL'Y 561 (1980).

Mediterranean Regional Office from Alexandria, Egypt, to Amman, Jordan, due to the Accords Egypt had signed with Israel at Camp David.⁶¹ 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.⁶² In 1981, as a result of the advisory opinion, the WHO adopted a resolution and moved its office.⁶³

B. *The Agreement Between the United Nations and the WHO*

Another authority that must be reviewed to determine the competence of the WHO is the Agreement Between the United Nations and the WHO (Agreement). The Agreement was approved by the United Nations General Assembly on November 15, 1947, and by the Health Assembly on July 10, 1948.⁶⁴ Article X, paragraph 2 of the Agreement addresses the relationship between the United Nations and the WHO. Paragraph 2 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."⁶⁵ 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.

The Charter expressly allows specialized agencies to request advisory opinions arising within the "*scope of their activities*." However, the Agreement limits requests for advisory opinions from the WHO to questions arising within

See also *supra* note 3.

61. *Id.*

62. *Id.*

63. WHA34.11, [as submitted to the ICJ for publication] concerning the ICJ advisory opinion on the moving of the Eastern Regional Mediterranean Office stated:

Recalling resolution WHA33.16 deciding to submit to the International Court of Justice for its Advisory Opinion certain questions before taking any decision on a transfer of the Regional Office from Alexandria. . . .

1. *Thanks* the International Court for its Advisory Opinion on the questions submitted to the Court by the World Health Organization;
2. *Accepts* the Advisory Opinion of the International Court of Justice of 20 December 1980 and recommends to all parties concerned to be guided by it;
3. *Requests* the Director-General:

- (a) to initiate action as contained in paragraph 51 of the Advisory Opinion and report the results to the sixty-ninth session of the Executive Board in January 1982 for consideration and recommendation to the Thirty-fifth World Health Assembly in May 1982;
- (b) to continue to take whatever action he considers necessary to ensure the smooth operations of the technical, administrative and managerial programmes of the Regional Office for the Eastern Mediterranean Region during the period of consultation;

4. *Requests* the Government of Egypt to hold consultations with the Director-General as mentioned above.

Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, 1980 ICJ Pleadings 139 (Dec. 20, 1980).

64. 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.

65. *Id.* art. X, ¶ 2, at 202 (emphasis added).

the “*scope of its competence*.” The distinction may seem small; but, “scope of their activities” may be viewed as a much broader description than “scope of its competence.” “Competent” is defined as: “Duly qualified; answering all requirements; having sufficient capacity, ability or authority. . . .”⁶⁶ “Activity” is defined as: “An occupation or pursuit in which [a] person is active.”⁶⁷ The United Nations Charter allows specialized agencies to request advisory opinions regarding any pursuit in which the agency is active. However, the Agreement limits the WHO’s request to areas in which it is duly qualified. Therefore, it can be argued that even though the WHO is duly qualified to request advisory opinions from the ICJ with respect to health matters, the WHO is not duly qualified to request advisory opinions concerning the legality of nuclear weapons.

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.⁶⁸ 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. Thus, requests for advisory opinions are limited to legal questions arising within the “competence” of the WHO.⁶⁹

D. The Competence of the WHO

While the ability of the WHO to ask for an advisory opinion from the ICJ can be narrowed to questions arising within its “competence,”⁷⁰ the competence of the WHO is the key to understanding whether the ICJ should give this advisory opinion. There is no better place to begin a search for the WHO’s competence than with the WHO Constitution itself. In resolution WHA46.40, the Health Assembly defined the role of the WHO using the relevant provisions of the WHO Constitution.⁷¹

The first role of the WHO, according to WHA46.40, is found in the language of Article 2(a) of the WHO Constitution.⁷² According to Article 2(a), the WHO is “to act as the *directing* and *co-ordinating* authority on international

66. BLACK’S LAW DICTIONARY 195 (6th ed. 1991).

67. *Id.* at 21.

68. WHO CONST. art. 76, *reprinted in* THE ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL RELATIONS 1035, 1037 (Edmund Jan Osmafczyk ed., 2d ed. 1990).

69. *Id.*

70. In the WHO’s only other request for an advisory opinion from the ICJ, there was no question as to its competence to make the request. In that case, both parties were amenable to the court’s jurisdiction and the question involved a treaty between the WHO and Egypt which can easily be seen as within the WHO’s competence. See Wintermeyer, *supra* note 60.

71. FORTY-SIXTH WORLD HEALTH ASSEMBLY: RESOLUTIONS AND DECISIONS ANNEXES, WHA Res. 46.40, at 44 (1993) [hereinafter WHA Res. 46.40].

72. *Id.*

health work."⁷³ However, nothing in the language of Article 2(a) indicates that the WHO has the power to attempt to prevent the use of nuclear weapons by requesting an advisory opinion from the ICJ, even though the WHO regards nuclear war primarily as a health issue.

The second role of the WHO according to WHA46.40 is found in the language of Article 2(k) of the WHO Constitution.⁷⁴ According to Article 2(k), another function of the WHO is "to *propose* conventions, agreements and regulations, and *make recommendations* with respect to international health matters and to perform such duties as may be assigned thereby to the Organization and are consistent with its objective."⁷⁵ The language does not suggest that the WHO should determine the legality of any type of action. The language seems, however, to limit the WHO to making proposals. The request for an advisory opinion on the legality of nuclear weapons use cannot be construed as a "proposal" by the WHO. Under this section, there is no basis for the WHO's request for an advisory opinion from the ICJ.

The third role of the WHO is derived from Article 2(p) of the WHO Constitution.⁷⁶ Section p describes another function of the WHO as the duty "to *study and report on*, in co-operation with other specialized agencies where necessary, administrative and social techniques affecting public health and medical care from preventive and curative points of view, including hospital services and social security."⁷⁷ This is the function of the WHO that best relates the WHO's true competence with respect to nuclear weapons. It is the WHO's function of studying and reporting that led to the request for the advisory opinion. The studies conducted by the WHO on the "Effects of Nuclear War on Health and Health Services"⁷⁸ were clearly within its mandate under this section. However, there is nothing in the language of Article 2(p) indicating that the WHO has competence to ask for an advisory opinion on the *legality* of the use of nuclear weapons.

The final role of the WHO, according to WHA46.40, is an extremely vague and broad function found in Article 2(v).⁷⁹ Article 2(v) recognizes that the WHO function is "generally to take all necessary action to attain the objective of the Organization."⁸⁰ Again, the objective of the WHO is "the attainment by all peoples of the highest possible level of health."⁸¹ According to the ambiguous wording of Article 2(v), it could easily be argued that the WHO does

73. WHO CONST. art. 2, ¶ a, *reprinted in* THE ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL RELATIONS 1035 (Edmund Jan Osmańczyk ed., 2d ed. 1990) (emphasis added).

74. WHA Res. 46.40, *supra* note 71.

75. WHO CONST. art. 2, ¶ k, *reprinted in* THE ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL RELATIONS 1035 (Edmund Jan Osmańczyk ed., 2d ed. 1990).

76. WHA Res. 46.40, *supra* note 71.

77. WHO CONST. art. 2, ¶ p, *reprinted in* THE ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL RELATIONS 1035 (Edmund Jan Osmańczyk ed., 2d ed. 1990) (emphasis added).

78. *See supra* notes 15 and 16.

79. WHA Res. 46.40, *supra* note 71.

80. WHO CONST. art. 2, ¶ v, *reprinted in* THE ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL RELATIONS 1035 (Edmund Jan Osmańczyk ed., 2d ed. 1990).

81. WHO CONST. art. 1, *reprinted in* THE ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL RELATIONS 1035 (Edmund Jan Osmańczyk ed., 2d ed. 1990); *see supra* note 7 and accompanying text.

have the competence to ask the ICJ for an advisory opinion on the legality of the use of nuclear weapons or anything else for that matter. Section v is of such a vague and broad nature that almost no action can be ruled as impermissible if necessary to attain the objective of the organization.⁸² Similarly, the WHO "objective" is also stated so broadly that the action taken could, in theory, be in furtherance of any remotely health-related goal.⁸³ It stands to reason that the language contained in the WHO's objective and in Article 2(v) are not indicative of the WHO's competence.

V. THE DISCRETIONARY FUNCTION OF THE ICJ AND ADVISORY OPINIONS

While the ability of the WHO to request an advisory opinion is unquestionable,⁸⁴ it is not absolute with respect to the kinds of questions it may pose.⁸⁵ The ICJ, which heard its first dispute in 1947,⁸⁶ retains the discretion to decide whether it will give an advisory opinion.⁸⁷ There are several factors that the ICJ will consider when 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."⁸⁸

The ICJ is seldom asked for advisory opinions⁸⁹ and has never refused to give an advisory opinion.⁹⁰ However, the Permanent International Court of

82. WHO CONST. art. 2, ¶ v, reprinted in THE ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL RELATIONS 1035 (Edmund Jan Osmaczyc ed., 2d ed. 1990).

83. See *supra* note 7 and accompanying text.

84. See *supra* notes 56-57 and accompanying text.

85. 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." Agreement Between the United Nations and the World Health Organization, *supra* note 64, at 202.

86. In its first decision, the Court found that:

Albania had mined—or knew of the mining of—part of Albanian territorial waters and had failed to give notice thereof to other nations required by the Eighth Hague Convention of 1907. A British ship had consequently been destroyed. When the ICJ ordered Albania to compensate the United Kingdom, Albania flatly refused.

Heidi K. Hubbard, *Separation of Powers Within the United Nations: A Revised Role for the International Court of Justice*, 38 STAN. L. REV. 165, 174 (1985).

87. MICHLA POMERANCE, THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT IN THE LEAGUE AND U.N. ERAS 281 (1973).

88. *Id.* at 279.

89. Stephen M. Schwebel, *Widening the Advisory Jurisdiction of the International Court of Justice Without Amending Its Statute*, 33 CATH. U. L. REV. 355, 358 (1984).

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.

Id.

90. POMERANCE, *supra* note 87, at 281.

Justice (PCIJ)⁹¹ 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 "nonmembership 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."⁹² 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."⁹³ Russia, then not a member of the League of Nations, refused to participate when the matter came before the PCIJ.⁹⁴ 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."⁹⁵ This decision falls into one of the listed grounds for refusing to give an advisory opinion, namely "the absence of consent on the part of a state immediately concerned."⁹⁶

Further grounds for refusing to give an advisory opinion by the ICJ, are the "political" and "abstract" nature of the question.⁹⁷ In the first instance, the WHO request can easily be seen as a political question. As evidenced in the 1993 meetings of Committee B, many of the delegates and Dr. Piel, the WHO's own legal counsel, viewed the proposed draft as "a political act outside the mandate of the WHO."⁹⁸ As previously stated, the studying of and reporting on nuclear war seemed to fall squarely within the mandate of the WHO. However, the two WHO reports on the effects of nuclear war expressly stated that the political steps towards the prevention of nuclear war were not within the

91. The Permanent Court of International Justice of 1922:

was a cherished objective of the peace movement of that era. A tenet of that movement was that war could be prevented by the processes of international arbitration and adjudication. The theory was that such civilized ways of settling disputes could displace the physical force of war. . . . Just as a common law court has developed common law in the process of rendering judgments, so the World Court develops international law in the process of rendering its judgments and in giving advisory opinions to the League of Nations.

Stephen M. Schwebel, *The Docket and Decisionmaking Process of the International Court of Justice*, 13 SUFFOLK TRANSNAT'L L.J. 543, 544-45 (1990).

92. POMERANCE, *supra* note 87, at 289 (referring to the Status of East Carelia (Fin. v. U.S.S.R.), 1923 P.C.I.J. (ser. B) No. 5 (July 23)).

93. Richard Thigpen, *Resolution of Conflicts Between National and Transnational Legal Prescriptions—A Case Review and Assessment*, 25 HOW. L.J. 635, 638 (1982).

94. *Id.*

95. *Id.* at 639. The Court stated:

It is well established in international law that no State can without its consent, be compelled to submit its dispute with other states to mediation or arbitration, or to any kind of pacific settlement As concerns states not members of the League, they are not bound by the Covenant. The submission, therefore, of a dispute between them and a member of the League for solution according to the methods provided for in the Covenant could take place only by virtue of that *consent*. Such consent, however, has not been given by Russia. On the contrary, Russia has, on several occasions, clearly declared that it accepts no intervention by the League of Nations. . . .

Id. (quoting The Status of East Carelia (Fin. v. U.S.S.R.), 1923 P.C.I.J. (ser. B) No. 5, at 28 (July 23)).

96. *See* POMERANCE, *supra* note 87, at 279.

97. *Id.*

98. FORTY-SIXTH WORLD HEALTH ASSEMBLY, *supra* note 30, at 259.

purview of the Committee (1st report), the Management Group (2d report), or the WHO (both reports).⁹⁹

The political nature of the WHO's request is not the only ground for denial by the ICJ. The wording of the WHO request can also be seen as too abstract for the ICJ to adequately render an opinion. Nowhere in the language of the request is there any limitation or exception to the use of nuclear weapons.¹⁰⁰ The question is simply too broad.

If the ICJ were to give an advisory opinion, an affirmative or negative decision would leave many important questions unanswered. If the use of nuclear weapons by a State in war or other conflict was found to be illegal by the ICJ, how could the ICJ give force to its decision?¹⁰¹ If the ICJ found the use of nuclear weapons to be legal when used by a State in war or other conflict, could the United Nations legally control the production of nuclear weapons in States that do not currently possess them? Considering that ICJ's past advisory opinions have been favorably received by the organs that requested them, how would those nations which currently possess nuclear weapons respond to a finding of illegality?¹⁰² It is clear that merely deciding to give the requested advisory opinion, much less the actual opinion itself, could cause great confusion with both the United Nations and international law.

VI. CONCLUSION

The issue of nuclear weapons possession and their use has been a central one in the arena of international law since its arrival. The issue is as complex and important as it is ambiguous and convoluted. While great strides since World War II have been made to protect the world from the effects of nuclear war, much more work needed. Most would agree that the devastating effects of nuclear weapons should be avoided at all costs. However, the methods for achieving this end should be carefully examined. The United Nations, to work effectively, requires that Member States are in agreement with its mandates. Without acquiescence, there can be no solid international law. Any disruption of this delicate balance between the Member States of the United Nations would negatively effect international law. The WHO's request for an advisory opinion from the ICJ concerning the legality of nuclear weapons use could conceivably disrupt this balance. Questions concerning the WHO's competence to ask for an opinion of this nature and the ambiguity of the question itself have

99. See *supra* notes 15-20 and accompanying text.

100. See ICJ Communiqué No. 93/26 (1993).

101. Even if the ICJ makes a judgment instead of an advisory opinion, questions will arise as to the Court's enforcement capabilities.

The Court is not in a position to order sovereign states about, as a national court is in a position to govern the participation of ordinary parties in the usual run of litigation. . . . [M]ost legal disputes between states do not come before the Court and some of the disputes which have, resulted in judgments which the losing party has not carried out. So the Court is not a fully effective institution.

I do not think you can compare its status, its influence, with the supreme courts of some countries. Schwebel, *supra* note 91, at 552, 557. See also Ago, *supra* note 14.

102. "In no case did a requesting organ refuse to accept and act upon the judicial advice rendered though, in some instances, initial insistence on absolute compliance with the Court's opinion was followed by subsequent tactical retreats." POMERANCE, *supra* note 87, at 341.

and will continue to divide the member States of the United Nations. If the ICJ decides to give the advisory opinion, the United Nations could be further divided. Therefore, the ICJ should give serious thought to the validity of the WHO's request.

While the issue of nuclear weapons continues to plague international law and while a consensus is needed to avoid their use, the correct methods for achieving this end cannot be overlooked. The answers lie within the Security Council and the General Assembly of the United Nations, not the WHO.

Martin M. Strahan

