LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS

Advisory Opinion of 8 July 1996

The Court handed down its advisory opinion on the request made by the General Assembly of the United Nations on the question concerning the Legality of the Threat or Use of Nuclear Weapons.

The final paragraph of the opinion reads as follows:

"For these reasons,

THE COURT,

(1) By thirteen votes to one,

Decides to comply with the request for an advisory opinion;

IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: Judge Oda;

(2) *Replies* in the following manner to the question put by the General Assembly:

A. Unanimously,

There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons;

B. By eleven votes to three,

There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such;

IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: Judges Shahabuddeen, Weeramantry, Koroma;

C. Unanimously,

A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the Charter of the United Nations and that fails to meet all the requirements of Article 51 is unlawful;

D. Unanimously,

A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons;

E. By seven votes to seven, by the President's casting vote,

It follows from the above-mentioned requirements 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;

IN FAVOUR: President Bedjaoui; Judges Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo;

AGAINST: Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Koroma, Higgins;

F. Unanimously,

There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control".

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The Court was composed as follows: President Bedjaoui, Vice-President Schwebel; Judges Oda, Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo, Higgins; Registrar Valencia-Ospina.

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President Bedjaoui and Judges Herczegh, Shi, Vereshchetin and Ferrari Bravo appended declarations to the advisory opinion of the Court; Judges Guillaume, Ranjeva and Fleischhauer appended separate opinions; Vice-President Schwebel and Judges Oda, Shahabuddeen, Weeramantry, Koroma and Higgins appended dissenting opinions.

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Submission of the request and subsequent procedure (paras. 1-9)

The Court begins by recalling that by a letter dated 19 December 1994, filed in the Registry on 6 January 1995, the Secretary-General of the United Nations officially communicated to the Registrar the decision taken by the Gen-

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eral Assembly to submit a question to the Court for an advisory opinion. The final paragraph of resolution 49/75 K, adopted by the General Assembly on 15 December 1994, which sets forth the question, provides that the General Assembly

"*Decides*, pursuant to Article 96, paragraph 1, of the Charter of the United Nations, to request the International Court of Justice urgently to render its advisory opinion on the following question: 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?'."

The Court then recapitulates the various stages of the proceedings.

Jurisdiction of the Court
(paras. 10-18)

The Court first considers whether it has the jurisdiction to give a reply to the request of the General Assembly for an advisory opinion and whether, should the answer be in the affirmative, there is any reason it should decline to exercise any such jurisdiction.

The Court observes that it draws its competence in respect of advisory opinions from Article 65, paragraph 1, of its Statute, while Article 96, paragraph 1, of the Charter provides that:

"The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question."

Some States which oppose the giving of an opinion by the Court argued that the General Assembly and the Security Council may ask for an advisory opinion on any legal question only within the scope of their activities. In the view of the Court, it matters little whether this interpretation of Article 96, paragraph 1, is or is not correct; in the present case, the General Assembly has competence in any event to seise the Court. Referring to Articles 10, 11 and 13 of the Charter, the Court finds that, indeed, the question put to the Court has 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.

"Legal question"
(para. 13)

The Court observes that it has already had occasion to indicate 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" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, para. 15).

It finds that the question put to the Court by the General Assembly is indeed a legal one, since the Court is asked to rule on the compatibility of the threat or use of nuclear weapons with the relevant principles and rules of international law. To do this, the Court must identify the existing principles and rules, interpret them and apply them to the threat or use of nuclear weapons, thus offering a reply to the question posed based on law.

The fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a "legal question" and to "deprive the Court of a competence expressly conferred on it by its Statute". Nor are the political nature of the motives which may be said to have inspired the request or the political implications that the opinion given might have of relevance in the establishment of the Court's jurisdiction to give such an opinion.

Discretion of the Court to give an advisory opinion
(paras. 14-19)

Article 65, paragraph 1, of the Statute provides: "The Court *may* give an advisory opinion . . . ". (Emphasis added.) This is more than an enabling provision. As the Court has repeatedly emphasized, the Statute leaves discretion as to whether or not it will give an advisory opinion that has been requested of it, once it has established its competence to do so. In this context, the Court has previously noted as follows:

"The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused." (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71.)

In the history of the present Court there has been no refusal, based on the discretionary power of the Court, to act upon a request for an advisory opinion; in the case concerning the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* the refusal to give the World Health Organization the advisory opinion requested by it was justified by the Court's lack of jurisdiction in that case.

Several reasons were adduced in these proceedings in order to persuade the Court that in the exercise of its discretionary power it should decline to render the opinion requested by the General Assembly. Some States, in contending that the question put to the Court is vague and abstract, appeared to mean by this that there exists no specific dispute on the subject-matter of the question. In order to respond to this argument, it is necessary to distinguish between requirements governing contentious procedure and those applicable to advisory opinions. The purpose of the advisory function is not to settle—at least directly—disputes between States, but to offer legal advice to the organs and institutions requesting the opinion. The fact that the question put to the Court does not relate to a specific dispute should consequently not lead the Court to decline to give the opinion requested. Other arguments concerned the fear that the abstract nature of the question might lead the Court to make hypothetical or speculative declarations outside the scope of its judicial function; the fact that the General Assembly has not explained to the Court for what precise purposes it seeks the advisory opinion; that a reply from the Court in this case might adversely affect disarmament negotiations and would, therefore, be contrary to the interest of the United Nations; and that in answering the question posed, the Court would be going beyond its judicial role and would be taking upon itself a law-making capacity.

The Court does not accept those arguments and concludes that it has the authority to deliver an opinion on the question posed by the General Assembly and that there exist no "compelling reasons" which would lead the Court to exercise its discretion not to do so. It points out,

however, that it is an entirely different question whether, under the constraints placed upon it as a judicial organ, it will be able to give a complete answer to the question asked of it. But that is a different matter from a refusal to answer at all.

Formulation of the question posed
(paras. 20-22)

The Court finds it unnecessary to pronounce on the possible divergences between the English and French texts of the question put. Its real objective is clear: to determine the legality or illegality of the threat or use of nuclear weapons. And the argument concerning the legal conclusions to be drawn from the use of the word "permitted", and the questions of burden of proof to which it was said to give rise, are found by the Court to be without particular significance for the disposition of the issues before it.

The applicable law
(paras. 23-34)

In seeking to answer the question put to it by the General Assembly, the Court must decide, after consideration of the great corpus of international law norms available to it, what might be the relevant applicable law.

The Court considers that the question whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to article 6 of the International Covenant on Civil and Political Rights, as argued by some of the proponents of the illegality of the use of nuclear weapons, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself. The Court also points out that the prohibition of genocide would be pertinent in this case if the recourse to nuclear weapons did indeed entail the element of intent, towards a group as such, required by article II of the Convention on the Prevention and Punishment of the Crime of Genocide. In the view of the Court, it would only be possible to arrive at such a conclusion after having taken due account of the circumstances specific to each case. And the Court further finds that while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict.

In the light of the foregoing, the Court concludes that the most directly relevant applicable law governing the question of which it was seised is that relating to the use of force enshrined in the Charter of the United Nations and the law applicable in armed conflict which regulates the conduct of hostilities, together with any specific treaties on nuclear weapons that the Court might determine to be relevant.

Unique characteristics of nuclear weapons
(paras. 35-36)

The Court notes that in order correctly to apply to the present case the Charter law on the use of force and the law applicable in armed conflict, in particular humanitarian law, it is imperative for it to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come.

Provisions of the Charter relating to the threat or use of force
(paras. 37-50)

The Court then addresses the question of the legality or illegality of recourse to nuclear weapons in the light of the provisions of the Charter relating to the threat or use of force.

In Article 2, paragraph 4, of the Charter, the use of force against the territorial integrity or political independence of another State or in any other manner inconsistent with the purposes of the United Nations is prohibited.

This prohibition of the use of force is to be considered in the light of other relevant provisions of the Charter. In Article 51, the Charter recognizes the inherent right of individual or collective self-defence if an armed attack occurs. A further lawful use of force is envisaged in Article 42, whereby the Security Council may take military enforcement measures in conformity with Chapter VII of the Charter.

These provisions do not refer to specific weapons. They apply to any use of force, regardless of the weapons employed. The Charter neither expressly prohibits, nor permits, the use of any specific weapon, including nuclear weapons.

The entitlement to resort to self-defence under Article 51 is subject to the conditions of necessity and proportionality. As the Court stated in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (*I.C.J. Reports 1986*, p. 94, para. 176): "there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law".

The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defence in all circumstances. But at the same time, a use of force that is proportionate under the law of self-defence must, in order to be lawful, also meet the requirements of the law applicable in armed conflict, which comprise in particular the principles and rules of humanitarian law. And the Court notes that the very nature of all nuclear weapons and the profound risks associated therewith are further considerations to be borne in mind by States believing they can exercise a nuclear response in self-defence in accordance with the requirements of proportionality.

In order to lessen or eliminate the risk of unlawful attack, States sometimes signal that they possess certain weapons to use in self-defence against any State violating their territorial integrity or political independence. Whether a signalled intention to use force if certain events occur is or is not a "threat" within Article 2, paragraph 4, of the Charter depends upon various factors. The notions of "threat" and "use" of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal—for whatever reason—the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter. For the rest, no

State—whether or not it defended the policy of deterrence—suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal.

Rules on the lawfulness or unlawfulness of nuclear weapons as such
(paras. 49-73)

Having dealt with the Charter provisions relating to the threat or use of force, the Court turns to the law applicable in situations of armed conflict. It first addresses the question whether there are specific rules in international law regulating the legality or illegality of recourse to nuclear weapons per se; it then examines the question put to it in the light of the law applicable in armed conflict proper, i.e., the principles and rules of humanitarian law applicable in armed conflict, and the law of neutrality.

The Court notes by way of introduction that international customary and treaty law does not contain any specific prescription authorizing the threat or use of nuclear weapons or any other weapon in general or in certain circumstances, in particular those of the exercise of legitimate self-defence. Nor, however, is there any principle or rule of international law which would make the legality of the threat or use of nuclear weapons or of any other weapons dependent on a specific authorization. State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition.

It does not seem to the Court that the use of nuclear weapons can be regarded as specifically prohibited on the basis of certain provisions of the Second Hague Declaration of 1899, the Regulations annexed to the Hague Convention IV of 1907 or the 1925 Geneva Protocol. The pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments. But the Court does not find any specific prohibition of recourse to nuclear weapons in treaties expressly prohibiting the use of certain weapons of mass destruction; and observes that, although, in the last two decades, a great many negotiations have been conducted regarding nuclear weapons, they have not resulted in a treaty of general prohibition of the same kind as for bacteriological and chemical weapons.

The Court notes that the treaties dealing exclusively with acquisition, manufacture, possession, deployment and testing of nuclear weapons, without specifically addressing their threat or use, certainly point to an increasing concern in the international community with these weapons. It concludes from this that these treaties could therefore be seen as foreshadowing a future general prohibition of the use of such weapons, but that they do not constitute such a prohibition by themselves. As to the treaties of Tlatelolco and Rarotonga and their Protocols, and also the declarations made in connection with the indefinite extension of the Treaty on the Non-Proliferation of Nuclear Weapons, it emerges from these instruments that:

(*a*) a number of States have undertaken not to use nuclear weapons in specific zones (Latin America; the South Pacific) or against certain other States (non-nuclear-weapon States which are parties to the Treaty on the Non-Proliferation of Nuclear Weapons);

(*b*) nevertheless, even within this framework, the nuclear-weapon States have reserved the right to use nuclear weapons in certain circumstances; and

(*c*) these reservations met with no objection from the parties to the Tlatelolco or Rarotonga Treaties or from the Security Council.

The Court then turns to an examination of customary international law to determine whether a prohibition of the threat or use of nuclear weapons as such flows from that source of law.

It notes that the members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past 50 years constitutes the expression of an *opinio juris*. Under these circumstances the Court does not consider itself able to find that there is such an *opinio juris*. It points out that the adoption each year by the General Assembly, by a large majority, of resolutions recalling the content of resolution 1653 (XVI), and requesting the Member States to conclude a convention prohibiting the use of nuclear weapons in any circumstance, reveals the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament. The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris*, on the one hand, and the still strong adherence to the doctrine of deterrence (in which the right to use those weapons in the exercise of the right to self-defence against an armed attack threatening the vital security interests of the State is reserved), on the other.

International humanitarian law
(paras. 74-87)

Not having found a conventional rule of general scope, nor a customary rule specifically proscribing the threat or use of nuclear weapons per se, the Court then deals with the question whether recourse to nuclear weapons must be considered as illegal in the light of the principles and rules of international humanitarian law applicable in armed conflict and of the law of neutrality.

After sketching the historical development of the body of rules which originally were called "laws and customs of war" and later came to be termed "international humanitarian law", the Court observes that the cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.

The Court also refers to the Martens Clause, which was first included in the Hague Convention II with Respect to the Laws and Customs of War on Land of 1899

and which has proved to be an effective means of addressing the rapid evolution of military technology. A modern version of that clause is to be found in article 1, paragraph 2, of Additional Protocol I of 1977, which reads as follows:

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

The extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles. These rules indicate the normal conduct and behaviour expected of States.

Turning to the applicability of the principles and rules of humanitarian law to a possible threat or use of nuclear weapons, the Court notes that nuclear weapons were invented after most of the principles and rules of humanitarian law applicable in armed conflict had already come into existence; the Conferences of 1949 and 1974-1977 left these weapons aside, and there is a qualitative as well as quantitative difference between nuclear weapons and all conventional arms. However, in the Court's view, it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future. In this respect it seems significant that the thesis that the rules of humanitarian law do not apply to the new weaponry, because of the newness of the latter, has not been advocated in the present proceedings.

The principle of neutrality
(paras. 88-89)

The Court finds that, as in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the Charter of the United Nations) to all international armed conflict, whatever type of weapons might be used.

Conclusions to be drawn from the applicability of international humanitarian law and the principle of neutrality
(paras. 90-97)

The Court observes that, although the applicability of the principles and rules of humanitarian law and of the principle of neutrality to nuclear weapons is hardly disputed, the conclusions to be drawn from this applicability are, on the other hand, controversial.

According to one point of view, the fact that recourse to nuclear weapons is subject to and regulated by the law of armed conflict does not necessarily mean that such recourse is as such prohibited. Another view holds that recourse to nuclear weapons, in view of the necessarily indiscriminate consequences of their use, could never be compatible with the principles and rules of humanitarian law and is therefore prohibited. A similar view has been expressed with respect to the effects of the principle of neutrality. Like the principles and rules of humanitarian law, that principle has therefore been considered by some to rule out the use of a weapon the effects of which simply cannot be contained within the territories of the contending States.

The Court observes that, in view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with respect for the requirements of the law applicable in armed conflict. It considers, nevertheless, that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance. Furthermore, the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake. Nor can it ignore the practice referred to as "policy of deterrence", to which an appreciable section of the international community adhered for many years.

Accordingly, in view of the present state of international law viewed as a whole, as examined by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.

Obligation to negotiate nuclear disarmament
(paras. 98-103)

Given the eminently difficult issues that arise in applying the law on the use of force and above all the law applicable in armed conflict to nuclear weapons, the Court considers that it needs to examine one further aspect of the question before it, seen in a broader context.

In the long run, international law, and with it the stability of the international order which it is intended to govern, is bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons. It is consequently important to put an end to this state of affairs: the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result.

In these circumstances, the Court appreciates the full importance of the recognition by article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of an obligation to negotiate in good faith a nuclear disarmament. The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result—nuclear disarmament in all its aspects—by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith. This twofold obligation to pursue and to conclude negotiations formally concerns the 182 States

parties to the Treaty on the Non-Proliferation of Nuclear Weapons, or, in other words, the vast majority of the international community. Indeed, any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the cooperation of all States.

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The Court finally emphasizes that its reply to the question put to it by the General Assembly rests on the totality of the legal grounds set forth by the Court above (paragraphs 20 to 103), each of which is to be read in the light of the others. Some of these grounds are not such as to form the object of formal conclusions in the final paragraph of the opinion; they nevertheless retain, in the view of the Court, all their importance.

Declaration of President Bedjaoui

After having pointed out that paragraph E of the operative part was adopted by 7 votes to 7, with his own casting vote, President Bedjaoui began by stressing that the Court had been extremely meticulous and had shown an acute sense of its responsibilities when proceeding to consider all the aspects of the complex question put to it by the General Assembly. He indicated that the Court had, however, had to find that in the current state of international law the question was one to which it was unfortunately not in a position to give a clear answer. In his view, the advisory opinion thus rendered does at least have the merit of pointing to the imperfections of international law and inviting the States to correct them.

President Bedjaoui indicated that the fact that the Court was unable to go any further should not "in any way be interpreted as leaving the way open to the recognition of the lawfulness of the threat or use of nuclear weapons". According to him, the Court does no more than place on record the existence of a legal uncertainty. After having observed that the voting of the Members of the Court on paragraph E of the operative part is not the reflection of any geographical dividing line, he gives the reasons that led him to approve the pronouncement of the Court.

To that end, he began by emphasizing the particularly exacting nature of international law and the way in which it is designed to be applied in all circumstances. More specifically, he concluded that "*the very nature of this blind weapon therefore has a destabilizing effect on humanitarian law which regulates discernment in the type of weapon used. Nuclear weapons, the ultimate evil, destabilize humanitarian law which is the law of the lesser evil. The existence of nuclear weapons is therefore a challenge to the very existence of humanitarian law*, not to mention their long-term effects of damage to the human environment, in respect to which the *right to life* can be exercised".

President Bedjaoui considered that "self-defence—if exercised under extreme circumstances in which the very survival of a State is in question—cannot engender a situation in which a State would exonerate itself from compliance with the '*intransgressible*' norms of international humanitarian law". According to him, it would be very rash to accord, without any hesitation, a higher priority to the survival of a State than to the survival of humanity itself.

As the ultimate objective of any action in the field of nuclear weapons is nuclear disarmament, President Bedjaoui concludes by stressing the importance of the obligation to negotiate in good faith for nuclear disarmament—which the Court has, moreover, recognized. He considers for his part that it is possible to go beyond the conclusions of the Court in this regard and to assert "that there in fact exists a twofold *general obligation*, opposable *erga omnes*, to negotiate in good faith and to achieve a specified result"; in other words, given the at least formally unanimous support for that object, that obligation has now—in his view—assumed customary force.

Declaration of Judge Herczegh

Judge Herczegh, in his declaration, takes the view that the advisory opinion could have included a more accurate summary of the present state of international law with regard to the question of the threat and use of nuclear weapons "in any circumstance". He voted in favour of the advisory opinion and, more particularly, in favour of paragraph 105, subparagraph E, as he did not wish to dissociate himself from the large number of conclusions that were expressed and integrated into the advisory opinion, and which he fully endorses.

Declaration of Judge Shi

Judge Shi has voted in favour of the operative paragraphs of the advisory opinion of the Court. However, he has reservations with regard to the role which the Court assigns to the policy of deterrence in determining the existence of a customary rule on the use of nuclear weapons.

In his view, "nuclear deterrence" is an instrument of policy to which certain nuclear-weapon States, supported by those States accepting nuclear umbrella protection, adhere in their relations with other States. This practice is within the realm of international politics and has no legal value from the standpoint of the formation of a customary rule prohibiting the use of the weapons as such.

It would be hardly compatible with the Court's judicial function if the Court, in determining a rule of existing law governing the use of the weapons, were to have regard to the "policy of deterrence".

Also, leaving aside the nature of the policy of deterrence, States adhering to the policy of deterrence, though important and powerful members of the international community and playing an important role on the stage of international politics, by no means constitute a large proportion of the membership of the international community.

Besides, the structure of the community of States is built on the principle of sovereign equality. The Court cannot view these nuclear-weapon States and their allies in terms of material power, but rather should have regard of them from the standpoint of international law. Any undue emphasis on the practice of these materially powerful States, constituting a fraction of the membership of the community of States, would not only be contrary to the principle of sovereign equality of States, but also make it more difficult to give an accurate and proper view of the existence of a customary rule on the use of nuclear weapons.

Declaration of Judge Vereshchetin

In his declaration, Judge Vereshchetin explains the reasons which have led him to vote in favour of paragraph 2 E of the *dispositif*, which carries the implication of the indecisiveness of the Court. In his view, in advisory procedure,

where the Court is requested not to resolve an actual dispute, but to state the law as it finds it, the Court may not try to fill any lacuna or improve the law that is imperfect. The Court cannot be blamed for indecisiveness or evasiveness where the law, upon which it is called to pronounce, is itself inconclusive.

Judge Vereshchetin is of the view that the opinion adequately reflects the current legal situation and shows the most appropriate means to putting an end to the existence of any "grey areas" in the legal status of nuclear weapons.

Declaration of Judge Ferrari Bravo

Judge Ferrari Bravo regrets that the Court should have arbitrarily divided into two categories the long line of General Assembly resolutions that deal with nuclear weapons. Those resolutions are fundamental. This is the case of resolution 1 (I) of 24 January 1946, which clearly points to the existence of a truly solemn *undertaking* to eliminate all forms of nuclear weapons, whose presence in military arsenals was declared unlawful. The cold war, which intervened shortly afterwards, prevented the *development* of this concept of illegality, while giving rise to the concept of nuclear deterrence which has *no legal value*. The theory of deterrence, while it has occasioned a practice of the nuclear-weapon States and their allies, has not been able to create a legal practice serving as a basis for the incipient creation of an international custom. It has, moreover, helped to widen the gap between Article 2, paragraph 4, of the Charter and Article 51.

The Court should have proceeded to a constructive analysis of the role of the General Assembly resolutions. These have, from the outset, contributed to the formation of a rule prohibiting nuclear weapons. The theory of deterrence has arrested the development of that rule and, while it has prevented the *implementation* of the prohibition of nuclear weapons, it is none the less still the case that that "bare" prohibition has remained unchanged and continues to produce its effects, at least with regard to the burden of proof, by making it more difficult for the nuclear Powers to vindicate their policies within the framework of the theory of deterrence.

Separate opinion of Judge Guillaume

After having pondered upon the admissibility of the request for an advisory opinion, Judge Guillaume begins by expressing his agreement with the Court with regard to the fact that nuclear weapons, like all weapons, can only be used in the exercise of the right of self-defence recognized by Article 51 of the Charter. On the other hand, he says he has had doubts about the applicability of traditional humanitarian law to the use—and above all the threat of use—of nuclear weapons. He goes on to say, however, that he has no choice in the matter but to defer to the consensus that has emerged before the Court between the States.

Moving on to an analysis of the law applicable to armed conflict, he notes that that law essentially implies comparisons in which humanitarian considerations have to be weighed against military requirements. Thus, the collateral damage caused to the civilian population must not be "excessive" as compared to the "military advantage" offered. The harm caused to combatants must not be "greater than that unavoidable to achieve legitimate military objectives". On that account, nuclear weapons of mass destruction can only be used lawfully in extreme cases.

In an attempt to define those cases, Judge Guillaume stresses that neither the Charter of the United Nations nor any conventional or customary rule can detract from the natural right of self-defence recognized by Article 51 of the Charter. He deduces from this that international law cannot deprive a State of the right to resort to nuclear weaponry if that resort constitutes the ultimate means by which it can ensure its survival.

He regrets that the Court has not explicitly recognized this, but stresses that it has done so implicitly. It has certainly concluded that it could not, in those extreme circumstances, make a definitive finding of either legality or illegality in relation to nuclear weapons. In other words, it has taken the view that, in such circumstances, the law provides no guidance to States. However, if the law is silent on that matter, the States, in the exercise of their sovereignty, remain free to act as they think fit.

Consequently, it follows implicitly but necessarily from paragraph 2 E of the Court's advisory opinion that the States may resort to "the threat or use of nuclear weapons in an extreme circumstance of self-defence, in which the very survival of a State would be at stake". When recognizing such a right the Court, by so doing, has recognized the legality of policies of deterrence.

Separate opinion of Judge Ranjeva

In his separate opinion, Judge Ranjeva has made a point of emphasizing that, for the first time, the Court has unambiguously stated that the use or threat of use of nuclear weapons is contrary to the rules of international law applicable, *inter alia*, to armed conflict and, more particularly, to the principles and rules of humanitarian law. That indirect response to the question of the General Assembly is, in his view, justified by the very nature of the law of armed conflict, applicable without regard to the status of victim or of aggressor, and that explains why the Court has not gone so far as to uphold the exception of extreme self-defence when the very survival of the State is at stake, as a condition for the suspension of illegality. In his view, State practice shows that a point of no return has been reached: the principle of the legality of the use or threat of use of nuclear weapons has not been asserted; it is on the basis of a justification of an exception to that principle, accepted as being legal, that the nuclear-weapon States attempt to give the reasons for their policies, and the increasingly closer-knit legal regimes of nuclear weapons have come about in the context of the consolidation and implementation of the final obligation to produce a specific result, i.e., generalized nuclear disarmament. These "givens" thus represent the advent of a consistent and uniform practice: an emergent *opinio juris*.

Judge Ranjeva considers, however, that the equal treatment that the advisory opinion has given to the principles of legality and illegality cannot be justified. The General Assembly gave a very clear definition of the object of its question: Does international law authorize the use or threat of use of nuclear weapons in any circumstance? By dealing at the same time and, above all, on the same level with both legality and illegality, the Court has been led to adopt a liberal acceptation of the concept of a "legal question" in an advisory proceeding, as henceforth any question whose object is to ask the Court to look into matters that some people do not seek to understand will be seen as admissible.

In conclusion, Judge Ranjeva, while being aware of the criticisms that specialists in law and judicial matters will be bound to level at the advisory opinion, ultimately considers that it does declare the law as it is, while laying down boundaries the exceeding of which is a matter for the competence of States. He none the less hopes that no Court will ever have to reach a decision along the lines of the second subparagraph of paragraph E.

Separate opinion of Judge Fleischhauer

Judge Fleischhauer's separate opinion highlights that international law is still grappling with and has not yet overcome the dichotomy that is created by the very existence of nuclear weapons between the law applicable in armed conflict, and in particular the rules and principles of humanitarian law, on the one side, and the inherent right of self-defence, on the other. The known qualities of nuclear weapons let their use appear scarcely reconcilable with humanitarian law, while the right to self-defence would be severely curtailed if for a State, victim of an attack with nuclear, chemical or bacteriological weapons or otherwise constituting a deadly menace for its very existence, nuclear weapons were totally ruled out as an ultimate legal option.

The separate opinion endorses the Court's finding that international law applicable in armed conflict, particularly the rules and principles of humanitarian law, applies to nuclear weapons. It goes on to agree with the Court's conclusion that the threat or use of nuclear weapons would generally be contrary to the rules applicable in armed conflict, and in particular the principles and rules of humanitarian law. The separate opinion then welcomes that the Court did not stop there, but that the Court admitted that there can be qualifications to that finding. Had the Court not done so, then it would have given prevalence to one set of principles involved over the other. The principles involved are, however, all legal principles of equal rank.

The separate opinion continues that the Court could and should have gone further and that it could and should have stated that in order to reconcile the conflicting principles, their smallest common denominator would apply. That means that recourse to nuclear weapons could remain a justified legal option in an extreme case of individual or collective self-defence as the last resort of a State victim of an attack with nuclear, bacteriological or chemical weapons or otherwise threatening its very existence. The separate opinion sees a confirmation of this view in the legally relevant State practice relating to matters of self-defence.

For a recourse to nuclear weapons to be considered justified, however, not only would the situation have to be extreme, but all the conditions on which the lawfulness of the exercise of the right of self-defence depends in international law, including the requirement of proportionality, would have to be met. Therefore, the margin for considering that a particular threat or use of nuclear weapons could be legal is extremely narrow.

Finally, the separate opinion endorses the existence of a general obligation of States to pursue in good faith, and bring to a conclusion, negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

Dissenting opinion of Vice-President Schwebel

Vice-President Schwebel, while agreeing with much of the body of the Court's opinion, dissented because of his "profound" disagreement with its principal operative conclusion: "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." The Court thereby concluded "on the supreme issue of the threat or use of force of our age that it has no opinion . . . that international law and hence the Court have nothing to say. After many months of agonizing appraisal of the law, the Court discovers that there is none. When it comes to the supreme interests of State, the Court discards the legal progress of the twentieth century, puts aside the provisions of the Charter of the United Nations of which it is 'the principal judicial organ', and proclaims, in terms redolent of *Realpolitik*, its ambivalence about the most important provisions of modern international law. If this was to be its ultimate holding, the Court would have done better to have drawn on its undoubted discretion not to render an opinion at all."

The Court's inconclusiveness was in accordance neither with its Statute, nor with its precedent, nor with events which demonstrate the legality of the threat or use of nuclear weapons in extraordinary circumstances. E.g., the threat which Iraq took as a nuclear threat that may have deterred it from using chemical and biological weapons against coalition forces in the Gulf War was "not only eminently lawful but intensely desirable".

While the principles of international humanitarian law govern the use of nuclear weapons, and while "it is extraordinarily difficult to reconcile the use . . . of nuclear weapons with the application of those principles", it does not follow that the use of nuclear weapons necessarily and invariably will contravene those principles. But it cannot be accepted that the use of nuclear weapons on a scale which would—or could—result in the deaths of "many millions in indiscriminate inferno and by far-reaching fallout . . . and render uninhabitable much or all of the earth, could be lawful". The Court's conclusion that the threat or use of nuclear weapons "generally" would be contrary to the rules of international law applicable in armed conflict "is not unreasonable".

The case as a whole presents an unparalleled tension between State practice and legal principle. State practice demonstrates that nuclear weapons have been manufactured and deployed for some 50 years; that in that deployment inheres a threat of possible use ("deterrence"); and that the international community, far from outlawing the threat or use of nuclear weapons in all circumstances, has recognized in effect or in terms that in certain circumstances nuclear weapons may be used or their use threatened. This State practice is not that of a lone and secondary persistent objector, but a practice of the permanent members of the Security Council, supported by a large and weighty number of other States, which together represent the bulk of the world's power and much of its population.

The Nuclear Non-Proliferation Treaty and the negative and positive security assurances of the nuclear Powers unanimously accepted by the Security Council indicate the acceptance by the international community of the threat or use of nuclear weapons in certain circumstances. Other nuclear treaties equally infer that nuclear weapons are not comprehensively prohibited either by treaty or by customary international law.

General Assembly resolutions to the contrary are not law-making or declaratory of existing international law.

When faced with continuing and significant opposition, the repetition of General Assembly resolutions is a mark of ineffectuality in law formation as it is in practical effect.

Dissenting opinion of Judge Oda

Judge Oda voted against part one of the Court's advisory opinion because of his view that, for the reasons of judicial propriety and judicial economy, the Court should have exercised its discretionary power to refrain from rendering an opinion in response to the request.

In the view of Judge Oda, the question in the request is not adequately drafted and there was a lack of a meaningful consensus of the General Assembly with regard to the 1994 request. After examining the developments of the relevant General Assembly resolutions on a convention on the prohibition of the use of nuclear weapons up to 1994, he notes that the General Assembly is far from having reached an agreement on the preparation of a Convention rendering the use of nuclear weapons illegal. In the light of that history, the request was prepared and drafted—not in order to ascertain the status of existing international law on the subject but to try to promote the total elimination of nuclear weapons—that is to say, with highly *political* motives.

He notes that the perpetuation of the NPT regime recognizes two groups of States—the five nuclear-weapon States and the non-nuclear-weapon States. As the five nuclear-weapon States have repeatedly given assurances to the non-nuclear-weapon States of their intention not to use nuclear weapons against them, there is almost no probability of any use of nuclear weapons given the current doctrine of nuclear deterrence.

Judge Oda maintains that an advisory opinion should only be given in the event of a real need. In the present instance there is no need and no rational justification for the General Assembly's request that the Court give an advisory opinion on the existing international law relating to the use of nuclear weapons. He also emphasizes that from the standpoint of judicial economy the right to request an advisory opinion should not be abused.

In concluding his opinion, Judge Oda stresses his earnest hope that nuclear weapons will be eliminated from the world but states that the decision on this matter is a function of political negotiations among States in Geneva (the Conference on Disarmament) or New York (the United Nations) but not one which concerns this judicial institution in The Hague.

He voted against subparagraph E as the equivocations contained therein serve, in his view, to confirm his point that it would have been prudent for the Court to decline from the outset to give any opinion at all in the present case.

Dissenting opinion of Judge Shahabuddeen

In Judge Shahabuddeen's dissenting opinion, the essence of the General Assembly's question was whether, in the special case of nuclear weapons, it was possible to reconcile the imperative need of a State to defend itself with the no less imperative need to ensure that, in doing so, it did not imperil the survival of the human species. If a reconciliation was not possible, which side should give way? The question was, admittedly, a difficult one; but the responsibility of the Court to answer it was clear. He was not persuaded that there was any deficiency in the law or the facts which prevented the Court from returning a definitive answer to the real point of the General Assembly's question. In his respectful view, the Court should and could have given a definitive answer—one way or another.

Dissenting opinion of Judge Weeramantry

Judge Weeramantry's opinion is based on the proposition that the use or threat of use of nuclear weapons is illegal *in any circumstances whatsoever*. It violates the fundamental principles of international law, and represents the very negation of the humanitarian concerns which underlie the structure of humanitarian law. It offends conventional law and, in particular, the Geneva Gas Protocol of 1925 and article 23 (*a*) of the Hague Regulations of 1907. It contradicts the fundamental principle of the dignity and worth of the human person on which all law depends. It endangers the human environment in a manner which threatens the entirety of life on the planet.

He regretted that the Court had not so held, directly and categorically.

However, there were some portions of the Court's opinion which were of value, in that it expressly held that nuclear weapons were subject to limitations flowing from the Charter of the United Nations, the general principles of international law, the principles of international humanitarian law, and a variety of treaty obligations. It was the first international judicial determination to this effect and further clarifications were possible in the future.

Judge Weeramantry's opinion explained that from the time of Henri Dunant, humanitarian law took its origin and inspiration from a realistic perception of the brutalities of war, and the need to restrain them in accordance with the dictates of the conscience of humanity. The brutalities of the nuclear weapon multiplied a thousandfold all the brutalities of war as known in the pre-nuclear era. It was doubly clear therefore that the principles of humanitarian law governed this situation.

His opinion examined in some detail the brutalities of nuclear war, showing numerous ways in which the nuclear weapon was unique, even among weapons of mass destruction, in injuring human health, damaging the environment and destroying all the values of civilization.

The nuclear weapon caused death and destruction; induced cancers, leukaemia, keloids and related afflictions; caused gastrointestinal, cardiovascular and related afflictions; continued, for decades after its use, to induce the health-related problems mentioned above; damaged the environmental rights of future generations; caused congenital deformities, mental retardation and genetic damage; carried the potential to cause a nuclear winter; contaminated and destroyed the food chain; imperilled the ecosystem; produced lethal levels of heat and blast; produced radiation and radioactive fallout; produced a disruptive electromagnetic pulse; produced social disintegration; imperilled all civilization; threatened human survival; wreaked cultural devastation; spanned a time range of thousands of years; threatened all life on the planet; irreversibly damaged the rights of future generations; exterminated civilian populations; damaged neighbouring States; and produced psychological stress and fear syndromes—*as no other weapons do.*

While it was true that there was no treaty or rule of law which expressly outlawed nuclear weapons by name, there was an abundance of principles of international law, and particularly international humanitarian law, which left no

doubt regarding the illegality of nuclear weapons, when one had regard to their known effects.

Among these principles were the prohibition against causing unnecessary suffering, the principle of proportionality, the principle of discrimination between combatants and civilians, the principle against causing damage to neutral States, the prohibition against causing serious and lasting damage to the environment, the prohibition against genocide, and the basic principles of human rights law.

In addition, there were specific treaty provisions contained in the Geneva Gas Protocol (1925) and the Hague Regulations (1907) which were clearly applicable to nuclear weapons, as they prohibited the use of poisons. Radiation fell directly within this description, and the prohibition against the use of poisons was indeed one of the oldest rules of the laws of war.

Judge Weeramantry's opinion also draws attention to the multicultural and ancient origins of the laws of war, referring to the recognition of its basic rules in Hindu, Buddhist, Chinese, Judaic, Islamic, African and modern European cultural traditions. As such, the humanitarian rules of warfare were not to be regarded as a new sentiment, invented in the nineteenth century, and so slenderly rooted in universal tradition that they may be lightly overridden.

The opinion also points out that there cannot be two sets of the laws of war applicable simultaneously to the same conflict—one to conventional weapons, and the other to nuclear weapons.

Judge Weeramantry's analysis includes philosophical perspectives showing that no credible legal system could contain a rule within itself which rendered legitimate an act which could destroy the entire civilization of which that legal system formed a part. Modern juristic discussions showed that a rule of this nature, which may find a place in the rules of a suicide club, could not be part of any reasonable legal system—and international law was preeminently such a system.

The opinion concludes with a reference to the appeal in the Russell-Einstein Manifesto to "remember your humanity and forget the rest", without which the risk arises of universal death. In this context, the opinion points out that international law is equipped with the necessary array of principles with which to respond, and that international law could contribute significantly towards rolling back the shadow of the mushroom cloud, and heralding the sunshine of the nuclear-free age.

The question should therefore have been answered by the Court—convincingly, clearly and categorically.

Dissenting opinion of Judge Koroma

In his dissenting opinion, Judge Koroma stated that he fundamentally disagreed with the Court's finding that:

> "... 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".

Such a finding, he maintained, could not be sustained on the basis of existing international law, or in the face of the weight and abundance of evidence and material presented to the Court. In his view, on the basis of the existing law, particularly humanitarian law and the material available to the Court, the use of nuclear weapons in any circumstance would at the very least result in the violation of the principles and rules of that law and is therefore unlawful.

Judge Koroma also pointed out that although the views of States are divided on the question of the effects of the use of nuclear weapons, or as to whether the matter should have been brought before the Court, he took the view that once the Court had found that the General Assembly was competent to pose the question, and that no compelling reason existed against rendering an opinion, the Court should have performed its judicial function and decided the case on the basis of existing international law. He expressed his regret that the Court, even after holding 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"

—a finding with which he concurred, save for the word "generally"—the Court had flinched from answering the actual question put to it that the threat or use of nuclear weapons in any circumstance would be unlawful under international law.

He maintained that the Court's answer to the question had turned on the "survival of the State", whereas the question posed to the Court was about the lawfulness of the use of nuclear weapons. He therefore found the Court's Judgment not only untenable in law, but even potentially destabilizing of the existing international legal order, as it not only made States that might be disposed to use such weapons judges about the lawfulness of the use of such weapons, but also threw the regime regarding the prohibition of the use of force and self-defence as regulated by the Charter of the United Nations into doubt, while at the same time, albeit unintentionally, it made inroads into the legal restraints imposed on nuclear-weapon States regarding such weapons.

Judge Koroma, in his dissenting opinion, undertook a survey of what, in his view, is the law applicable to the question, analysed the material before the Court and came to the conclusion that it is wholly unconvincing for the Court to have ruled that, in view of the "current state of the law", it could not conclude definitively whether the use of nuclear weapons would be illegal. In his opinion, not only does the law exist in substantial and ample form, but it is also precise and the purported lacuna is entirely unpersuasive. In his opinion, there was no room for a finding of *non liquet* in the matter before the Court.

On the other hand, after analysing the evidence, Judge Koroma came to the same conclusion as the Court that nuclear weapons, when used, are incapable of distinguishing between civilians and military personnel, and would result in the death of thousands if not millions of civilians, cause superfluous injury and unnecessary suffering to survivors, affect future generations, damage hospitals and contaminate the natural environment, food and drinking water with radioactivity, thereby depriving survivors of the means of survival, contrary to the Geneva Conventions of 1949 and the 1977 Additional Protocol I thereto. It followed, therefore, that the use of such weapons would be unlawful.

His dissent from the Court's main finding notwithstanding, Judge Koroma stated that the opinion should not be viewed as entirely without legal significance or merit. The normative findings contained in it should be regarded as a step forward in the historic process of imposing legal restraints in armed conflicts and in reaffirming that nuclear weapons are subject to international law and to the rule of

law. The Court's advisory opinion, in his view, constitutes the first time in history that a tribunal of this standing has declared and reaffirmed that the threat or use of nuclear weapons that is contrary to Article 2, paragraph 4, of the Charter prohibiting the use of force is unlawful and would be incompatible with the requirements of international law applicable in armed conflict. The finding, though qualified, is tantamount to a rejection of the argument that because nuclear weapons were invented after the advent of humanitarian law, they are therefore not subject to that law.

In conclusion, Judge Koroma regretted that the Court did not follow through with those normative conclusions and make the only possible and inescapable finding that because of their established characteristics, it is impossible to conceive of any circumstance when the use of nuclear weapons in an armed conflict would not be unlawful. Such a conclusion by the Court would have been a most invaluable contribution by the Court, as the guardian of legality of the United Nations system, to what has been described as the most important aspect of international law facing humanity today.

Dissenting opinion of Judge Higgins

Judge Higgins appended a dissenting opinion in which she explained that she was not able to support that key finding of the Court in paragraph 2 E. In her view, the Court had not applied the rules of humanitarian law in a systematic and transparent way to show how it reached the conclusion in the first part of paragraph 2 E of the *dispositif*. Nor was the meaning of the first part of paragraph 2 E clear. Judge Higgins also opposed the *non liquet* in the second part of paragraph 2 E, believing it to be unnecessary and wrong in law.