DECLARATION OF JUDGE VERESHCHETIN

The reply of the Court, in my view, adequately reflects the current legal situation and gives some indication for the further development of the international law applicable in armed conflict.

However, I find myself obliged to explain the reasons which have led me to vote in favour of paragraph 2 E of the *dispositif*, which carries the implication of the indecisiveness of the Court and indirectly admits the existence of a "grey area" in the present regulation of the matter.

The proponents of the view that a court should be prohibited from declaring *non liquet* regard this prohibition as a corollary of the concept of the "completeness" of the legal system. Those among their number who do not deny the existence of gaps in substantive international law consider that it is the obligation of the Court in a concrete case to fill the gap and thus, by reference to a general legal principle or by way of judicial law-creation, to provide for the "completeness" of the legal system.

On the other hand, there is a strong doctrinal view that the alleged "prohibition" on a declaration of a *non liquet* "may not be fully sustained by any evidence yet offered" (J. Stone, "*Non Liquet* and the Function of Law in the International Community", *The British Year Book of International Law*, 1959, p. 145). In his book devoted specifically to the problems of lacunae in international law, L. Siorat comes to the conclusion that in certain cases a court is obliged to declare a *non liquet* (*Le problème des lacunes en droit international*, 1958, p. 189).

In critically assessing the importance for our case of the doctrinal debate on the issue of *non liquet*, one cannot lose sight of the fact that the debate has concerned predominantly, if not exclusively, the admissibility or otherwise of *non liquet* in a contentious procedure in which the Court is called upon to pronounce a binding, definite decision settling the dispute between the parties. Even in those cases, the possibility of declaring a *non liquet* was not excluded by certain authoritative publicists, although this view could not be convincingly supported by arbitral and judicial practice.

In the present case, however, the Court is engaged in advisory procedure. It is requested not to resolve an actual dispute between actual parties, but to state the law as it finds it at the present stage of its development. Nothing in the question put to the Court or in the written and oral pleadings by the States before it can be interpreted as a request to fill the gaps, should any be found, in the present status of the law on the matter. On the contrary, several States specifically stated that the Court

"is not being asked to be a legislator, or to fashion a régime for nuclear disarmament" (Samoa, CR 95/31, p. 34) and that "[t]he Court would be neither speculating nor legislating, but elucidating the law as it exists and is understood by it . . ." (Egypt, CR 95/23, pp. 32-33; see also the oral statement of Malaysia, CR 95/27, p. 52.)

Even had the Court been asked to fill the gaps, it would have had to refuse to assume the burden of law-creation, which in general should not be the function of the Court. In advisory procedure, where the Court finds a lacuna in the law or finds the law to be imperfect, it ought merely to state this without trying to fill the lacuna or improve the law by way of judicial legislation. The Court cannot be blamed for indecisiveness or evasiveness where the law, upon which it is called to pronounce, is itself inconclusive. Even less warranted would be any allegation of the Court's indecisiveness or evasiveness in this particular Opinion, which gives an unequivocal, albeit non-exhaustive, answer to the question put to the Court.

In its reply the Court clearly holds that the threat or use of nuclear weapons would fall within the ambit of the prohibitions and severe restrictions imposed by the United Nations Charter and a number of other multilateral treaties and specific undertakings as well as by customary rules and principles of the law of armed conflict. Moreover, the Court found 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" (Opinion, para. 105 (2) E). It is plausible that by inference, implication or analogy, the Court (and this is what some States in their written and oral statements had exhorted it to do) could have deduced from the aforesaid a general rule comprehensively proscribing the threat or use of nuclear weapons, without leaving room for any "grey area", even an exceptional one.

The Court could not, however, ignore several important considerations which debarred it from embarking upon this road. Apart from those which have been expounded in the reasoning part of the Opinion, I would like to add the following. The very States that called on the Court to display courage and perform its "historical mission", insisted that the Court should remain within its judicial function and should not act as a legislator, requested that the Court state the law as it is and not as it should be. Secondly, the Court could not but notice the fact that, in the past, all the existing prohibitions on the use of other weapons of mass destruction (biological, chemical), as well as special restrictions on nuclear weapons, had been established by way of specific international treaties or separate treaty provisions, which undoubtedly point to the course of action chosen by the international community as most appropriate for the total prohibition on the use and eventual elimination of weapons of mass destruction. And thirdly, the Court must be concerned about the

authority and effectiveness of the "deduced" general rule with respect to the matter on which the States are so fundamentally divided.

Significantly, even such a strong proponent of the "completeness" of international law and the inadmissibility of *non liquet* as H. Lauterpacht observes that, in certain circumstances, the

> "apparent indecision [of the International Court of Justice], which leaves room for discretion on the part of the organ which requested the Opinion, may — both *as a matter of development of the law and as a guide to action* — be preferable to a deceptive clarity which fails to give an indication of the inherent complexities of the issue. In so far as the decisions of the Court are an expression of existing international law — whether customary or conventional — they cannot but reflect the occasional obscurity or inconclusiveness of a defective legal system." (*The Development of International Law by the International Court,* reprinted ed., 1982, p. 152; emphasis added.)

In my view, the case in hand presents a good example of an instance where the absolute clarity of the Opinion would be "deceptive" and where, on the other hand, its partial "apparent indecision" may prove useful "as a guide to action".

If I may be allowed the comparison, the construction of the solid edifice for the total prohibition on the use of nuclear weapons is not yet complete. This, however, is not because of the lack of building materials, but rather because of the unwillingness and objections of a sizeable number of the builders of this edifice. If this future edifice is to withstand the test of time and the vagaries of the international climate, it is the States themselves — rather than the Court with its limited building resources — that must shoulder the burden of bringing the construction process to completion. At the same time, the Court has clearly shown that the edifice of the total prohibition on the threat or use of nuclear weapons is being constructed and a great deal has already been achieved.

The Court has also shown that the most appropriate means for putting an end to the existence of any "grey areas" in the legal status of nuclear weapons would be "nuclear disarmament in all its aspects under strict and effective international control". Accordingly, the Court has found that there exists an obligation of States to pursue in good faith and bring to a conclusion negotiations leading to this supreme goal.

(Signed) Vladlen S. VERESHCHETIN.