SEPARATE OPINION OF JUDGE GUILLAUME

[Translation]

1. The Advisory Opinion given by the Court in the present case was the subject of serious reservations by a number of my colleagues and will probably be received with a chorus of criticism. I share some of the reservations but will not join in the chorus.

Of course the Opinion has many imperfections. It deals too quickly with complex questions which should have received fuller and more balanced treatment, for example with respect to environmental law, the law of reprisals, humanitarian law and the law of neutrality. In these various areas, the Court, seeking to identify the custom in force, has taken hardly any account, whatever it may say on the matter, of practice and of the *opinio juris* of States, and too often it allowed itself to be guided by considerations falling more within the sphere of natural law than of positive law, of *lex ferenda* rather than of *lex lata*. It also accorded excessive import to the resolutions of the General Assembly of the United Nations. This confusion, aggravated by paragraph 104 of the Opinion, was not without consequence for the wording adopted in the operative part. Indeed, this operative part, while ruling *ultra petita* with regard to nuclear disarmament, gives, on certain points, only an implicit answer to the question posed. In these circumstances it would be easy to condemn the Court. I will not do so, for this unsatisfactory situation ultimately stems less from the erring ways of the judge than from the applicable law.

2. This being the case, the Court could have considered declining to respond to the request for an advisory opinion. This solution would have found some justification in the very circumstances of the seisin. The opinion requested by the General Assembly of the United Nations (like indeed the one requested by the World Health Assembly) originated in a campaign conducted by an association called International Association of Lawyers Against Nuclear Arms (IALANA), which in conjunction with various other groups launched in 1992 a project entitled "World Court Project" in order to obtain from the Court a proclamation of the illegality of the threat or use of nuclear weapons. These associations worked very intensively to secure the adoption of the resolutions referring the question to the Court and to induce States hostile to nuclear weapons to appear before the Court. Indeed, the Court and the judges received thousands of letters inspired by these groups, appealing both to the Members' conscience and to the public conscience.

I am sure that the pressure brought to bear in this way did not influence the Court's deliberations, but I wondered whether, in such circumstances, the requests for opinions could still be regarded as coming from

the Assemblies which had adopted them or whether, piercing the veil, the Court should not have dismissed them as inadmissible. However, I dare to hope that Governments and intergovernmental institutions still retain sufficient independence of decision to resist the powerful pressure groups which besiege them today with the support of the mass media. I also note that none of the States which appeared before the Court raised such an objection. In the circumstances I did not believe that the Court should uphold it *proprio motu.*

3. Basically, I share the Court's opinion as stated in operative paragraph 2 B, to the effect that there is in neither customary nor conventional international law any comprehensive and universal prohibition of the recourse to nuclear weapons as such. On the other hand, I find it hard to understand why, in operative paragraph 2 A, the Court saw fit to state that "there is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons". This statement is not incorrect in itself, but it is of no interest to the General Assembly of the United Nations since it stems from the view of the Court itself 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" (para. 52).

4. In contrast, I fully endorse operative paragraph 2 C, since States can obviously have recourse to nuclear weapons, or indeed to any weapons, only under the conditions established by the Charter of the United Nations and in particular by its Article 51, concerning the right of individual or collective self-defence. States are moreover bound to respect the conventional rules specifically governing recourse to nuclear weapons which are summarized in paragraphs 58 and 59 of the Opinion.

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5. The application of customary humanitarian law to nuclear weapons raised much more difficult questions.

As the Court noted, customary law concerning the conduct of military operations derives mainly from the Annex to the Hague Convention IV respecting the Laws and Customs of War on Land of 18 October 1907. In view of the nature and age of these provisions, it could be asked whether they were applicable to the use, and especially to the threat of use, of nuclear weapons. It seemed legitimate to have the gravest doubts on this latter point. But no nuclear-weapon State contested before the Court that this was the case, and the immense majority, if not all, of the other States was in agreement. The Court could only take note of this consensus in paragraph 22 of its Opinion.

These customary rules were summarized by the Court in three categories in paragraph 78 of the Opinion: States do not have unlimited free-

dom of choice in the weapons they use; they must never use weapons which are incapable of distinguishing between civilian and military targets; and they are prohibited to use weapons likely to cause unnecessary suffering to combatants.

I fully subscribe to this analysis but I think that it should have been completed by a reference to the rules concerning the collateral damage which attacks on legitimate military objectives can cause to civilian populations. These rules originated in Articles 23 *(g)*, 25 and 27 of the Annex to the Hague Convention IV. They were the subject of new formulations in the draft convention on the rules of aerial warfare of 1923 and in the resolution adopted by the Assembly of the League of Nations on 30 September 1938. They were clarified by the United States Nuremberg Military Tribunal in case No. 47. They were further clarified by the General Assembly of the United Nations in its resolution 2444 (XXIII) of 19 December 1968 concerning respect for human rights in armed conflicts, which was adopted unanimously and states:

> "it is prohibited to launch attacks against the civilian populations as such; . . . distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible".

Lastly, they were further developed by Article 51 of Additional Protocol I of 1977 to the Geneva Conventions, which condemns attacks on military objectives which may be expected to cause "excessive" incidental damage to the civilian population.

Customary humanitarian law thus contains only one absolute prohibition: the prohibition of so-called "blind" weapons which are incapable of distinguishing between civilian targets and military targets. But nuclear weapons obviously do not necessarily fall into this category.

Furthermore, this law implies comparisons. The collateral damage caused to civilian populations must not be "excessive" in relation to "the military advantage anticipated". The suffering caused to combatants must not be "unnecessary", i.e. it must not cause, in the words of the Court itself, "a harm greater than that unavoidable to achieve legitimate military objectives" (para. 78).

Hence nuclear weapons could not be regarded as illegal by the sole reason of the suffering which they are likely to cause. Such suffering must still be compared with the "military advantage anticipated" or with the "military objectives" pursued.

With regard to nuclear weapons of mass destruction, it is clear however that the damage which they are likely to cause is such that their use could not be envisaged except in extreme cases.

6. The same reasoning holds good with respect to the law of neutrality since, on many occasions, it has been maintained or recognized that the legality of actions carried out by belligerents in neutral territory depends

on the "military necessities", as the late Judge Ago noted in the light of a widespread practice described in the addendum to his Eighth Report to the International Law Commission on the Responsibility of States (para. 50 and note 101).

7. In short, the Court should therefore, in my view, have replied on this point to the question put by stating that the threat or use of nuclear weapons is compatible with the law applicable in armed conflict only in certain extreme cases. The Court preferred, in operative paragraph 2 E, to use a negative formula when it stated that such threat or use were "generally prohibited". This wording is vague but it nevertheless implies that the threat or use of nuclear weapons are not prohibited "in any circumstance" by the law applicable in armed conflict, as indeed the Court pointed out in paragraph 95 of the Opinion.

8. The Court added in operative paragraph 2 E:

> "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."

Once again, this wording is not entirely satisfactory, and I therefore believe that it needs some clarification.

None of the States which appeared before the Court raised the question of the relations between the right of self-defence recognized by Article 51 of the Charter and the principles and rules of the law applicable in armed conflict. All of them argued as if these two types of prescription were independent, in other words as if the *jus ad bellum* and the *jus in bello* constituted two entities having no relation with each other. In some parts of its Opinion the Court even seemed to be tempted by such a construction. It may be wondered whether that is indeed the case or whether, on the contrary, the rules of the *jus ad bellum* may not provide some clarification of the rules of the *jus in bello*.

The right of self-defence proclaimed by the Charter of the United Nations is characterized by the Charter as natural law. But Article 51 adds that nothing in the Charter shall impair this right. The same applies *a fortiori* to customary law or treaty law. This conclusion is easily explained, for no system of law, whatever it may be, could deprive one of its subjects of the right to defend its own existence and safeguard its vital interests. Accordingly, international law cannot deprive a State of the right to resort to nuclear weapons if such action constitutes the ultimate means by which it can guarantee its survival. In such a case the State enjoys a kind of "absolute defence" *("excuse absolutoire")* similar to the one which exists in all systems of criminal law.

The Court did indeed identify this problem when, in paragraph 96 of the Opinion, it stated that it 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".

With this in mind, it pointed out in the same paragraph that "an appreciable section of the international community adhered for many years" to "the practice referred to as 'policy of deterrence'". It also stressed that States which adhered to this doctrine and this practice

> "have always, in concert with certain other States, reserved the right to use those weapons in the exercise of the right to self-defence against an armed attack threatening their vital security interests" (para. 66).

It also noted

> "the reservations which certain nuclear-weapon States have appended to the undertakings they have given, notably under the Protocols to the Treaties of Tlatelolco and Rarotonga, and also under the declarations made by them in connection with the extension of the Treaty on the Non-Proliferation of Nuclear Weapons, not to resort to such weapons" (para. 96).

Lastly, the Court observed that the reservations to these Protocols and the ones contained in the declarations had "met with no objection from the parties to the Tlatelolco or Rarotonga Treaties or from the Security Council" (para. 62). Indeed, it pointed out that the Security Council had noted with appreciation or welcomed the statements made in this connection (para. 45).

9. In these circumstances, the Court, in my view, ought to have carried its reasoning to its conclusion and explicitly recognized the legality of deterrence for defence of the vital interests of States. It did not do so explicitly, and that is why I was unable to support operative paragraph 2 E. But it did so implicitly, and that is why I appended to the Advisory Opinion a separate opinion and not a dissenting one.

In operative paragraph 2 E the Court decided in fact that it could not in those extreme circumstances conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful. In other words, it concluded that in such circumstances the law provided no guide for States. But if the law is silent in this case, States remain free to act as they intend.

10. International law rests on the principle of the sovereignty of States and thus originates from their consent. In other words, in the excellent language of the Permanent Court, "international law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will." (*"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 18.)

The Court itself had occasion to draw the consequences of this principle in various forms in the case between Nicaragua and the United

States of America. It pointed out that the principle of the sovereignty of States permits all States to decide freely on "the choice of a political, economic, social and cultural system, and the formulation of foreign policy" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, I.C.J. Reports 1986*, p. 108). It stated in particular that

> "in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception" (*ibid.*, p. 135).

11. The constant practice of States is along these lines as far as the *jus in bello* is concerned. All the treaties concerning certain types of weapons are formulated in terms of prohibition. This is true, for example, of the 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America, the 1975 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological Weapons, the 1981 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious, or the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction. Similarly, the draft convention annexed to resolutions 45/59 and 46/37 of the General Assembly of the United Nations is designed to achieve according to its own title "the prohibition of the use of nuclear weapons".

It will also be noted that the only national judgment, to my knowledge, to have pronounced on this point did so along the same lines. The Tokyo District Court stated in its judgment of 7 December 1963: "Of course, it is right that the use of a new weapon is legal as long as international law does not prohibit it." (*Japanese Annual of International Law*, 1964, No. 8, p. 235.)

Indeed, and as already pointed out, the Court itself recognized in this Opinion the customary nature of such a principle when it stated 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" (para. 52).

12. In these circumstances it follows implicitly but necessarily from operative paragraph 2 E of the Court's Opinion that States can 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". This has always been the foundation of the policies of deterrence whose legality is thus recognized.

13. Nuclear weapons are nevertheless "potentially catastrophic", and it is therefore understandable that the Court should have felt a need to stress in paragraph 99 of its Opinion the great importance of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons.

I fully approve of this reference and earnestly hope that the negotia-

tions provided for by this text with regard both to nuclear disarmament and to conventional disarmament will be crowned with success. However, I would have preferred the Court to limit itself to dealing with this question in the reasons for its Opinion. For I fear that by adopting operative paragraph 2 F, in a formulation which attempts to summarize the obligations of States parties to the Treaty on the Non-Proliferation of Nuclear Weapons, without however doing so clearly, the Court may have ruled *ultra petita*.

14. I should like solemnly to reaffirm in conclusion that it is not the role of the judge to take the place of the legislator. During the last two decades the international community has made considerable progress towards the prohibition of nuclear weapons. But this process has not been completed, and the Court must limit itself to recording the state of the law without being able to substitute its assessment for the will of sovereign States. It is the mark of the greatness of a judge to remain within his role in all humility, whatever religious, philosophical or moral debates he may conduct with himself.

(Signed) Gilbert GUILLAUME.