SEPARATE OPINION OF JUDGE FLEISCHHAUER

I have voted in favour of all of the Court's Conclusions as contained in paragraph 105 of the Advisory Opinion, although these Conclusions do not give a complete and clear-cut answer to the question asked of the Court by the General Assembly. In their incompleteness and vagueness the Court's Conclusions — and in particular their critical point 2 E — rather reflect the terrible dilemma that confronts persons and institutions alike which have to deal with the question of the legality or otherwise of the threat or use of nuclear weapons in international law. At present, international law is still grappling with, and has not yet overcome, the dichotomy that exists between the international law applicable in armed conflict and, in particular, the rules and principles of humanitarian law, on the one side, with which principles and rules the use of nuclear weapons — as the Court says in paragraph 95 of its Opinion — seems scarcely reconcilable; and, on the other side, the inherent right of self-defence which every State possesses as a matter of sovereign equality. That basic right 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 survival, nuclear weapons were totally ruled out as an ultimate legal option in collective or individual self-defence.

1. In explaining my views more in detail, I would like to begin by stating that, in my view, the Court is right in its reasoning that the humanitarian rules and principles apply to nuclear weapons (para. 86) and in its conclusion that

> "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 . . ." (Point 2 D of the Conclusions.)

This is so, because of the intrinsically humanitarian character of those rules and principles and in spite of the fact that they essentially evolved much before nuclear weapons were invented. This finding is also not altered by the fact that the Geneva Conferences, which were held after the appearance on the international scene of nuclear weapons and which adopted the four Geneva Conventions of 12 August 1949 on the Protection of War Victims as well as the Protocol I of 8 June 1977 to those Conventions, did not address nuclear weapons specifically. The same is true for other principles of the law applicable in armed conflict, such as

the principle of neutrality which likewise evolved much before the advent of nuclear weapons.

2. The rules and principles of humanitarian law applicable in armed conflict are expression of the — as the Court puts it (para. 95) — "overriding consideration of humanity" which is at the basis of international law and which international law is expected to uphold and defend. The humanitarian rules and principles remind States that whatever the weaponry used, notwithstanding the regrettable inevitability of civilian losses in times of war, civilians might never be the object of an attack. So far as combatants are concerned, weapons may not be used that cause unnecessary suffering. Similarly, the respect for the neutrality of States not participating in an armed conflict is a key element of orderly relations between States. The nuclear weapon is, in many ways, the negation of the humanitarian considerations underlying the law applicable in armed conflict and of the principle of neutrality. The nuclear weapon cannot distinguish between civilian and military targets. It causes immeasurable suffering. The radiation released by it is unable to respect the territorial integrity of a neutral State.

I therefore agree with the Court's finding in the first paragraph of point 2 E of the Conclusions, to the effect 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".

3. As the Court rightly sees it, the answer to the question asked of it by the General Assembly does not lie alone in a finding that the threat or use of nuclear weapons would be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law. Through the use of the word "generally" in the first paragraph of point 2 E of the Conclusions and through the addition of the second paragraph to that point, the Court points to qualifications that apply or may apply to its findings regarding irreconcilability between the use of nuclear weapons and humanitarian law. The word "generally" limits the finding as such; and according to the second paragraph,

> "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".

To end the matter with the simple statement that recourse to nuclear weapons would be contrary to international law applicable in armed conflict, and in particular the principles and rules of humanitarian law, would have meant that the law applicable in armed conflict, and in particular the humanitarian law, was given precedence over the inherent right of individual or collective self-defence which every State possesses as a matter of sovereign equality and which is expressly preserved in

Article 51 of the Charter. That would be so because if a State is the victim of an all-out attack by another State, which threatens the very existence of the victimized State, recourse to the threat or use of nuclear weapons in individual (if the victimized State is a nuclear-weapon State) or collective (if the victim is a non-nuclear-weapon State allied to a nuclear-weapon State) self-defence could be for the victimized State the last and only alternative to giving itself up and surrender. That situation would in particular exist if the attack is made by nuclear, bacteriological or chemical weapons. It is true that the right of self-defence as protected by Article 51 of the Charter is not weapon-specific (paragraph 39 of the considerations of the Opinion). Nevertheless, the denial of the recourse to the threat or use of nuclear weapons as a legal option in any circumstance could amount to a denial of self-defence itself if such recourse was the last available means by way of which the victimized State could exercise its right under Article 51 of the Charter.

A finding that amounted to such a denial therefore would not, in my view, have been a correct statement of the law; there is no rule in international law according to which one of the conflicting principles would prevail over the other. The fact that the attacking State itself would act in contravention of international law, would not alter the situation. Nor would recourse to the Security Council, as mandated by Article 51, guarantee by itself an immediate and effective relief.

4. It is true that the qualifying elements in point 2 E of the Conclusions have been couched by the Court in hesitating, vague and halting terms. The first paragraph of point 2 E does not explain what is to be understood by "*generally* . . . contrary to the rules of international law applicable in armed conflict" (emphasis added), and the wording of the second paragraph of point 2 E avoids taking a position when it says 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".

Nor is the reasoning of the Court in the considerations of its Opinion leading up to the qualifications of the main finding in point 2 E very clear. As far as the term "generally" in the first paragraph of point 2 E of the Conclusions is concerned, the Court's explanations in paragraph 95 of its Opinion are limited to the statement

> "that it [i.e. the Court] 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".

The considerations leading to the second paragraph of point 2 E are contained in paragraph 96. They refer to Article 51 of the Charter, the State

practice referred to as "policy of deterrence" and 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 (paragraph 59 of the Opinion). The hesitating terms in which the Court has couched the qualifying elements in point 2 E of the Conclusions witness, in my view, the legal and moral difficulties of the territory into which the Court has been led by the question asked of it by the General Assembly.

5. Nevertheless, the Court, by acknowledging in the considerations of its Opinion as well as in point 2 E of the Conclusions the possibility of qualifying elements, made it possible for me to vote in favour of that particularly important point of its Conclusions. The Court could however — and in my view should — have gone further. My view on this is the following:

The principles and rules of the humanitarian law and the other principles of law applicable in armed conflict, such as the principle of neutrality on the one side and the inherent right of self-defence on the other, which are through the very existence of the nuclear weapon in sharp opposition to each other, are all principles and rules of law. None of these principles and rules is above the law, they are of equal rank in law and they can be altered by law. They are justiciable. Yet international law has so far not developed — neither in conventional nor in customary law — a norm on how these principles can be reconciled in the face of the nuclear weapon. As I stated above (paragraph 3 of this separate opinion), there is no rule giving prevalence of one over the other of these principles and rules. International politics has not yet produced a system of collective security of such perfection that it could take care of the dilemma, swiftly and efficiently.

In view of their equal ranking this means that, if the need arises, the smallest common denominator between the conflicting principles and rules has to be found. This means in turn that, although recourse to nuclear weapons is scarcely reconcilable with humanitarian law applicable in armed conflict as well as the principle of neutrality, recourse to such weapons could remain a justified legal option in an extreme situation of individual or collective self-defence in which the threat or use of nuclear weapons is the last resort against an attack with nuclear, chemical or bacteriological weapons or otherwise threatening the very existence of the victimized State.

The same result is reached if, in the absence of a conventional or a customary rule for the conciliation of the conflicting legal principles and rules, it is accepted that the third category of law which the Court has to apply by virtue of Article 38 of its Statute, that is, the general principles of law recognized in all legal systems, contains a principle to the effect

that no legal system is entitled to demand the self-abandonment, the suicide, of one of its subjects. Much can be said, in my view, in favour of the applicability of such a principle in all modern legal systems and consequently also in international law.

Whichever of the two lines of reasoning is followed, the result that the smallest common denominator, as I see it, is the guiding factor in the solution of the conflict created by the nuclear weapon between the law applicable in armed conflict and the right of self-defence, is confirmed by the important role played by the policy of deterrence during all the years of the Cold War in State practice of nuclear-weapon States as well as in the practice of non-nuclear-weapon States, supporting or tolerating that policy. Even after the end of the Cold War the policy of deterrence has not altogether been abandoned, if only in order to maintain the balance of power among nuclear-weapon States and in order to deter non-nuclear-weapon States from acquiring and threatening or using nuclear weapons. Nuclear-weapon States have found it necessary to continue beyond the end of the Cold War the reservations they have made to the undertakings they have given, notably to the Treaties of Tlatelolco and Rarotonga (paragraph 59 of the Opinion), and to add similar reservations under the declarations given by them in connection with the unlimited extension of the Non-Proliferation Treaty. These reservations are tolerated by the non-nuclear parties concerned as well as, in the case of the unlimited extension of the Non-Proliferation Treaty, by the Security Council. Of course, as the Court itself has stated (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 44), not every act habitually performed or every attitude taken over a prolonged period of time by a plurality of States is a practice relevant for the determination of the state of the law. In the words of the Court:

> "There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty." (*Ibid.*, p. 44, para. 77.)

But the practice embodied in the policy of deterrence is based specifically on the right of individual or collective self-defence and so are the reservations to the guarantees of security. The States which support or which tolerate that policy and those reservations are aware of this. So was the Security Council when it adopted resolution 984 (1995). Therefore, the practice which finds expression in the policy of deterrence, in the reservations to the security guarantees and in their toleration, must be regarded as State practice in the legal sense.

6. For a recourse to nuclear weapons to be lawful, however, not only would the situation have to be an extreme one, but the conditions on which the lawfulness of the exercise of self-defence generally depends would also always have to be met. These conditions comprise, as the Opinion states *expressis verbis* (para. 41) that there must be proportionality. The need to comply with the proportionality principle must not *a priori* rule out recourse to nuclear weapons; as the Opinion states (para. 42): "The proportionality principle may thus not in itself exclude the use of nuclear weapons in all circumstances." The margin that exists for considering that a particular threat or use of nuclear weapons could be lawful is therefore extremely narrow.

The present state of international law does not permit a more precise drawing of the border-line between unlawfulness and lawfulness of recourse to nuclear weapons.

7. In the long run the answer to the conflict which the invention of the nuclear weapon entailed between highest values and most basic needs of the community of States, can only lie in effective reduction and control of nuclear armaments and an improved system of collective security. This is why I have supported point 2 F of the Conclusions of the Opinion on 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 — although this pronouncement goes, strictly speaking, beyond the question asked of the Court.

(Signed) Carl-August FLEISCHHAUER.