DISSENTING OPINION OF JUDGE KOROMA

It is a matter of profound regret to me that I have been compelled to append this dissenting opinion to the Advisory Opinion rendered by the Court, as I fundamentally disagree with its finding — secured by the President's casting vote — 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*" (paragraph 2 E, second sentence, of the *dispositif*; emphasis added).

This finding, in my considered opinion, is not only unsustainable on the basis of existing international law, but, as I shall demonstrate later, is totally at variance with the weight and abundance of material presented to the Court. The finding is all the more regrettable in view of the fact that the Court had itself reached a conclusion 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" (*ibid.*, first sentence).

A finding with which I concur, save for the word "generally". It is my considered opinion based on the existing law and the available evidence that the use of nuclear weapons in any circumstance would be unlawful under international law. That use would at the very least result in the violation of the principles and rules of international humanitarian law, and would therefore be contrary to that law.

I am also unable to agree with various aspects of the reasoning which motivates the Advisory Opinion. Some of it, in my view, is not only untenable in law, but may even have the effect of potentially destabilizing the existing international legal order.

According to the material before the Court, it is estimated that more than 40,000 nuclear warheads exist in the world today with a total destructive capacity around a million times greater than that of the bomb which devastated Hiroshima. A single nuclear bomb detonated over a large city is said to be capable of killing more than 1 million people. These weapons, if used massively, could result in the annihilation of the human race and the extinction of human civilization. Nuclear weapons

are thus not just another kind of weapon, they are considered the absolute weapon and are far more pervasive in terms of their destructive effects than any conventional weapon. A request for an advisory opinion asking for a determination about the lawfulness or otherwise of the use of such weapons is a matter which, in my considered opinion, this Court as a court of law and the guardian of legality in the United Nations system should be capable of making.

While it is admitted that the views of States are divided on the question of nuclear weapons, as well as about their possible consequences, views are also divided as to whether the Court should have been asked to render an opinion on the matter at all. However, the Court, having found that the General Assembly was competent to ask the question and in the absence of any "compelling reason" relating to propriety or to any issue that would compromise its judicial character, should have performed its judicial function in accordance with Article 38 of its Statute and determined the question, "in accordance with international law", by simultaneously applying international conventions, international custom as established rules recognized by States or as evidence of general practice accepted as law or the general principles of law recognized by all States, the judicial decisions of the Court and resolutions of international organizations, at a minimum as evidence of the law.

In my view, the prevention of war, by the use of nuclear weapons, is a matter for international law and, if the Court is requested to determine such an issue, it falls within its competence to do so. Its decision can contribute to the prevention of war by ensuring respect for the law. The Court in the *Corfu Channel* case described as its function the need to "ensure respect for international law, of which it is the organ" (*I.C.J. Reports 1949*, p. 35). The late Judge Nagendra Singh, a former Member and President of this Court, commenting on that statement, observed that it was made by the Court without reference to the United Nations Charter or to its own Statute. He observed that "the Court has thus to be conscious of this fact, as something inherent to its existence in relation to the law which it administers" (*The Role and Record of the International Court of Justice*, p. 173). Today a system of war prevention exists in international law, and comprises the prohibition of the use of force, the collective security provisions of the United Nations Charter for the maintenance of international peace, the obligation to resort to peaceful means for the settlement of international disputes and the regulations on weapons prohibition, arms limitation and disarmament. The Court's Advisory Opinion in this case could have strengthened this régime by serving as a shield of humanity.

In my view, it is wholly incoherent in the light of the material before the Court to say that it cannot rule definitively on the matter now before it in view of the current state of the law and because of the elements of facts at its disposal, for neither the law nor the facts are so imprecise or

inadequate as to prevent the Court from reaching a definitive conclusion on the matter. On the other hand, the Court's findings could be construed as suggesting either that there is a gap, a lacuna, in the existing law or that the Court is unable to reach a definitive conclusion on the matter because the law is imprecise or its content insufficient or that it simply does not exist. It does not appear to me any new principles are needed for a determination of the matter to be made. All that was requested of the Court was to apply the existing law. A finding of *non liquet* is wholly unfounded in the present case. The Court has always taken the view that the burden of establishing the law is on the Court and not on the Parties. The Court has stated that:

> "there is no incompatibility with its judicial function in making a pronouncement on the rights and duties of the Parties under existing international law which would clearly be capable of having a forward reach . . . The possibility of the law changing is ever present: but that cannot relieve the Court from its obligation to render a judgment on the basis of the law as it exists at the time of its decision . . ." (*Fisheries Jurisdiction, Merits, I.C.J. Reports 1974*, p. 19, para. 40.)

The *corpus juris* on the matter is not only considerable, but is sufficiently clear and precise for the Court to have been able to make a definitive finding. If the Court had applied the whole spectrum of the law, including international conventions, rules of customary international law, general principles of international law, judicial decisions, as well as resolutions of international organizations, there would have been no room for a purported finding of *non liquet*.

Furthermore, all States — both the nuclear-weapon and non-nuclear-weapon States — are agreed that the rules of international law applicable in armed conflict, particularly international humanitarian law, apply to the use of nuclear weapons. This law, which has been formulated and codified to restrict the use of various weapons and methods of warfare, is intended to limit the terrible effects of war. Central to it is the principle of humanity which above all aims to mitigate the effects of war on civilians and combatants alike. It is this law which also establishes a régime on the basis of which the methods and means of warfare are to be judged. Accordingly, it would seem apposite and justifiable for the effects of a conflict involving nuclear weapons — regarded as the ultimate weapon of mass destruction — to be judged against the standards of such a régime.

Despite its findings, the Court has itself recognized that the law of armed conflict, and in particular the principles and rules of humanitarian law — would apply to a conflict involving the use of nuclear weapons. It follows that the Court's finding that it 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, is a contradiction and can at best be described as the identification of two principles, namely, the obligation to comply with the principles and rules of international law applicable in armed conflict and the right of a State to self-defence including when it considers its very survival to be at stake. These principles are not mutually exclusive and are recognized in international law. However, it has been argued that when the Court is faced with two competing principles or rights, it should jurisprudentially assign a priority to one of them and cause it to prevail. In the opinion of Sir Hersch Lauterpacht, even though the margin of preference for giving a priority to one principle over another may be small, yet, however tenuous, that margin must be decisive. He admits that judicial action along this line may in some respects be indistinguishable from judicial legislation. However, he argues, the Court "may have to effect a compromise — which is not a diplomatic but a legitimate judicial compromise — between competing principles of law", and concludes that:

> "there is no decisive reason why the Court should avoid at all cost some such outcome. It is in accordance with the true function of the Court that the dispute submitted to it should be determined by its own decision and not by the contingent operation of an attitude of accommodation on the part of the disputants. There is an embarrassing anticlimax, which is not legally irrelevant, in a situation in which the Court, after prolonged written and oral pleadings, is impelled to leave the settlement of the actual issue to . . . the parties." (*The Development of International Law by the International Court*, p. 146.)

The suggestion that it should be left to individual States to determine whether or not it may be lawful to have recourse to nuclear weapons is not only an option fraught with serious danger, both for the States that may be directly involved in conflict, and for those nations not involved, but may also suggest that such an option is not legally reprehensible. Accordingly, the Court, instead of leaving it to each State to decide whether or not it would be lawful or unlawful to use nuclear weapons in an extreme circumstance of "State survival", should have determined whether or not it is permissible to use nuclear weapons even in a case involving the survival of the State. The question put to the Court is whether it is lawful to use nuclear weapons and is not about the survival of the State, which is what the Court's reply turned on. If the Court had correctly interpreted the question this would not only have had the effect of declaring the law regarding the use of nuclear weapons but could well have deterred the use of such weapons. Regrettably, the Court refrained not only from performing its judicial function, but, by its "non-finding", appears to have made serious inroads into the present legal

restraints relating to the use of nuclear weapons, while throwing the régime of self-defence into doubt by creating a new category called the "survival of the State", seen as constituting an exception to Articles 2, paragraph 4, and 51 of the United Nations Charter and to the principles and rules of humanitarian law. In effect, this kind of restraint would seem to be tantamount to judicial legislation at a time when the Court has itself — rightly in my view — recognized that it "cannot legislate", and, that

> "in the circumstances of the present case, *it is not* called upon *to do so*. Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons." (Advisory Opinion, para. 18; emphasis added.)

However, just after reaffirming this self-denying ordinance, the Court went on to do just that by proclaiming that it cannot conclude definitively whether or not 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", given the current state of international law and the elements of fact at its disposal (paragraph 2 E of the *dispositif*; emphasis added). This finding, with respect, is not only untenable in law but legally superfluous. The right of self-defence is inherent and fundamental to all States. It exists within and not outside or above the law. To suggest that it exists outside or above the law is to render it probable that force may be used unilaterally by a State when it by itself considers its survival to be at stake. The right of self-defence is not a licence to use force; it is regulated by law and was never intended to threaten the security of other States.

Thus the Court's finding does not only appear tantamount to judicial legislation which undermines the régime of the non-use of force as enshrined in Article 2, paragraph 4, of the Charter, and that of self-defence as embodied in Article 51, but the doctrine of the survival of the State represents a throwback to the law before the adoption of the United Nations Charter and is even redolent of a period long before that. Grotius, writing in the seventeenth century, stated that: "[t]he right of self-defence . . . has its origin directly, and chiefly, in the fact that nature commits to each his own protection" (*De Jure Belli Ac Pacis*, Book II, Chap. I, Part III, at p. 172 (Carnegie Endowment trans. 1925) (1646)). Thus, the Court's finding would appear to be tantamount to according to each State the exclusive right to decide for itself to use nuclear weapons when its survival is at stake as that State perceives it — a decision subjected neither to the law nor to third party adjudication. When Lauterpacht had to consider a similar situation following the conclusion of the

Briand-Kellogg Pact of 1928, according to which the participating States declared that a State claiming the right of self-defence "alone is competent to decide whether circumstances require recourse to war in self-defence", he found such a claim to be "self-contradictory in as much as it purports to be based on legal right and at the same time, it dissociates itself from regulations and evaluation of the law". While he acknowledged the right of self-defence as "absolute" in the sense that no law could disregard it, Lauterpacht however maintained that the right is "relative" in as much as it is presumably regulated by law. "It is regulated to the extent that it is the business of the Courts to determine whether, how far, and for how long, there was a necessity to have recourse to it." (*The Function of Law in the International Community*, pp. 179-180.)

As already stated, the Court's present finding represents a challenge to some of the fundamental precepts of existing international law including the proscription of the use of force in international relations and the exercise of the right of self-defence. That the Court cannot decide definitively whether the use of nuclear weapons would be lawful or unlawful when the survival of the State is at stake is a confirmation of the assertion that the survival of that State is not only not a matter for the law but that a State, in order to ensure its survival, can wipe out the rest of humanity by having recourse to nuclear weapons. In its historical garb "of the fundamental right of self-preservation", such a right was used in the past as a pretext for the violation of the sovereignty of other States. Such acts are now considered unlawful under contemporary international law. The International Military Tribunal at Nuremberg in 1946 rejected the argument that the State involved had acted in self-defence and that every State must be the judge of whether, in a given case, it is entitled to decide whether to exercise the right of self-defence. The Tribunal held that "whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation or adjudication if international law is ever to be enforced" (Judgment of the International Military Tribunal at Nuremberg, 1946, *Trial of German Major War Criminals before the International Military Tribunal*, 1947, Vol. I, p. 208).

Similarly, this Court, in the *Nicaragua* case, rejected the assertion that the right of self-defence is not subject to international law. While noting that Article 51 of the United Nations Charter recognizes a "natural" or "inherent" right of self-defence, it stated that "it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed by the Charter" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1986*, p. 94). By its present findings, the Court would appear to be departing from its own jurisprudence by saying that it cannot determine conclusively whether or not it would be lawful for a State to use nuclear weapons.

Be that as it may, it is not as if the Court was compelled to reach such

a conclusion, for the law is clear. The use of force is firmly and peremptorily prohibited by Article 2, paragraph 4, of the United Nations Charter. The régime of self-defence or the doctrine of "self-survival", as the Court would prefer to have it, is likewise regulated and subjected to that law. The right of self-defence by a State is clearly stipulated in Article 51 of the Charter, as follows:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

Thus, the Article permits the exercise of that right subject to the conditions stipulated therein. Firstly, in order to exercise the right, a State must have been the victim of an armed attack and, while exercising such a right, it must observe the principle of proportionality. Secondly, the measure or measures taken in exercise of such a right must be reported to the Security Council and are to be discontinued as soon as the Security Council itself has taken measures necessary for the maintenance of international peace. Article 51 therefore envisages the ability of a State *lawfully* to defend itself against armed attack. The Court emphasized this when it stated that the right of self-defence under Article 51 is conditioned by necessity and proportionality and that these conditions would apply whatever the means of force employed. Moreover, self-defence must also meet the requirements of the law applicable in armed conflict, particularly the principles and rules of international humanitarian law.

The question therefore is not whether a State is entitled to exercise its right of self-defence in an extreme circumstance in which the very survival of that State would be at stake, but rather whether the use of nuclear weapons would be lawful or unlawful under any circumstance including an extreme circumstance in which its very survival was at stake — or, in other words, whether it is possible to conceive of consequences of the use of such weapons which do not entail an infringement of international law applicable in armed conflict, particularly international humanitarian law. As stated above, in terms of the law, the right of self-defence is restricted to the repulse of an armed attack and does not permit of retaliatory or punitive action. Nor is it an exception to the *jus in bello* (conduct of hostilities). Since, in the light of the law and the facts, it is inconceivable that the use of nuclear weapons would not entail an infringement of, at the very least, the law applicable in armed conflict,

particularly humanitarian law, it follows that the use of such weapons would be unlawful. Nuclear weapons do not constitute an exception to humanitarian law.

Given these considerations, it is not legally sustainable to find, as the Court has done, that, in view of the present state of the law, it cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-survival, for as it stated in the *Nicaragua* case:

> "the conduct of States should, in general, be consistent with . . . rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1986*, p. 98, para. 186).

Judge Mosler, a former member of this Court has in another context, stated

> "that law cannot recognise any act either of one member or of several members in concert, as being legally valid if it is directed against the very foundation of law" (H. Mosler, *The International Society as a Legal Community*, 1980, p. 18).

The Court's finding is also untenable, for, and as already mentioned, the *corpus juris* on which it should have reached its conclusion does indeed exist, and in an ample and substantial form. The Court had itself taken cognizance of this when it noted that the "laws and customs of war" applicable to the matter before it had been codified in the Hague Conventions of 1899 and 1907, based upon the 1868 Declaration of St. Petersburg as well as the results of the Brussels Conference of 1874. The Court also recognized that the "Hague Law" and, more particularly, the Regulations Respecting the Laws and Customs of War on Land, do regulate the rights and duties of belligerent States in the conduct of their hostilities and limit the choice of methods and means of injuring the enemy in wartime. It found that the "Geneva Law" (the Conventions of 1864, 1906, 1929 and 1949), which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities, is equally applicable to the issue before it. It noted that these two branches of law today constitute international humanitarian law which was codified in the 1977 Additional Protocols to the Geneva Conventions of 1949.

It observed that, since the turn of the century, certain weapons, such as explosive projectiles under 400 g, dum-dum bullets and asphyxiating gases, have been specifically prohibited, and that chemical and bacteriological weapons were also prohibited by the 1925 Geneva Gas Protocol. More recently, the Court found, the use of weapons producing "non-

detectable fragments", of other types of mines, booby traps and other devices, and of incendiary weapons, was either prohibited or limited depending on the case by the Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects. Such prohibition, it stated, was in line with the rule that "the right of belligerents to adopt means of injuring the enemy is not unlimited" as stated in Article 22 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land. The Court further noted that the St. Petersburg Declaration had already condemned the use of weapons "which uselessly aggravate the suffering of disabled men or make their death inevitable" and that the aforementioned Regulations annexed to the Hague Convention IV of 1907 prohibit the use of "arms, projectiles, or material calculated to cause unnecessary suffering" (Art. 23).

The Court also identified the cardinal principles constituting the fabric of international humanitarian law, the first of which is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants. According to those principles, States are obliged not to make civilians the object of attack and must consequently not use weapons that are incapable of distinguishing between civilian and military targets. Secondly, it is prohibited to cause unnecessary suffering to combatants and, accordingly, it is prohibited to use weapons causing them needless harm or that uselessly aggravate their suffering. In this regard, the Court noted that States do not have unlimited freedom of choice in the weapons they can use.

The Court also considered applicable to the matter the Martens Clause, first enunciated in the Hague Convention of 1899 with respect to the laws and customs of war on land, a modern version of which has been codified in Article 1, paragraph 2, of Additional Protocol I of 1977, and 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 Court noted that the principles embodied in the Clause are principles and rules of humanitarian law and, together with the principle of neutrality, apply to nuclear weapons.

It was in the light of the foregoing that the Court recognized that humanitarian law does prohibit the use of certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary and superfluous harm caused to combatants. The Court accordingly held that the principles and rules of international

humanitarian law are obligatory and binding on all States as they also constitute intransgressible principles of customary international law.

With regard to the applicability of Additional Protocol I of 1977 to nuclear weapons, the Court recalled that even if not all States are parties to the Protocol, they are nevertheless bound by those rules in the Protocol which, when adopted, constituted an expression of the pre-existing customary law, such as, in particular, the Martens Clause, which is enshrined in Article I of the Protocol.

The Court observed that the fact that certain types of weapons were not specifically mentioned in the Convention does not permit the drawing of any legal conclusions relating to the substantive issues raised by the use of such weapons. It took the view that there can be no doubt that the principles and rules of humanitarian law, which are enshrined in the Geneva Conventions of 1949 and the Additional Protocols of 1977, are applicable to nuclear weapons. Even when it observed that the Conferences of 1949 and 1977 did not specifically address the question of nuclear weapons, the Court stated that it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict do not apply to nuclear weapons, as such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeate the entire law of armed conflict and apply to all forms of warfare and to all kinds of weapons.

The Court agreed with the submission that:

> "63. In general, international humanitarian law bears on the threat or use of nuclear weapons as it does of other weapons.
>
> 64. International humanitarian law has evolved to meet contemporary circumstances, and is not limited in its application to weaponry of an earlier time. The fundamental principles of this law endure: to mitigate and circumscribe the cruelty of war for humanitarian reasons." (New Zealand, Written Statement, p. 15.)

The Court also observed that none of the States advocating the legality of the use of nuclear weapons under certain circumstances, including the "clean" use of smaller, low-yield, tactical nuclear weapons, had indicated that the principles of humanitarian law do not apply to nuclear weapons, noting that, for instance, the Russian Federation had recognized that "restrictions set by the rules applicable to armed conflicts in respect of means and methods of warfare definitely also extend to nuclear weapons"; that for the United States, "the United States has long shared the view that the law of armed conflict governs the use of nuclear weapons — just as it governs the use of conventional weapons"; while for the United Kingdom, "so far as the customary law of war is concerned, the United Kingdom has always accepted that the use of nuclear weapons is subject to the general principles of the *jus in bello*" (Advisory Opinion, para. 86).

With regard to the elements of fact advanced in its findings, the Court noted the definitions of nuclear weapons contained in various treaties and instruments, including those according to which nuclear explosions are "capable of causing massive destruction, generalized damage or massive poisoning" (Paris Accords of 1954), or the preamble of the Tlatelolco Treaty of 1967 which described nuclear weapons

> "whose terrible effects are suffered, indiscriminately and inexorably, by military forces and civilian population alike, [and which] constitute through the persistence of the radioactivity they release, an attack on the integrity of the human species and ultimately may even render the whole earth uninhabitable".

It also took note of the fact that nuclear weapons release not only immense quantities of heat and energy, but also powerful and prolonged radiation; that the first two causes of damage are vastly more powerful than such causes of damage in other weapons of mass destruction, and that the phenomenon of radiation is said to be peculiar to nuclear weapons. These characteristics, the Court concluded, render nuclear weapons potentially catastrophic; their destructive power cannot be contained in either space or time, and they have the potential to destroy all civilization and the entire ecosystem of the planet.

With regard to the elements of fact, the Court noted that the radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a wide area and that such weapons would be a serious danger to future generations. It further noted that ionizing radiation has the potential to damage the future environment, food and marine ecosystems, and to cause genetic defects and illness in future generations.

Also in this regard, the Government of Japan told the Court that the yields of the atomic bombs detonated in Hiroshima on 6 August 1945 and in Nagasaki on 9 August 1945 were the equivalent of 15 kilotons and 22 kilotons of TNT respectively. The bomb blast produced a big fireball, followed by extremely high temperatures of some several million degrees centigrade, and extremely high pressures of several hundred thousand atmospheres. It also emitted a great deal of radiation. According to the delegation, the fireball, which lasted for about 10 seconds, raised the ground temperature at the hypocentre to somewhere between 3,000° C and 4,000° C, and the heat caused the scorching of wood buildings over a radius of approximately 3 kilometres from the hypocentre. The number of houses damaged by the atomic bombs was 70,147 in Hiroshima and 18,409 in Nagasaki. People who were within 1,000 metres of the hypocentre were exposed to the initial radiation of more than 3.93 Grays. It is estimated that 50 per cent of people who were exposed to more than 3 Grays die of marrow disorder within two months. Induced radiation

was emitted from the ground and buildings charged with radioactivity. In addition, soot and dust contaminated by induced radiation was dispersed into the air and whirled up into the stratosphere by the force of the explosion, and this caused radioactive fallout back to the ground over several months.

According to the delegation, the exact number of fatalities was not known, since documents were scarce. It was estimated, however, that the number of people who had died by the end of 1945 amounted to approximately 140,000 in Hiroshima and 74,000 in Nagasaki. The population of the cities at that time was estimated at 350,000 in Hiroshima and 240,000 in Nagasaki. The number of people who died of thermal radiation immediately after the bomb blast, on the same day or within a few days, was not clear. However, 90 to 100 per cent of the people who were exposed to thermal radiation without any shield within 1 kilometre of the hypocentre, died within a week. The early mortality rates for the people who were within 1.5 kilometre to 2 kilometres of the hypocentre were 14 per cent for people with a shield and 83 per cent for the people without a shield. In addition to direct injury from the bomb blast, death was caused by several interrelated factors such as being crushed or buried under buildings, injuries caused by splinters of glass, radiation damage, food shortages or a shortage of doctors and medicines.

Over 320,000 people who survived but were affected by radiation still suffer from various malignant tumours caused by radiation, including leukaemia, thyroid cancer, breast cancer, lung cancer, gastric cancer, cataracts and a variety of other after-effects. More than half a century after the disaster, they are still said to be undergoing medical examinations and treatment.

According to the Mayor of Hiroshima who made a statement before the Court, the atomic bomb which was detonated in Hiroshima produced an enormous destructive power and reduced innocent civilian populations to ashes. Women, the elderly and the newborn were said to have been bathed in deadly radiation. The Court was told that the dropping of the bomb unleashed a mushroom cloud and human skin was burned raw while other victims died in desperate agony. The Mayor further told the Court that when the bomb exploded, enormous pillars of flame leaped up towards the sky and a majority of the buildings crumbled, causing a large number of casualties, many of them fatal.

Later in his statement he described the unique characteristic of the atomic bombing as one whose enormous destruction was instantaneous and universal. Old, young, male, female, soldiers, civilians were all killed *indiscriminately*. The entire city of Hiroshima, he said, had been exposed to thermal rays, shock-wave blast and radiation. The bomb purportedly generated heat that reached several million degrees centigrade. The fire-

ball was about 280 metres in diameter, the thermal rays emanating from it were thought to have instantly charred any human being who was outdoors near the hypocentre. The witness further disclosed that according to documented cases, clothing had burst into flames at a distance of 2 kilometres from the hypocentre of the bomb; many fires were ignited simultaneously throughout the city; the entire city was carbonized and reduced to ashes. Yet another phenomenon was a shock-wave which inflicted even greater damage when it ricocheted off the ground and buildings. The blast wind which resulted had, he said, lifted and carried people through the air. All wooden buildings within a radius of 2 kilometres collapsed, while many well beyond that distance were damaged.

The blast and thermal rays combined to burn to ashes or cause the collapse of approximately 70 per cent of the 76,327 dwellings in Hiroshima at the time. The rest were partially destroyed, half-bombed or damaged. The entire city was said to have been instantly devastated by the dropping of the bomb.

On the day the bomb was dropped, the witness further disclosed that there were approximately 350,000 people in Hiroshima, but it was later estimated that some 140,000 had died by the end of December 1945. Hospitals were said to be in ruins with medical staff dead or injured and with no medicines or equipment, and an incredible number of victims died, unable to receive sufficient treatment. Survivors developed fever, diarrhoea, haemorrhaging, and extreme fatigue, many died abruptly. Such was said to be the pattern of the acute symptoms of the atomic bomb disease. Other consequences were a widespread destruction of cells, loss of blood-producing tissue, and organ damage. The immune systems of survivors were weakened and such symptoms as hair loss were conspicuous. Other experiences recorded were an increase in leukaemia, cataracts, thyroid cancer, breast cancer, lung cancer and other cancers. As a result of the bombing, children exposed to radiation suffered mental and physical retardation. Nothing could be done for these children medically and even unborn babies, the Mayor stated, had been affected. He concluded by saying that exposure to high levels of radiation continues in Hiroshima to this day.

The Mayor of Nagasaki, in his testimony, described effects on his city that were similar to those experienced by Hiroshima as a result of the atomic bombing which had taken place during the war. According to the witness,

> "The explosion of the atomic bomb generated an enormous fireball, 200 metres in radius, almost as though a small sun had appeared in the sky. The next instant, a ferocious blast and wave of heat

assailed the ground with a thunderous roar. The surface temperature of the fireball was about 7,000° C, and the heat rays that reached the ground were over 3,000° C. The explosion instantly killed or injured people within a two-kilometre radius of the hypocentre, leaving innumerable corpses charred like clumps of charcoal and scattered in the ruins near the hypocentre. In some cases not even a trace of the person's remains could be found. The blast wind of over 300 metres per second slapped down trees and demolished most buildings. Even iron reinforced concrete structures were so badly damaged that they seemed to have been smashed by a giant hammer. The fierce flash of heat meanwhile melted glass and left metal objects contorted like strands of taffy, and the subsequent fires burned the ruins of the city to ashes. Nagasaki became a city of death where not even the sounds of insects could be heard. After a while, countless men, women and children began to gather for a drink of water at the banks of nearby Urakami River, their hair and clothing scorched and their burnt skin hanging off in sheets like rags. Begging for help, they died one after another in the water or in heaps on the banks. Then radiation began to take its toll, killing people like a scourge of death expanding in concentric circles from the hypocentre. Four months after the atomic bombing, 74,000 people were dead and 75,000 had suffered injuries, that is, two-thirds of the city population had fallen victim to this calamity that came upon Nagasaki like a preview of the Apocalypse." (CR 95/27, p. 38.)

The witness went on to state that even people who were lucky enough to survive continued to this day to suffer from the late effects unique to nuclear weapons. Nuclear weapons, he concluded, bring in their wake the indiscriminate devastation of civilian populations.

Testimony was also given by the delegation of the Marshall Islands which was the site of 67 nuclear weapons tests from 30 June to 18 August 1958, during the period of the United Nations Pacific Islands territories trusteeship. The total yield of those weapons was said to be equivalent to more than 7,000 bombs of the size of that which destroyed Hiroshima. Those nuclear weapon tests were said to have caused extensive radiation, induced illnesses, deaths and birth defects. Further on in the testimony, it was disclosed that human suffering and damage to the environment occurred at great distances, both in time and in geography, from the sites of detonations even when an effort was made to avoid or mitigate harm. The delegation went on to inform the Court that the unique characteristics of nuclear weapons are that they cause unnecessary suffering and include not only widespread, extensive, radioactive contamination with cumulative adverse effects, but also locally intense radiation with severe,

immediate and long-term adverse effects, far-reaching blasts, heat, and light resulting in acute injuries and chronic ailments. Permanent, as well as temporary, blindness from intense light and reduced immunity from radiation exposures were said to be common and unavoidable consequences of the use of nuclear weapons, but which were uncommon or absent from the use of other destructive devices.

The delegation further disclosed that birth defects and extraordinarily prolonged and painful illnesses caused by the radioactive fallout inevitably and profoundly affected the civilian population long after the nuclear weapons tests had been carried out. Such suffering had affected generations born long after the testing of such weapons. It went on to say that, apart from the immediate damage at and near ground zero (where the detonation took place), the area experienced contamination of animals and plants and the poisoning of soil and water. As a consequence, some of the islands were still abandoned and in those that had recently been resettled, the presence of caesium in plants from the radioactive fallout rendered them inedible. Women on some of the other atolls in the islands who had been assured that their atolls were not affected by radiation were said to have given birth to "monster babies". A young girl on one of these atolls was said to have no knees, three toes on each foot and a missing arm; her mother had not been born by 1954 when the tests started but had been raised on a contaminated atoll.

In the light of the foregoing the Court, as well as taking cognizance of the unique characteristics of nuclear weapons when used, reached the following conclusions; that nuclear weapons have a destructive capacity unmatched by any conventional weapon; that a single nuclear weapon has the capacity to kill thousands if not millions of human beings; that such weapons cause unnecessary suffering and superfluous injury to combatants and non-combatants alike; and that they are unable to distinguish between civilians and combatants. When recourse is had to such weapons, it can cause damage to generations unborn and produce widespread and long-term effects on the environment, particularly in respect of resources necessary for human survival. In this connection, it should be noted that the radioactive effects of such weapons are not only similar to the effects produced by the use of poison gas which would be in violation of the 1925 Geneva Gas Protocol, but are considered even more harmful.

The above findings by the Court should have led it inexorably to conclude that any use of nuclear weapons is unlawful under international law, in particular the law applicable in armed conflict including humanitarian law. However, instead of this, the Court found 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" (paragraph 2E of the *dispositif*).

This finding that would appear to suggest that nuclear weapons when used in circumstances of a threat to "State survival" — a concept invented by the Court — would constitute an exception to the corpus of humanitarian law which applies in all armed conflicts and makes no exception for nuclear weapons. In my considered opinion, the unlawfulness of the use of nuclear weapons is not predicated on the circumstances in which the use takes place, but rather on the unique and established characteristics of those weapons which under any circumstance would violate international law by their use. It is therefore most inappropriate for the Court's finding to have turned on the question of State survival when what is in issue is the lawfulness of nuclear weapons. Such a misconception of the question deprives the Court's finding of any legal basis.

On the other hand, if the Court had properly perceived the question and intended to give an appropriate reply, it would have found that an overwhelming justification exists on the basis of the law and the facts, which would have enabled it to reach a finding that the use of nuclear weapons in any circumstance would be unlawful. The Court's failure to reach this inevitable conclusion has compelled me to enter a vigorous dissent to its main finding.

I am likewise constrained to mention various other, more general, misgivings with regard to the Advisory Opinion on the whole. While the purpose of the Court's advisory jurisdiction is to provide an authoritative legal opinion and to enlighten the requesting body on certain legal aspects of an issue with which it has to deal when discharging its functions, the device has also been used to secure authoritative interpretations of the provisions of the Charter or the constitutive instruments of specialized agencies, or to provide guidance to various organs of the United Nations in relation to their functions. Furthermore, although the advisory opinions of the Court are not legally binding and impose no legal obligations either upon the requesting body or upon States, such opinions are nonetheless not devoid of effect as they remain the law "recognized by the United Nations" (*Admissibility of Hearings of Petitioners by the Committee on South West Africa, I.C.J. Reports 1956*, separate opinion of Judge Lauterpacht, p. 46). Accordingly, this Court has, on various occasions, used its advisory jurisdiction as a medium of participation in the work of the United Nations, helping the Organization to achieve its objectives. Advisory opinions have enabled the Court to contribute meaningfully to the development and crystallization of the law. For example, in the *Namibia* Advisory Opinion, the Court referred to the

development "of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, p. 31), which made the principle of self-determination applicable to such territories.

In its Advisory Opinion on the *Western Sahara*, the Court, citing the *Namibia* Opinion in relation to the principle of self-determination, stated that when questions are asked with reference to that principle, the Court

> "'must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law'.
>
> . . . . . .
>
> 'In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.'" (*I.C.J. Reports 1975*, p. 32, para. 56.)

The Court's Opinion in the case accordingly referred to Article 1 of the United Nations Charter and to the Declaration on the Granting of Independence to Colonial Countries and Peoples which, it said, "confirm and emphasize that the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned" (*I.C.J. Reports 1975*, p. 32, para. 55). Moreover, the Court insisted that

> "The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory." (*Ibid.*, p. 33, para. 59.)

It can therefore be observed that through the medium of its advisory opinions, the Court has rendered normative decisions which have enabled the United Nations to achieve its objectives, in some cases even leading to the peaceful settlement of disputes, and has either contributed to the crystallization and development of the law or, with its imprimatur, affirmed the emergence of the law.

It is therefore to be regretted that, on this occasion, the Court would seem not only to have retreated from this practice of making its contribution to the development of the law on a matter of such vital importance to the General Assembly and to the international community as a whole but may, albeit unintentionally, have cast doubt on established or emerging rules of international law. Indeed, much of the approach of the Court in this Opinion is indicative of this attitude. When not looking for specific treaties or customary law rules supposed to regulate or prohibit the use of nuclear weapons, the Court has tended to declare either that it is

not called upon to make a finding on the matter or that it is not necessary for it to take a position. For instance, regarding the matter of whether the principles and rules of humanitarian law are part of *jus cogens* as defined in Article 53 of the Vienna Convention on the Law of Treaties of 1969, the Court stated that there is no need for it to pronounce on the matter even though there is almost universal adherence to the fact that the Geneva Conventions of 1949 are declaratory of customary international law, and there is community interest and consensus in the observance of and respect for their provisions. A pronouncement of the Court emphasizing their humanitarian underpinnings and the fact that they are deeply rooted in the traditions and values of member States of the international community and deserve universal respect and protection, and not to be derogated from by States would assist in strengthening their legal observance especially in an era which has so often witnessed the most serious and egregious violation of humanitarian principles and rules and whose very raison d'être is irreconcilable with the use of nuclear weapons. This has been part of the judicial function of the Court — the establishment of international legal standards for the community of States and, in particular, for those that appear before it or are parties to its Statute. In the establishment of such legal standards, the Court, in the *Reservations* case, referred to the principles underlying the Convention on the Prohibition of Genocide as principles which are recognized by civilized nations "as binding on States, even without any conventional obligation" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 23). It also recognized the co-operation required by the Convention "in order to liberate mankind from such an odious scourge . . ." *(ibid.)*. The Court noted that the Convention was adopted for a purely humanitarian and civilizing purpose, "to safeguard the very existence of certain human groups and . . . to confirm and endorse the most elementary principles of morality" *(ibid.)*. In the *Corfu Channel* case, the Court referred to "certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war" (*I.C.J. Reports 1949*, p. 22). Such pronouncements would undoubtedly have helped to foster a proper sense of restraint within the international community. In the *Barcelona Traction* case, the Court in discussing the obligations of States towards the international community stated that such obligations are *ergo omnes* and

> "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law . . ." (*Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1970*, p. 32, para. 34).

In the case under consideration, the Court would appear to have been all too reluctant to take a position of principle on a question involving what the late Judge Nagendra Singh has described as the most important aspect of international law facing humanity today (*Nuclear Weapons and International Law*, p. 17). Instead, the Court would seem to have attempted to overcome this fundamental issue about the *jus cogens* character of some of the principles and rules of humanitarian law by saying that the request transmitted to it "does not raise the question of the character of the humanitarian law which would apply to the use of nuclear weapons". With respect they do. A pronouncement by the Court regarding the character and application of such rules, while not a guarantee of their observance at all times, would nevertheless be considered as a reaffirmation of those rules as they relate to human values which are already protected by positive legal principles and, when taken together, reveal certain criteria of public policy. (See I. Brownlie, *Principles of Public International Law*, 1990, p. 28.) H. Lauterpacht has also stated that, among other reasons, many of the provisions of the Geneva Conventions following as they do from "compelling considerations of humanity, are declaratory of universally binding international custom" (E. Lauterpacht (ed.), *International Law, Being the Collected Papers of Hersch Lauterpacht*, 1970, p. 115). The International Law Commission pointed out in its commentary on Article 50 (now 53) of the Vienna Convention on the Law of Treaties, that "it is not the form of a general rule of international law, but the particular nature of the subject-matter with which it deals that may . . . give it a character of *jus cogens*". Already in 1980, the Commission observed that "some of the rules of humanitarian law are, in the opinion of the Commission, rules which impose obligations of *jus cogens*".

The Court also adopted the judicial policy of "non-pronouncement" on the question of belligerent reprisals — an issue most pertinent to the question before it — "save to observe that in any case any right of recourse to such reprisals would, like self-defence, be governed *inter alia* by the principle of proportionality" (para. 46). It is to say the least strange that the Court should refrain from pronouncing on the lawfulness or otherwise of belligerent reprisals, particularly if it would involve the use of nuclear weapons. Under contemporary international law, belligerent reprisals, if carried out with nuclear weapons, would grossly violate humanitarian law in any circumstance and international law in general. More specifically the Geneva Conventions prohibit such reprisals against a range of protected persons and objects as reaffirmed in Additional Protocol I of 1977. According to the Protocol, all belligerent parties are prohibited from carrying out belligerent reprisals. If nuclear weapons were used and given the characteristics of those weapons, their inability to discriminate between civilians and combatants and between civilian and military objectives, together with the likelihood of violations of the prohibition of unnecessary suffering and superfluous injuries to

belligerents, such reprisals would at a minimum be contrary to established humanitarian law and would therefore be unlawful. The Court's "judicial restraint" on an issue of such crucial importance to the question before it contributes neither to the clarification of the law, let alone to its observance.

The Court's reluctance to take a legal position on some of the important issues which pertain to the question before it could also be discerned from what may be described as a "judicial odyssey" in search of a specific conventional or customary rule specifically authorizing or prohibiting the use of nuclear weapons, which only led to the discovery that no such specific rule exists. Indeed, if such a specific rule did exist, it is more than unlikely that the question would have been brought before the Court in its present form, if at all. On the other hand, the absence of a specific convention prohibiting the use of nuclear weapons should not have suggested to the Court that the use of such weapons might be lawful, as it is generally recognized by States that customary international law embodies principles which are applicable to the use of such weapons. Hence the futile quest for specific legal prohibition can only be attributable to an extreme form of positivism, which is out of keeping with the international jurisprudence — including that of this Court. The futility of such an enterprise was recognized by the British-American Claims Arbitral Tribunal in the *Eastern Extension, Australia and China Telegraph Company* case, where it was held that even if there were no specific rule of international law applicable to a case, it could not be said that there was no rule of international law to which resort might be had:

> "International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find — exactly as in the mathematical sciences — the solution of the problem. This is the method of jurisprudence; it is the method by which the law has been gradually evolved in every country, resulting in the definition and settlement of legal relations as well between States as between private individuals." (United Nations, *Reports of International Arbitral Awards*, Vol. VI, pp. 114-115.)

Such then has been the jurisprudential approach to issues before the Court. The Court has applied legal principles and rules to resolve the conflict of opposing rights and interests where no specific provision of the law exists, and has relied on the corollaries of general principles in order to find a solution to the problem. The Court's approach has not been restricted to a search for a specific treaty or rule of customary law specifically regulating or applying to a matter before it and, in the absence of

such a specific rule or treaty, it has not declared that it cannot definitively conclude or that it is unable to reach a decision or make a determination on that matter. The Court has in the past — rightly in my view — not imposed such restrictions upon itself when discharging its judicial function to decide disputes in accordance with international law, but has referred to the principles of international law, to equity and to its own jurisprudence in order to define and settle the legal issues referred to it.

On the other hand, the search for specific rules led the Court to overlook or not fully to apply the principles of the United Nations Charter when considering the question before it. One such principle that does not appear to have been given its due weight in the Judgment of the Court is Article 2, paragraph 1, of the Charter of the United Nations, which provides that "The Organization is based on the principle of sovereign equality of all its Members." The principle of sovereign equality of States is of general application. It presupposes respect for the sovereignty and territorial integrity of all States. International law recognizes the sovereignty of each State over its territory as well as the physical integrity of the civilian population. By virtue of this principle, a State is prohibited from inflicting injury or harm on another State. The principle is bound to be violated if nuclear weapons are used in a given conflict, because of their established and well-known characteristics. The use of such weapons would not only result in the violation of the territorial integrity of non-belligerent States by radioactive contamination, but would involve the death of thousands, if not millions, of the inhabitants of territories not parties to the conflict. This would be in violation of the principle as enshrined in the Charter, an aspect of the matter that would appear not to have been taken fully into consideration by the Court when making its findings.

I am likewise constrained to express my apprehension over some of the other findings in the Advisory Opinion with regard to respect for human rights and genocide, the protection of the natural environment and the policy of deterrence. With regard to genocide, it is stated that genocide would be considered to have been committed if a recourse to nuclear weapons resulted from an intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. This reflects the text of the Genocide Convention. However, one must be mindful of the special characteristics of the Convention, its object and purpose, to which the Court itself referred in the *Reservations* case as being to condemn and punish

> "'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 23);

while further pointing out

> "that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation" (*I.C.J. Reports 1951*, p. 23).

It further emphasized the co-operation required in order "to liberate mankind from such an odious scourge" and, given the humanitarian and civilizing purpose of the Convention, it referred to it as intended "to safeguard the very existence of certain human groups", and "to confirm and endorse the most elementary principles of morality". The Court cannot therefore view with equanimity the killing of thousands, if not millions, of innocent civilians which the use of nuclear weapons would make inevitable, and conclude that genocide has not been committed because the State using such weapons has not manifested any intent to kill so many thousands or millions of people. Indeed, under the Convention, the quantum of the people killed is comprehended as well. It does not appear to me that judicial detachment requires the Court from expressing itself on the abhorrent shocking consequences that a whole population could be wiped out by the use of nuclear weapons during an armed conflict, and the fact that this could tantamount to genocide, if the consequences of the act could have been foreseen. Such expression of concern may even have a preventive effect on the weapons being used at all.

As to whether recourse to nuclear weapons would violate human rights, in particular the right to human life, the Court found that it was never envisaged that the lawfulness or otherwise of such weapons would be regulated by the International Covenant on Civil and Political Rights. While this is accepted as a legal position, it does seem to me that too narrow a view has been taken of the matter. It should be recalled that both human rights law and international humanitarian law have as their raison d'être the protection of the individual as well as the worth and dignity of the human person, both during peacetime or in an armed conflict. It is for this reason, to my mind, that the United Nations Charter, which was adopted immediately after the end of the Second World War in the course of which serious and grave violations of human rights had occurred, undertook to protect the rights of individual human beings whatever their race, colour or creed, emphasizing that such rights were to be protected and respected even during an armed conflict. It should not be forgotten that the Second World War had witnessed the use of the atomic weapon in Hiroshima and Nagasaki, resulting in the deaths of thousands of human beings. The Second World War therefore came to be regarded as the period epitomizing gross violations of human rights. The possibility that the human rights of citizens, in particular their right to life, would be violated during a nuclear conflagration, is a matter which falls within the purview of the Charter and other relevant international legal instruments. Any activity which involves a terrible violation

of the principles of the Charter deserves to be considered in the context of both the Charter and the other applicable rules. It is evidently in this context that the Human Rights Committee under the International Covenant on Civil and Political Rights adopted, in November 1984, a "general comment" on Article 6 of the Covenant (Right to Life), according to which the production, testing, possession, deployment and use of nuclear weapons ought to be prohibited and recognized as crimes against humanity. It is to be recalled that Article 6 of the Charter of the Nuremberg Tribunal defined crimes against humanity as "murder, extermination . . ., and other inhumane acts committed against any civilian population, before or during war . . .". It follows that the Nuremberg principles are likewise pertinent to the matter just considered by the Court.

With regard to the protection and safeguarding of the natural environment, the Court reached the conclusion that existing international law does not prohibit the use of nuclear weapons, but that important environmental factors are to be taken into account in the context of the implementation of the principles and rules of law applicable in armed conflict. The Court also found that relevant treaties in relation to the protection of the natural environment could not have intended to deprive a State of the exercise of its right to self-defence under international law.

In my view, what is at issue is not whether a State might be denied its right to self-defence under the relevant treaties intended for the protection of the natural environment, but rather that, given the known qualities of nuclear weapons when exploded as well as their radioactive effects which not only contaminate human beings but the natural environment as well including agriculture, food, drinking water and the marine ecosystem over a wide area, it follows that the use of such weapons would not only cause severe and widespread damage to the natural environment, but would deprive human beings of drinking water and other resources needed for survival. In recognition of this, the First Additional Protocol of 1977 makes provision for the preservation of objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural produce, drinking water installations, etc. The Advisory Opinion should have considered the question posed in relation to the protection of the natural environment from this perspective, rather than giving the impression that the argument advanced was about denying a State its legitimate right of self-defence.

The Advisory Opinion considered that the fact of nuclear weapons not having been used for 50 years cannot be regarded as an expression of an *opinio juris*. The legal basis for such a recognition was not elaborated; it was more in the nature of an assertion. However, the Court was unable to find that the conviction of the overwhelming majority of States that the fact that nuclear weapons have not been used for the last 50 years has established an *opinio juris* in favour of the prohibition of such use, was such as to have a bearing on its Opinion. In this connection, the Court

should have given due consideration and weight to the statements of the overwhelming majority of States together with the resolutions adopted by various international organizations on the use of nuclear weapons, as evidence of the emergence of an *opinio juris*.

In my view, it was injudicious for the Court to have appeared to give legal recognition to the doctrine of deterrence as a principle of international law. While it is legitimate that judicial notice should be taken of that policy, the Court should have realized that it has the potential of being declared illegal if implemented, as it would involve a nuclear conflict between belligerents with catastrophic consequences for the civilian population not only of the belligerent parties but those of States not involved in such a conflict, and could result in the violation of international law in general and humanitarian law in particular. It would therefore have been prudent for the Court to have refrained from taking a position on this matter, which is essentially non-legal.

Be that as it may, the Advisory Opinion cannot be considered as entirely without legal merit or significance. The positive findings it contains should be regarded as a step forward in the historic process of imposing legal restraints in armed conflicts. Some of those restraints as they relate to nuclear weapons have now found expression in the opinion of the Court. For the first time in its history, indeed in the history of any tribunal of similar standing, the Court has declared and confirmed that nuclear weapons are subject to international law; that a threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter, and that fails to meet the requirements of Article 51 is unlawful. The Court has also held that any threat or use of nuclear weapons that is incompatible with the requirements of international law applicable in armed conflict, particularly those of the principles of humanitarian law as well as specific obligations under the treaties or other undertakings, dealing expressly with nuclear weapons, would be unlawful. Inferentially, it is because recourse to nuclear weapons could not meet the aforementioned requirements that the Court has 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" (paragraph 2 E of the *dispositif*).

This finding, though qualified, should be regarded as of normative importance, when taken together with the other conclusions reached by the Court. Among other things, it is a rejection of the argument that since humanitarian law pre-dated the invention of nuclear weapons, it could not therefore be applicable to those weapons. On the contrary, the Court has found that given the intrinsic character of the established principles and rules of humanitarian law, it does apply to them.

It is in the response to these juridical findings of both historic and normative importance that I have voted in favour of paragraphs 2 A, 2 C, 2 D and 2 F of the *dispositif*, but not without reservations with respect to paragraph 2 C.

However, I have voted against paragraph 2 B according to which the Court finds that there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat of nuclear weapons as such. Such a finding, in my view, is not in accordance with the law. At the very least, the use of nuclear weapons would violate the prohibition of the use of poison weapons as embodied in Article 23 *(a)* of the Hague Convention of 1899 and 1907 as well as the Geneva Gas Protocol of 1925 which prohibits the use of poison gas and/or bacteriological weapons. Because of its universal adherence, the Protocol is considered binding on the international community as a whole. Furthermore, the prohibition of the use of poison gas is now regarded as a part of customary international law binding on all States, and, the finding by the Court in paragraph 2 B cannot be sustained in the face of the Geneva Conventions of 1949 and the 1977 Additional Protocols thereto either. With regard to the Conventions, they are as of today binding on at least 186 States and their universal acceptance is said to be even greater than that of the United Nations Charter. Accordingly, those treaties are now recognized as a part of customary international law binding on all States. The Court in its Judgment in the *Nicaragua* case confirmed that the Conventions are a part of customary international law, when it stated that:

> "there is an obligation . . . in the terms of Article 1 of the Geneva Conventions, to 'respect' the Conventions and even 'to ensure respect' for them 'in all circumstances', since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1986*, p. 114, para. 220).

By reference to the humanitarian principles of international law, the Court recognized that the Conventions themselves are reflective of customary law and as such universally binding. The same reasoning applies to Additional Protocol I in particular, which constitutes a restatement and a reaffirmation of customary law rules based on the earlier Geneva and Hague Conventions. To date, 143 States have become parties to the Protocol, and the customary force of the provisions of the Protocol are not based on the formal status of the Protocol itself.

In the light of the foregoing conclusion, it cannot be maintained, as the Court has done, that there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat

or use of nuclear weapons as such. Such a finding is not consistent with its jurisprudence either as alluded to above.

I have however voted in favour of paragraph 2 F of the *dispositif* which stresses the 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. I am of the view that the parties to the 1968 Treaty on the Non-Proliferation of Nuclear Weapons, realizing the danger posed to all States by the proliferation of nuclear weapons, entered into a binding commitment to end the nuclear arms race at an early date and to embark on nuclear disarmament. The dangers that those weapons posed for humanity in 1968 are still current today, as is evident from the decision taken in 1995 by the States parties to the Treaty, to make it permanent. The obligation to eliminate those weapons remains binding on those States so as to remove the threat such weapons pose to violate the Charter or the principles and rules of humanitarian law. There is accordingly a correlation between the obligation of nuclear disarmament assumed by those States parties to the Non-Proliferation Treaty and the obligations assumed by States under the United Nations Charter and under the law applicable in armed conflict, in particular international humanitarian law.

Despite this and some of the other normative conclusions reached by the Court in its Advisory Opinion, it is a matter of profound regret that on the actual question put to it, that is, whether it is permitted under international law to use nuclear weapons in any circumstances, the Court flinched and failed to reach the only and inescapable finding, namely, that in view of the established facts of the use of such weapons, it is inconceivable that there is any circumstance in which their use would not violate the principles and rules of international law applicable in armed conflict and, in particular, the principles and rules of humanitarian law. By not answering the question and leaving it to States to decide the matter, the Court declined the challenge to reaffirm the applicability of the rules of law and of humanitarian law in particular to nuclear weapons and to ensure the protection of human beings, of generations unborn and of the natural environment against the use of such weapons whose destructive power, we have seen, is unable to discriminate between combatants and non-combatants, cannot spare hospitals or prisoner-of-war camps and can cause suffering out of all proportion to military necessity leaving their victims to die as a result of burns after weeks of agony, or to be afflicted for life with painful infirmities. The request by the General Assembly was for the Court, as the guarantor of legality, to affirm that because of these consequences, the use of nuclear weapons is unlawful under international law. A determination that this Court as a court of law should have been able to make.

In the absence of such a categoric and inescapable finding, I am left with no alternative but with deep regret to dissent from the Advisory Opinion.

(Signed) Abdul G. KOROMA.