LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS (REQUEST FOR ADVISORY OPINION BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS)

[1996] ICJ Reports

On 8 July 1996, the Court handed down its Advisory Opinion on the request made by the General Assembly of the United Nations in this case. In the final paragraph of the Opinion, the Court held the following:

(1) By thirteen votes to one, the Court decided to comply with the request for an advisory opinion (Bedjaoui P, Schwebel V-P, Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo, Higgins JJ; Oda J dissenting).

(2) (A) The Court unanimously replied that there was in neither customary nor conventional international law any specific authorisation of the threat or use of nuclear weapons.

(B) By eleven votes to three, the Court held that there was in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such (Bedjaoui P, Schwebel V-P, Oda, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins JJ; Shahabuddeen, Weeramantry, Koroma JJ dissenting).

(C) The Court unanimously decided that a threat or use of force by means of nuclear weapons that is contrary to Article 2 (4) of the United Nations Charter, and which failed to meet all the requirements of Article 51, was unlawful.

(D) The Court also unanimously decided that a threat or use of nuclear weapons should be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons.

(E) By seven votes to seven, the Court decided that it followed from the above findings that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and

rules of humanitarian law. However, in view of the current state of international law, and of the elements of fact at its disposal, the Court could not 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 (Bedjaoui P, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo JJ; Schwebel V-P, Oda, Guillaume, Shahabuddeen, Weeramantry, Koroma, Higgins JJ dissenting).

(F) Finally, the Court unanimously decided that there existed an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

SUBMISSION OF THE REQUEST

By a letter dated 19 December 1994, filed in the Registry on 6 January 1995, the United Nations Secretary-General officially communicated to the Registrar the decision taken by the General Assembly to submit a question to the Court for an advisory opinion. The final paragraph of Resolution 49/75 K, adopted by the General Assembly on 15 December 1994, which set forth the question, provided that the General Assembly had decided:

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

JURISDICTION OF THE COURT

The Court first considered whether it had the jurisdiction to give a reply to the request of the General Assembly for an Advisory Opinion and whether, should the answer be in the affirmative, there was any reason it should decline to exercise any such jurisdiction.

The Court observed that it drew its competence in respect of advisory opinions from Article 65(1) of its Statute of the Court, while Article 96(1) of the United Nations Charter provided:

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

Some states, which opposed the giving of an opinion by the Court argued that the General Assembly and Security Council might ask for an advisory opinion on any legal question only within the scope of their activities. In the Court's view, it mattered little whether this interpretation of Article 96(1) was or was not correct. In the present case, the General Assembly had competence in any event to seise the Court. Referring to Articles 10, 11 and 13 of the Charter, the Court found that the question put to it had a relevance to many aspects of the activities and concerns of the General Assembly including those relating to the threat or use of force in international relations, the disarmament process, and the progressive development of international law.

LEGAL QUESTION

The Court observed that it had already had occasion to indicate that questions framed in terms of law and raising problems of international law were by their very nature susceptible of a reply based on law and appeared to be questions of a legal character.[1]

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

The fact that this question also had political aspects did not suffice to deprive it of its character as a "legal question" nor "deprive the Court of a competence expressly conferred on it by its Statute". Nor was the political nature of the motives relevant when establishing the Court's jurisdiction to give such an opinion.

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[1] See *Western Sahara (Advisory Opinion)* [1975] ICJ Reports 18 para 15.

DISCRETION OF THE COURT TO GIVE AN ADVISORY OPINION

Article 65(1) of the Statute provided: "The Court *may* give an advisory opinion..." (emphasis added). This was more than an enabling provision. As the Court had repeatedly emphasised, the Statute left a discretion as to whether or not the Court would give an advisory opinion that had been requested of it, once it had established its competence to do so. In this context, the Court had previously noted as follows:

> The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an "organ of the United Nations", represents its participation in the activities of the Organisation, and, in principle, should not be refused.[2]

In the history of the Court there had been no refusal, based on the discretionary power of the Court, to act upon a request for advisory opinion. In the case concerning the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*,[3] the refusal to give the World Health Organisation the advisory opinion requested by it was justified by the Court's lack of jurisdiction in that case.

Several reasons were adduced in the proceedings in order to persuade the Court that in the exercise of its discretionary power it should decline to render the opinion requested by the General Assembly. Some states, in contending that the question put to the Court was vague and abstract, appeared to mean by this that there existed no specific dispute on the subject matter of the question. In order to respond to this argument, it was necessary to distinguish between requirements governing contentious procedure and those applicable to advisory opinions. The purpose of the advisory function was not to settle, at least directly, disputes between states, but to offer legal advice to the organs and institutions requesting the opinion. The fact that the question put to the Court did not relate to a specific dispute should consequently not lead the Court to decline to give the opinion requested.

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2 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)* [1950] ICJ Reports 71.

3 The proceedings in this case were adjunct to the present proceedings. The case is as yet unreported.

Other arguments concerned the fear that the abstract nature of the question might lead the Court to make hypothetical or speculative declarations outside the scope of its judicial function. The following points were raised, namely, that the General Assembly had not explained to the Court for what precise purposes it sought the advisory opinion, that a reply from the Court in the case might adversely affect disarmament negotiations and therefore would be contrary to the interest of the United Nations, and that in answering the question posed, the Court would go beyond its judicial role and take upon itself a law-making capacity.

The Court did not accept these arguments and concluded that it had the authority to deliver an opinion on the question posed by the General Assembly. It held that there existed no "compelling reasons" which would lead the Court to exercise its discretion and not provide the advisory opinion sought. It pointed out, however, that it was an entirely different question whether, under the constraints placed upon it as a judicial organ, it would be able to give a complete answer to the question asked of it. But that was a different matter from a refusal to answer at all.

FORMULATION OF THE QUESTION POSED

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

THE APPLICABLE LAW

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

The Court considered that the question whether a particular loss of life, through the use of a certain weapon in warfare, was to be considered an arbitrary deprivation of life contrary to Article 6 of the 1966 International Covenant on Civil and Political Rights, as argued by some of the proponents

of the illegality of the use of nuclear weapons, could only be decided by reference to the law applicable in armed conflict and could not be deduced from the terms of the Covenant itself. The Court also pointed out that the prohibition of genocide would be pertinent in this case if the recourse to nuclear weapons entailed the element of intent, towards a group as such, as required by Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. In the Court's view, it would only be possible to arrive at such a conclusion after having taken due account of the circumstances specific to each case.

The Court found that while the existing international law relating to the protection and safeguarding of the environment did not specifically prohibit the use of nuclear weapons, it indicated important environmental factors that were to be properly taken into account in the context of implementation of the principles and rules of law applicable in armed conflict.

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

UNIQUE CHARACTERISTICS OF NUCLEAR WEAPONS

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

CHARTER PROVISIONS RELATING TO THE THREAT OR USE OF FORCE

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

In Article 2(4) the use of force against the territorial integrity or political independence of another state or in any other manner inconsistent with the purposes of the United Nations was prohibited. This prohibition had to be considered in the light of other relevant provisions of the Charter. In Article 51, the Charter recognised the inherent right of individual or collective self-defence if an armed attack occurred. A further lawful use of force was envisaged in Article 42, whereby the Security Council might take military enforcement measures in conformity with Chapter VII.

These provisions did not refer to specific weapons. They applied to any use of force, regardless of the weapons employed. The Charter did not expressly prohibit or permit the use of any specific weapon, including nuclear weapons.

The entitlement to self-defence under Article 51 was subject to the conditions of necessity and proportionality. As the Court stated in the *Case concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*):[4] "there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law".[5]

Thus, the proportionality principle might not, in itself, exclude the use of nuclear weapons in self-defence in all circumstances. But at the same time, a use of force that was proportionate under the law of self-defence, must in order to be lawful, also meet the requirements of the law applicable in armed conflict that comprise the principles and rules of humanitarian law in particular. The Court noted that the very nature of all nuclear weapons and the profound risks associated with it were further considerations to be borne in mind by states believing they could exercise a nuclear response in self-defence in accordance with the requirements of proportionality.

In order to lessen or eliminate the risk of unlawful attack, states sometimes signalled that they possessed certain weapons to use in self-defence against any state violating their territorial integrity or political independence. Whether a signalled intention to use force if certain events occurred was or

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4 [1986] ICJ Reports 96.
5 Ibid at para 176.

was not a "threat" within Article 2(4) of the Charter depended upon various factors. The notions of "threat" and "use" of force under Article 22(4) of the Charter stood together in the sense that if the use of force itself in a given case was illegal, for whatever reason, the threat to use such force would likewise be illegal. In short, if it was to be lawful, the declared readiness of a force had to be a use of force that was in conformity with the Charter. For the rest, no state, whether or not it defended the policy of deterrence, suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal.

RULES ON THE LAWFULNESS OR UNLAWFULNESS OF NUCLEAR WEAPONS

On the law applicable in situations of armed conflict, the Court first addressed the question whether there were specific rules in international law regulating the legality or illegality or recourse to nuclear weapons *per se*. It then examined the question put to it in the light of the law applicable in armed conflict proper, namely, the principles and rules of humanitarian law applicable in armed conflict, including the law of neutrality.

The Court noted that international customary and treaty law did not contain any specific prescription authorising the threat or use of nuclear weapons or any other weapon in general or in certain circumstances, in particular those of the exercise of legitimate self-defence. Nor was there any principle or rule of international law which would make the legality of the threat or use of nuclear weapons or of any other weapons dependent on a specific authorisation. State practice showed that the illegality of the use of certain weapons as such did not result from an absence of authorisation but, on the contrary, was formulated in terms of prohibition.

It did not seem to the Court that the use of nuclear weapons could be regarded as specifically prohibited on the basis of certain provisions of the Second Hague Declaration of 1899, the Regulations annexed to the 1907 Hague Convention IV or the 1925 Geneva Protocol. The pattern until now had been for weapons of mass destruction to be declared illegal by specific instruments. But the Court did not find any specific prohibition of recourse to nuclear weapons in treaties expressly prohibiting the use of certain weapons of mass destruction. It observed that although in the last two decades, a great many negotiations have been conducted regarding nuclear

weapons, they had not resulted in a treaty of general prohibition of the same kind as for bacteriological and chemical weapons.

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

(a) a number of states had undertaken not to use nuclear weapons in specific zones (Latin America; the South Pacific) or against certain other states (non-nuclear-weapons states which were parties to the Treaty on the Non-Proliferation of Nuclear Weapons);
(b) even within this framework, the nuclear-weapon states had reserved the right to use nuclear weapons in certain circumstances; and
(c) these reservations met with no objection from the parties to the Tlatelolco or Rarotonga Treaties or from the Security Council.

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

It noted that the members of the international community were profoundly divided on the matter of whether non-recourse to nuclear weapons over the past fifty years constituted the expression of an *opinio juris*. Under these circumstances the Court did not consider itself able to find that there was such an *opinio juris*. It pointed out that the adoption each year by the General Assembly, by a large majority, of resolutions recalling the content of resolution 1653 (XVI), and requesting member states to conclude a convention prohibiting the use of nuclear weapons in any circumstance, revealed the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step toward complete nuclear disarmament. The emergence, as

lex lata of a customary rule specifically prohibiting the use of nuclear weapons as such was hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the doctrine of deterrence (in which the right to use those weapons in the exercise of the right to self-defence against an armed attack threatening the vital security interests of the state was reserved) on the other.

INTERNATIONAL HUMANITARIAN LAW

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

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

The Court also referred to the Martens Clause, which was first included in the Hague Convention II with Respect to the Laws and Customs of War on Land of 1899 and which has proved to be an effective means of addressing the rapid evolution of military technology. A modern version of that clause was found in Article I(2) of Additional Protocol I of 1977. It read as follows:

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

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

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

THE PRINCIPLE OF NEUTRALITY

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

CONCLUSIONS TO BE DRAWN FROM THE APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW AND THE PRINCIPLE OF NEUTRALITY

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

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

The Court observed that, in view of the unique characteristics of nuclear weapons, the use of such weapons in fact seemed scarcely reconcilable with the requirements of the law applicable in armed conflict. Nevertheless, the Court considered that it did not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance. Furthermore, the Court could not lose sight of the fundamental right of every state to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival was at stake. Nor could the Court ignore the practice referred to as "policy of deterrence", to which an appreciable section of the international community adhered for many years.

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

OBLIGATION TO NEGOTIATE NUCLEAR DISARMAMENT

Given the eminently difficult issues that arose in applying the law on the use of force and above all the law applicable in armed conflict to nuclear weapons, the Court considered that it needed to examine one further aspect of the question before it, seen in a broader context. In the long run, international law, and with it the stability of the international order which it was intended to govern, were bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons. It was consequently important to put an end to this state of affairs and the long-promised complete nuclear disarmament appeared to be the most appropriate means of achieving that result.

In these circumstances, the Court appreciated the full importance of the recognition by Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of an obligation to negotiate in good faith a nuclear disarmament. The legal import of that obligation went beyond that of a mere obligation of conduct. The obligation involved was an obligation to achieve a precise result, nuclear disarmament in all its aspects, by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith. This twofold obligation to pursue and to conclude negotiations formally concerned the 182 states party to the Treaty on the Non-Proliferation of Nuclear Weapons, or, in other words, the vast majority of the international community. Indeed, any realistic search for general and complete disarmament, especially nuclear disarmament, necessitated the cooperation of all states.

The Court finally emphasised that its reply to the question put to it by the General Assembly rested on the totality of the legal grounds set forth by the Court, each of which was to be read in the light of the others. Some of these grounds were not such as to form the object of formal conclusions in the final paragraph of the Court's opinion; nevertheless they retained all their importance.

ANNEXURE[6]

DECLARATION OF BEDJAOUI P

Paragraph 2(E), the operative part of the Court's opinion, had been adopted by seven votes to seven. In his casting vote, Bedjaoui P began by stressing that the Court had been extremely meticulous and had shown an acute sense of responsibility when proceeding to consider all the aspects of the complex question put to it by the General Assembly. However, he indicated that in the current state of international law, the Court was unfortunately not in a position to give a clear answer to the question. In his view, the Advisory Opinion thus rendered did at least have the merit of pointing to the imperfections of international law and he invited the states to correct them.

Bedjaoui P indicated that the fact that the Court was unable to go any further should not "in any way be interpreted as leaving the way open to the recognition of the lawfulness of the threat or use of nuclear weapons". According to him, the Court did no more than place on record the existence of a legal uncertainty. After having observed that the voting of the members of the Court on paragraph 3 of the operative part was not the reflection of any geographical dividing line, he gave the reasons that led him to approve the pronouncement of the Court.

He emphasised the particularly exacting nature of international law and the way in which it was designed to be applied in all circumstances. More specifically, he concluded that:

> *the very nature of this blind weapon therefore has a destabilising effect on humanitarian law which regulates discernment in the type of weapon used. Nuclear weapons, the ultimate evil, destabilise humanitarian law which is the law of the lesser evil. The existence of nuclear weapons is therefore a challenge to the very existence of humanitarian law,* not to mention their long-term effects of damage to the human environment, in respect to which the *right to life* can be exercised.

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[6] This is summary of the separate Declarations and Opinions of the judges.

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

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

DECLARATION OF HERCZEGH J

Herczegh J took the view that the Advisory Opinion could have included a more accurate summary of the present state of international law with regard to the question of the threat and use of nuclear weapons "in any circumstance". He voted in favour of the Advisory Opinion and, more particularly, in favour of paragraph 105(E) as he did not wish to disassociate himself from the large number of conclusions that were expressed and integrated into the Advisory Opinion, and which he fully endorsed.

DECLARATION OF SHI J

Shi J voted in favour of the operative paragraphs of the Advisory Opinion of the Court. However, he had reservations with regard to the role which the Court assigned to the policy of deterrence in determining the existence of a customary rule on the use of nuclear weapons.

In his view, "nuclear deterrence" was an instrument of policy to which certain nuclear-weapon states, supported by those states accepting nuclear umbrella protection, adhere in their relations with other states. This practice

was within the realm of international politics and had no legal value from the standpoint of the formation of a customary rule prohibiting the use of the weapons as such.

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

Further, leaving aside the nature of the policy of deterrence, states adhering to the policy of deterrence, though important and powerful members of the international community and which played an important role on the international politics stage, by no means constituted a large proportion of the membership of the international community.

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

DECLARATION OF VERESHCHETIN J

Vereshchetin J explained the reasons which led him to vote in favour of paragraph 2E of the *dispositif*, which carried the implication of the Court's indecisiveness. In his view, in advisory proceedings where the Court was not requested to resolve an actual dispute, but to state the law as it was found, the Court should not try to fill any lacuna or improve the law which was imperfect. The Court should not be blamed for indecisiveness or evasiveness where the law, upon which it was called to pronounce, was itself inconclusive.

Vereshchetin J was of the view that the Opinion adequately reflected the current legal situation and showed the most appropriate means of ending any "grey areas" in the legal status of nuclear weapons.

DECLARATION OF FERRARI BRAVO J

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

The Court should have proceeded to a constructive analysis of the role of General Assembly resolutions. From the outset, these had contributed to the formation of a rule prohibiting nuclear weapons. The theory of deterrence had arrested the development of that rule. While it prevented the implementation of the prohibition of nuclear weapons, it was nonetheless still the case that that "bare" prohibition had remained unchanged and continued to produce its effects, at least with regard to the burden of proof. It made it more difficult for the nuclear powers to vindicate their policies within the framework of the theory of deterrence.

SEPARATE OPINION OF GUILLAUME J

Guillaume J began by expressing his agreement with the Court with regard to the fact that nuclear weapons, like all weapons, could only be used in the exercise of the right of self-defence recognised by Article 51 of the Charter. On the other hand, he had doubts about the applicability of traditional humanitarian law to the use, and above all the threat of use, of nuclear weapons. However, he felt that he had no choice in the matter and instead deferred to the consensus that had emerged before the Court between the states.

When analysing the law applicable to armed conflict, he noted that that law essentially implied comparisons in which humanitarian considerations had to

be weighed against military requirements. Thus, the collateral damage caused to the civilian population should not be "excessive" as compared to the "military advantage" offered. The harm caused to combatants should not be "greater than that unavoidable to achieve legitimate military objectives". On that account, nuclear weapons of mass destruction could only be used lawfully in extreme cases.

In an attempt to define those cases, Guillaume J stressed that neither the United Nations Charter nor any conventional or customary rule could detract from the natural right of self-defence recognised by Article 51. He deduced from this that international law could not deprive a state of the right to resort to nuclear weaponry if that resort constituted the ultimate means by which it could ensure its survival.

He regretted that the Court had not explicitly recognised this, but stressed that it had done so implicitly. It had certainly concluded that it could not, in those extreme circumstances, make a definitive finding either of legality or illegality in relation to nuclear weapons. In other words, it had taken the view that, in such circumstances, the law provided no guidance to states. However if the law was silent, then states, in the exercise of their sovereignty, remained free to act as they thought fit.

Consequently, it followed implicitly but necessarily from paragraph 2(E) of the Court's Opinion that states might resort to "the threat or use of nuclear weapons in an extreme circumstance of self-defence, in which the very survival of a State would be at stake". When recognising such a right the Court had recognised the legality of policies of deterrence.

SEPARATE OPINION OF RANJEVA J

Ranjeva J emphasised that, for the first time, the Court had unambiguously stated that the use or threat of use of nuclear weapons was contrary to the rules of international law applicable *inter alia to* armed conflict and, more particularly, to the principles and rules of humanitarian law. That indirect response to the question of the General Assembly was, in his view, justified by the very nature of the law of armed conflict, applicable without regard to the status of victim or aggressor. That explained why the Court had not gone so far as to uphold the exception of extreme self-defence when the very survival of the state was at stake, as a condition for the suspension of

illegality. In his view, state practice showed that a point of no return had been reached. The principle of the legality of the use or threat of use of nuclear weapons had not been asserted. It was on the basis of a justification of an exception to that principle, accepted as being legal, that the nuclear-weapon states attempted to give the reasons for their policies, and the increasingly closer-knit legal regimes of nuclear weapons had come about in the context of the consolidation and implementation of the final obligation to produce a specific result, namely, generalised nuclear disarmament. These "givens" thus represented the advent of a consistent and uniform practice: an emergent *opinio juris*.

Ranjeva J considered that the equal treatment the Advisory Opinion had given to the principles of legality and illegality could not be justified. The General Assembly gave a very clear definition of the object of its question: did international law authorise the use or threat of use of nuclear weapons in any circumstance? By dealing at the same time and, above all, on the same level with both legality and illegality, the Court had been led to adopt a liberal acceptance of the concept of a "legal question" in an advisory proceeding. Henceforth, any question whose object was to ask the Court to look into matters that some parties did not seek to understand, would be seen as admissible.

In conclusion, while being aware of the criticisms that specialists in law and judicial matters would be bound to level at the Advisory Opinion, Ranjeva J considered that the Advisory Opinion declared the law as it was. It also laid down boundaries, the exceeding of which was a matter for the competence of states. Nonetheless, he hoped that no Court would ever have to reach a decision along the lines of paragraph 2(E).

SEPARATE OPINION OF FLEISCHHAUER J

Fleischhauer J's separate opinion highlighted that international law was still grappling with and had not yet overcome the dichotomy that was created by the very existence of nuclear weapons between the law applicable in armed conflict, and in particular the rules and principles of humanitarian law regarding on the one hand, and the inherent right of self-defence on the other hand. The known qualities of nuclear weapons let their use appear scarcely reconcilable with humanitarian law. Further, the right to self-defence would be severely curtailed if nuclear weapons were totally ruled

out as an ultimate legal option for a state that is victim of an attack by nuclear, chemical or bacteriological weapons or otherwise, constituting a deadly menace for its very existence.

Fleischhauer J agreed with the Court's conclusion that the threat or use of nuclear weapons would generally be contrary to the rules applicable in armed conflict, and in particular the principles and rules of humanitarian law. He agreed that the Court should not stop there, as there could be qualifications to that finding. Had the Court not done so, it would have given prevalence to one set of the legal principles involved over the other. However, the principles involved were all of equal rank.

He felt that the Court could and should have gone further. It could and should have stated, that in order to reconcile the conflicting principles, their smallest common denominator would apply. That meant that recourse to nuclear weapons could remain a justified legal option in an extreme case of individual or collective self-defence, if a state's very existence was threatened. His opinion confirmed the relevant state practice relating to matters of self-defence.

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

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

DISSENTING OPINION OF SCHWEBEL V-P

Although Schwebel V-P agreed with much of the body of the Court's Opinion, he dissented because of his "profound" disagreement with this principal operative conclusion:

> The Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme

> circumstance of self-defence, in which the very survival of a state would be at stake. ...[O]n the supreme issue of the threat or use of force of our age that it had no opinion...that international law and hence the Court have nothing to say. After many months of agonising appraisal of the law, the Court discovers that there is none. When it comes to the supreme interests of State, the Court discards the legal progress of the Twentieth Century, puts aside the provisions of the United Nations Charter of which it is "the principal judicial organ", and proclaims, in terms redolent of *Realpolitik*, its ambivalence about the most important provisions of modern international law. If this was to be its ultimate holding, the Court would have done better to have drawn on its undoubted discretion not to render an Opinion at all.

Schwebel J felt that the Court's inconclusiveness was not in accordance with its Statute, or its precedent, or with events which demonstrated the legality of the threat or use of nuclear weapons in extraordinary circumstances. For example, the threat which Iraq took as a nuclear threat, which may have deterred it from using chemical and biological weapons against coalition forces in the Gulf War, was "not only eminently lawful but intensely desirable".

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

The case as a whole presented an unparalleled tension between state practice and legal principle. State practice demonstrated that nuclear weapons had been manufactured and deployed for some 50 years; that in that deployment inheres a threat of possible use ("deterrence"); and that the international community, far from outlawing the threat or use of nuclear weapons in all circumstances, had recognised in effect or in terms that in

certain circumstances nuclear weapons might be used or their use threatened. This state practice was not that of a lone and secondary persistent objector, but a practice of the permanent members of the Security Council, supported by a large and weighty number of other states, which together represented the bulk of the world's power and much of its population.

The Nuclear Non-Proliferation Treaty (NPT) and the negative and positive security assurances of the nuclear powers unanimously accepted by the Security Council indicated the acceptance by the international community of the threat or use of nuclear weapons in certain circumstances. Other nuclear treaties equally inferred that nuclear weapons were not comprehensively prohibited either by treaty or by customary international law. General Assembly resolutions, to the contrary, were not law-making or declaratory of existing international law. When faced with continuing and significant opposition, the repetition of General Assembly resolutions was a mark of ineffectuality in law formation as it is in practical effect.

DISSENTING OPINION OF ODA J

Oda J voted against the first part of the Court's Advisory Opinion because of his view that, for the reasons of judicial propriety and judicial economy, the Court should have exercised its discretionary power to refrain from rendering an Opinion in response to the Request. In his view, the question in the Request was not adequately drafted and there was a lack of meaningful consensus of the General Assembly with regard to the 1994 Request. After examining the developments of the relevant General Assembly resolutions on a convention on the prohibition of the use of nuclear weapons up to 1994, he noted that the General Assembly was far from having reached an agreement on the preparation of a convention rendering the use of nuclear weapons illegal. In the light of that history, the Request was prepared and drafted, not in order to ascertain the status of existing international law on the subject but to try to promote the total elimination of nuclear weapons, that is to say, with highly *political* motives.

He noted that the perpetuation of the NPT regime recognised two groups of states, namely, the five nuclear-weapon states and the non-nuclear-weapon states. As the former had repeatedly given assurances to the latter of their intention not to use nuclear weapons against them, there was almost no

probability of any use of nuclear weapons given the current doctrine of nuclear deterrence.

Oda J maintained that an advisory opinion should only be given in the event of a real need. In the present instance there was no need and no rational justification for the General Assembly's request. He also emphasised that from the standpoint of judicial economy the right to request an advisory opinion should not be abused.

In concluding his Opinion, Oda J stressed his earnest hope that nuclear weapons would be eliminated from the world but stated that the decision on this matter was a function of political negotiations among states in Geneva (the Conference on Disarmament) or New York (United Nations) but not one which concerned the Court in The Hague.

He voted against paragraph 2(E) as the equivocations contained therein served to confirm his point that it would have been prudent for the Court to decline from the outset to give any opinion at all in the present case.

DISSENTING OPINION OF SHAHABUDDEEN J

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

DISSENTING OPINION OF WEERAMANTRY J

Weeramantry J's opinion was based on the proposition that the use or threat of use of nuclear weapons was illegal *in any circumstances whatsoever*. It violated the fundamental principles of international law, and represented the very negation of the humanitarian concerns which formed the underlying

structure of humanitarian law. It offended conventional law and, in particular, the 1925 Geneva Gas Protocol, and Article 23(a) of the 1907 Hague Regulations. It contradicted the fundamental principle of the dignity and worth of the human person on which all law depended. It endangered the human environment in a manner which threatened the entirety of life on the planet.

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

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

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

He examined in some detail the brutalities of nuclear war, showing numerous ways in which the nuclear weapon was unique, even among weapons of mass destruction in injuring human health, damaging the environment, and destroying all the values of civilisation. The nuclear weapon caused death and destruction; induced cancers, leukaemia, keloids and related afflictions; caused gastro-intestinal, cardiovascular and related afflictions; continued, for decades after its use, to induce the health-related problems mentioned above; damaged the environmental rights of future generations; caused congenital deformities, mental retardation and genetic damage; carried the potential to cause a nuclear winter; contaminated and destroyed the food chain; imperilled the ecosystem; produced lethal levels of heat and blast; produced radiation and radioactive fallout; produced a disruptive electromagnetic pulse; produced social disintegration; imperilled all civilisation; threatened human survival; wreaked cultural devastation;

spanned a time range of thousands of years; threatened all life on the planet; irreversibly damaged the rights of future generations; exterminated civilian populations; damaged neighbouring states; and produced psychological stress and fear syndromes, as no other weapons did.

While it was true that there was no treaty or rule of law which expressly outlawed nuclear weapons by name, there was an abundance of principles of internationally law, and particularly international humanitarian law, which left no doubt regarding the illegality of nuclear weapons, when one had regard to their known effects. Among these principles were the prohibition against causing unnecessary suffering, the principle of proportionality, the principle of discrimination between combatants and civilians, the principle against causing damage to neutral states, the prohibition against causing serious and lasting damage to the environment, the prohibition against genocide, and the basic principles of human rights law.

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

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

He pointed out that there could not be two sets of the laws of war applicable simultaneously to the same conflict, one to conventional weapons, and the other to nuclear weapons.

His analysis included philosophical perspectives showing that no credible legal system could contain a rule within itself which rendered legitimate an act which could destroy the entire civilisation of which that legal system formed a part. Modern juristic discussions showed that a rule of this nature, which might find a place in the rules of a suicide club, could not be part of

any reasonable legal system, and international law as pre-eminently such a system.

Weeramantry J concluded with a reference to the appeal in the Russell-Einstein Manifesto to "remember your humanity and forget the rest", without which the risk arose of universal death. In this context, his opinion pointed out that international law was equipped with the necessary array of principles with which to respond, and that international law could contribute significantly towards rolling back the shadow of the mushroom cloud, and heralding the sunshine of the nuclear-free age. Consequently, the question should have been convincingly, clearly and categorically answered by the Court.

DISSENTING OPINION OF KOROMA J

Koroma J stated that he fundamentally disagreed with the Court's finding that:

> in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.

He maintained that such a finding could not be sustained on the basis of existing international law, nor in the face of the weight and abundance of evidence and material presented to the Court. In his view, on the basis of the existing law, particularly humanitarian law and the material available to the Court, the use of nuclear weapons in any circumstance would at the very least result in the violation of the principles and rules of that law and was therefore unlawful.

He observed that although the views of states were divided on the question of the effects of the use of nuclear weapons, or as to whether the matter should have been brought before the Court, he held that once the Court had found that the General Assembly was competent to pose the question, and that no compelling reason existed against rendering an opinion, the Court should have performed its judicial function and decided the case on the basis

of existing international law. He expressed his regret the Court did not do this, even after holding that:

> the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law.

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

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

Koroma J surveyed the law applicable to the question and analysed the material before the Court. He came to the conclusion that it was wholly unconvincing for the Court to have rules that in view of the "current state of the law", could not help it to conclude definitively whether the use of nuclear weapons would be illegal. In his opinion, not only did the law exist in substantial and ample form, but it was also precise and the purported lacuna was entirely unpersuasive. As a result, there was no room for a finding of *non liquet* in the matter before the Court.

On the other hand, after analysing the evidence, Koroma J came to the conclusion that nuclear weapons, when used, were incapable of distinguishing between civilians and military personnel, would result in the death of thousands if not millions of civilians, would cause superfluous injury and unnecessary suffering to survivors, would affect future generations, damage hospitals and contaminate the natural environment, food and drinking water with radioactivity, thereby depriving survivors of

the means of survival contrary to the 1949 Geneva Conventions and the 1977 Additional Protocol I. Therefore, it followed that the use of such weapons would be unlawful.

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

In his view, the Advisory Opinion constituted the first time a tribunal of this standing had made such a finding, namely, that the threat or use of nuclear weapons that was contrary to Article 2(4) of the Charter prohibiting the use of force, was unlawful and incompatible with the requirements of the international law of armed conflict. The finding, though qualified, amounted to a rejection of the argument that because nuclear weapons were invented after the advent of humanitarian law, they were therefore not subjected to that law.

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

DISSENTING OPINION OF HIGGINS J

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

APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE
(Bosnia and Herzegovina v Yugoslavia [Serbia and Montenegro])
PRELIMINARY OBJECTIONS

[1996] ICJ Reports

In its judgment delivered on 11 July 1996, the Court rejected the seven preliminary objections raised by Yugoslavia in the case. It found that it had jurisdiction to deal with the case on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, and dismissed the additional bases of jurisdiction invoked by Bosnia-Herzegovina. The Court further found that the Application filed by Bosnia-Herzegovina was admissible.

The Court therefore proceeded to consider the merits of the case on the basis of Article IX of the Genocide Convention.

Note: The Court did not deal with the seven preliminary objections in any order.

HISTORY OF THE CASE

On 20 March 1993, the Republic of Bosnia-Herzegovina (Bosnia-Herzegovina) instituted proceedings against the Federal Republic of Yugoslavia (Yugoslavia) in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) adopted by the General Assembly of the United Nations on 9 December 1948, as well as various matters which Bosnia-Herzegovina claimed were connected with it. The Application invoked Article IX of the Genocide Convention as the basis of the jurisdiction of the Court.

Immediately after the filing of its Application, Bosnia-Herzegovina submitted a request for the indication of provisional measures under Article 41 of the Statute of the Court. As an additional basis of the jurisdiction of the Court in the case of Bosnia-Herzegovina, it involved a letter dated 8 June 1992, addressed to the President of the Arbitration Commission of the