SEPARATE OPINION OF JUDGE RANJEVA

[Translation]

I voted for the whole of the operative part, in particular the first clause of paragraph 2 E, since this Opinion confirms the principle of the illegality of the threat or use of nuclear weapons, although I consider that the second clause of paragraph 2 E raises problems of interpretation which may impair the clarity of the rule of law.

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The illegality of the threat or use of nuclear weapons will have been affirmed, for the first time, in the international jurisprudence inaugurated by this Advisory Opinion requested by the General Assembly of the United Nations. If the first clause of operative paragraph 2 E had been worded differently, it would have kept alive the doubt about the justification of this principle of positive law, for a superficial comparison of the two declaratory paragraphs 2 A and 2 B could have led to error. To have regarded the statements contained in these paragraphs as of equal weight would presumably have excluded either an affirmative or a negative answer to the question put in the resolution referring the matter to the Court. The Court's true answer is given in paragraph 2 E, more accurately in the first clause thereof, while paragraph 104 of the reasons provides the key to the reading of the reasons and the operative part in the sense that this paragraph 2 E cannot be detached from paragraphs 2 A, 2 C, 2 D and 2 F. In my view, the adverb "generally" means: in the majority of cases and in the doctrine; its grammatical function is to determine with emphasis the statement made in the main proposition. By using a determinative adverb the Opinion dismisses any other interpretation which would have resulted from the use of a dubitative adverb such as "apparently", "perhaps" or "no doubt". Lastly, the conditional mood of the verb "to be" used in making this statement expresses two ideas: on the one hand a probability, i.e. a characteristic which can be more easily characterized than some other characteristic; and on the other hand a supposition about the future which it is hoped will never come about. These reasons, producing the conclusion of the illegality of the threat or use of nuclear weapons, merely confirm, in my view, the state of positive law.

The absence of a direct and specific reference to nuclear weapons cannot be used to justify the legality, even indirect, of the threat or use of nuclear weapons. The wording of the first clause of operative paragraph 2 E excludes any limitation to the general principle of illegality. On

the assumption that the intention is to assign a dubitative value to the adverb "generally", no conclusion implying modification of the scope of the illegality could withstand legal analysis. When "generally" is taken as an adverb of quantity, the natural meaning of the word excludes any temptation to infer an idea of legality, which is contrary to the fundamental principle stated. The use of the adverb "generally" is due only to an indirect appeal by the Court for the consequences of the analyses contained in paragraphs 70, 71 and 72 of the reasons to be drawn by those to whom the Opinion is addressed. In other words, the current law, which the Opinion has stated, wants consolidation. The absence of a specific reference to nuclear weapons in fact has more to do with considerations of diplomatic, technical or political expediency than with juridical considerations. It would thus seem necessary to analyse the international practice in terms of law, in order to confirm this interpretation.

Three facts deserve attention. Firstly, there has been no repetition of the precedents of Hiroshima and Nagasaki since 1945 even though the spectre of the nuclear threat has been widely debated; on the other hand, the effects of nuclear power in general, and of nuclear weapons in particular, are such as to challenge the very foundations of humanitarian law and the law of armed conflict. Secondly, no declaration of the legality of nuclear weapons in principle has been recorded; there is no need to emphasize the fact that it is in the form of a justification of an exception to a principle accepted as being established in law, in this case the illegality of the threat or use of nuclear weapons, that the nuclear-weapon States seek to present the reasons for their attitude. Thirdly and lastly, the consistently guarded and even hostile attitude of the General Assembly towards nuclear weapons and the continuous development of nuclear awareness have resulted in the steady tightening of the juridical mesh of the régime governing nuclear weapons, the control of which belongs less and less to the discretionary power of their possessors, in order to arrive at juridical situations of prohibition.

Two observations are prompted by this account of the facts. Firstly, the principle of the illegality of the threat or use of nuclear weapons has taken shape gradually in positive law. An exhaustive inventory of the relevant legal instruments and acts reveals the catalytic effect of the principle that nuclear weapons should be regarded as unlawful. The study of the positive law cannot be limited, therefore, to stating purely and simply the current state of the law; as the Permanent Court of International Justice stressed in the case concerning *Nationality Decrees Issued in Tunis and Morocco*, the question of conformity with international law depends on the evolution of thinking and of international relations. Legal realism argues for acceptance of the notion that the juridical awareness of nuclear matters depends on the evolution of attitudes and knowledge, while one fact remains permanent: the final objective — nuclear disarmament. The same catalytic effect can be seen in the evolution of the law of the Charter of the United Nations. The examples of the law of decolonization and of the law of Article 2, paragraph 4, show that, originally, to

regard the relevant principles as falling within the sphere of juridical prolegomena amounted to a legal heresy. Can these same arguments be maintained today? Cannot questions also be asked about the advent of an ecological and environmental order which would tend to superimpose itself on the nuclear order and which is in process of being elaborated in the order of positive law? There is no longer any permissible doubt about the illegality of the threat or use of nuclear weapons. But for some States the difficulty stems from the fact that this principle has not been consolidated in treaties, a question raised by the second observation.

Secondly, does the silence on the specific case of nuclear weapons with respect to a legal régime for their use truly exclude the customary illegality of the threat or use of nuclear weapons? There can be no doubt that, in a matter of such importance for peace and the future of mankind, the treaty solution remains the best means of achieving general disarmament and nuclear disarmament in particular. But the consensualism characteristic of international law cannot be limited either to a technique of contractual or conventional engineering or to the formalization by majority vote of the rules of international law. The law of nuclear weapons is one of the branches of international law which is inconceivable without a minimum of ethical requirements expressing the values to which the members of the international community as a whole subscribe. The survival of mankind and of civilization is one of these values. It is not a question of substituting a moral order for the legal order of positive law in the name of some higher or revealed order. The moral requirements are not direct and positive sources of prescriptions or obligations but they do represent a framework for the scrutiny and questioning of the techniques and rules of conventional and consensual engineering. On the great issues of mankind the requirements of positive law and of ethics make common cause, and nuclear weapons, because of their destructive effects, are one such issue. In these circumstances, is illegality a matter of *opinio juris*? To this question the Court gives an answer which some would consider dubitative, whereas an answer in the affirmative, in my view, cannot be questioned and prevails.

Traditionally, when an *opinio juris* is sought, the fact precedes the law in the examination of the relations between the fact and the law: the analysis of the facts determines the application of the rule of law. But can this hold good in the present advisory proceedings? The Court is in fact requested to go back to the first principles which provide the foundation of the normative rule (see below) before saying whether the combined interpretation of the relevant rules results in the legality or illegality of the threat or use of nuclear weapons. In other words, the Court is dealing with a case in which the rule of law appears to precede the fact. The Court is rightly very rigorous and very exacting when it is considering sanctioning the juridical consolidation of a practice by way of an *opinio*

juris. But does not the Court's increasingly frequent reference to the principles stated in the Charter and to the resolutions and legal instruments of international organizations indicate a solution of continuity? The recognition of the customary nature of the principles set out in Article 2, paragraph 4, of the Charter and in the case concerning *Military and Paramilitary Activities in and against Nicaragua* constitutes in fact a significant break with earlier practice. Does not the repeated proclamation of principles, hitherto regarded as merely moral but of such importance that the irreversible nature of their acceptance appears definitive, constitute the advent of a *constant and uniform practice*? It is on the basis of these concrete considerations that such important principles as the prohibition of genocide, the right to decolonization, the prohibition of the use of force, and the theory of implicit jurisdictions have been incorporated in customary law. In the present case it is this conviction, constantly affirmed and never denied in principle in the facts, which indicates the incorporation of the principle of the illegality of the threat or use of nuclear weapons in customary law.

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The second clause of paragraph 2 E might prompt one to wonder whether the Court did not try to evade giving a clear answer to the basic question addressed to it by the General Assembly. Much of the argumentation of the reasons for the Opinion is designed to establish that international law would not prohibit the threat or use of nuclear weapons. Thus, the problem is to decide whether in its handling of the General Assembly's request the Court has not based its position on a postulate: the equality of treatment to be accorded both to the principle of legality and to the principle of illegality. This difficulty, in my view, calls for an examination of the essential purpose of the question put, followed by an examination of the subject-matter of the second clause of paragraph 2 E.

The natural meaning of the words used in the General Assembly resolution defines the actual subject-matter of the question: does international law authorize the threat or use of nuclear weapons in any circumstance? Does the Opinion answer this question honestly when it speaks simultaneously, and most importantly on the same footing, of "the legality or the illegality"?

In my view, the structure of the question implied a comprehensive analysis of the law governing nuclear weapons within the framework of the limits set by the subject-matter of the question.

Several delegations were uncomfortable with the structure of the General Assembly's question, partly because the question was unprecedented and partly because of the scope of the matters dealt with in the first section of the operative part of the Opinion.

Firstly, the legal character of the question amply justifies the Court's positive reaction to the General Assembly's request. But the Court's judi-

cial reply would appear enigmatic or even incoherent if the Court had not previously provided the key to its reading. The Opinion ought to have elaborated on the meaning of the interpretation of the notion of "legal question" it had implicitly opted for. The *travaux préparatoires* of the San Francisco Conference are reticent on the attempts to define this notion. Can we take it that its meaning is to be found in the data directly available to the mind or should we view this silence as the expression of the jurist's unease when he has to contemplate the notion of "question" as such.

The context of these advisory proceedings is unique in the history of the World Court. The General Assembly's request has nothing whatsoever in common with an international dispute or with a dispute born of a difference of interpretation of a specific written rule. The Court's task is in fact a complex one in the present case. The final conclusion, or to use the language of the theatre, the dénouement, is for the Court to pronounce on the compliance or non-compliance of an act, decision or fact with a higher normative rule; but in order to do this the Court must first ascertain the presence or absence of general, objective prescriptions (paras. 2 A and 2 B of the *dispositif*) and then justify the legal nature of the principles thus identified and stated. In other words, to parody Lévi-Strauss, the General Assembly is requesting the Court to try to answer questions which no one asks. The inherent difficulty of this kind of question lies in the scope of the reply which the Court wishes to give both in the reasons and in the operative part (see Opinion, para. 104). In this case, as pointed out above, the Court gave equal treatment to the different aspects of the problem of legality and illegality, devoting particular attention to the question of the absence of a prohibition on use.

Expressis verbis, resolution 49/75 does not request a legal opinion on the illegality or prohibition of the threat or use of nuclear weapons. The General Assembly invites the Court to go back to the first principles and to the most general propositions which explain or may call into question the interpretation that, in the absence of rules accepted as such which prohibit such acts, discretionary freedom would be the norm. There was obviously no lack of criticism of the structure of the question. The arguments put forward to support the idea that the question was poorly defined were based on two main grounds: first, the obvious or absurd nature of the question, for the reply is not in doubt: no rule authorizes in international law the threat or use of nuclear weapons; second, such a question, which these criticisms regard as apparently valid, would run the risk of leading to inadmissible conclusions in view of the judicial nature of the Court. By seeing fit on the one hand to respond to the General Assembly's request (last section of the operative part) and on the other hand not to reformulate the terms of the question (see para. 20), notwithstanding the slight difference between the English and French versions of the text, the Court rejected the sophistry of fear of innovation. Such a

question does not amount to a questioning of positive law or to a request for it to be modified; nor was the Court asked to depart from its judicial function, for:

> "The Court . . . as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of . . . law . . . lies within the judicial knowledge of the Court." (*I.C.J. Reports 1974*, p. 9, para. 17, and p. 181, para. 18.)

These considerations facilitate a better understanding of the meaning of the notion of *legal question* and of the method followed by the Court in replying to the General Assembly's question, which does not in fact amount to a request or question which would restrict the Court's reply to one alternative.

By addressing exhaustively all the aspects of the problem, the Opinion invests the legal question with a broad dimension. A question represents a subject, a matter on which the knowledge of the relevant rule lacks certainty. This uncertainty results from the inflationary proliferation of contradictory propositions having a link to the subject submitted to the Court. The Court is then invited to impose order on them by identifying the propositions clad in the sanction of juridical normativity and by explaining, in terms of an *opinio juris*, the normative status of various propositions. It is obvious that the outcome of such a consultation cannot avoid producing a proposition of a general character.

Secondly, the decision to accept the General Assembly's request for an opinion, the subject of the first section of the operative part, confirms the Court's liberal interpretation of the right of access of authorized international institutions to advisory proceedings. The case of the request for an opinion submitted by the World Health Organization will in all probability remain unusual, if not unique. Intrinsically, the subject-matter of WHO resolution 46/40 could not give rise to criticism, since each institution is the judge of its own jurisdiction. But when the question establishes a link of conditionality between the Court's reply, if any, and the performance of the preventive functions of primary health care, the specialized agency has substituted a link of conditionality for the link of connectivity envisaged by the Charter, the Statute and the relevant instruments of the World Health Organization. The fact that the subject-matter of the question can be detached from the Organization's functions did not allow the Court, in the light of the rules of its own jurisdiction, to perform its advisory function. This connection to today's Opinion is not

without interest; it is evident that the same majority of States wanted to obtain from the General Assembly confirmation of a request for an advisory opinion which contained defects capable of justifying a decision by the Court not to reply. By referring to the WHO request, the General Assembly revived memories of Article 14 of the Covenant of the League of Nations. By not effecting a joinder of decisions, each request being dealt with separately, the Court confirmed the magnitude of the potential scope of requests for advisory opinions which is adjudged by it to belong to the General Assembly. Nevertheless, the limits of access to the advisory procedure are constituted by the legal nature of the subject-matter of the question put. On the other hand, there is no effect on the settled case-law that a request seeking to obtain by the advisory procedure the amendment of positive law amounts to a political question.

The conditions in which the Court discharged its task expose it to the criticism that procedural law professionals will inevitably level at the whole of paragraph 2 of the operative part of the Opinion. The judicial reply *stricto sensu* is found in paragraph 2 E; in fact, its purpose is to declare compliance or non-compliance with a pre-established rule. However, revolving round this judicial conclusion are a number of propositions whose purpose is to state the justification or *petitio principii* leading to the actual conclusion. This circumductory structure of the operative part combined with the wording of paragraph 2 E poses the problem of the actual consistency of the judicial conclusion in the Advisory Opinion of the Court. It is regrettable that the inherent difficulties of the very subject of nuclear weapons were not turned to advantage by the Court to enable it to exercise its judicial function more definitely by stating the principle of illegality more clearly through a division of the two clauses of paragraph 2 E into two separate paragraphs. A casual perusal of the whole text of the Opinion (reasons and operative part) can give the impression of a Court setting itself up as a legal consultation service. But on this question the Court was not requested to carry out legal analyses whose use would be left to the discretion of the various parties. The exercise of its advisory function imposes on the Court the duty to state the law on the question put by the author of the application; the optional character attached to the normative scope of an opinion does not however have the consequence of changing the nature of the Court's judicial function. Its "dictum" constitutes the interpretation of the rule of law in question, and to violate the operative part of the dictum amounts to a failure to fulfil the obligation to respect the law. It is always the case that, unlike contentious proceedings concerning a dispute over subjective rights, the statement of the law in advisory proceedings can necessarily not be limited to the alternatives of permitted/prohibited; although complex, positive law must be stated with clarity, a quality wanting in the second clause of paragraph 2 E.

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In my view, the second clause of paragraph 2 E raises difficulties of interpretation by virtue of the problem of its intrinsic coherence in relation to the rules of the law of armed conflict themselves, although its positive aspect must be emphasized: the principle that the exercise of self-defence is subject to the rule of law.

Paragraph 2 E deals with the law of armed conflict and with humanitarian law, the second branch of law applicable to the threat or use of nuclear weapons (see para. 34). The law of armed conflict is a matter of written law, while the so-called Martens principle performs a residual function.

Two consequences flow from this: firstly, this law of armed conflict cannot be interpreted as containing lacunae of the sort likely to warrant reserve or at least doubt; secondly, nuclear weapons cannot be used outside the context of the law of armed conflict. Moreover, since no State supported the principle of a régime of non-law, the use of these weapons must be in conformity, from the standpoint of the law, with the rules governing such conflict. In these circumstances and on such an important question, there cannot be any doubt about the validity of the principle of illegality in the law of armed conflict.

With regard to the substance of the law of armed conflict, the second clause of operative paragraph 2 E introduces the possibility of an exception to the rules of the law of armed conflict by introducing a notion hitherto unknown in this branch of international law: the "extreme circumstance of self-defence, in which the very survival of a State would be at stake". Two criticisms must be offered. Firstly, the Court makes an amalgamation of the rules of the Charter of the United Nations on the one hand and the law of armed conflict and specifically the rules of humanitarian law on the other; whereas paragraph 2 E deals only with the law of armed conflict, and the right of self-defence belongs in paragraph 2 C. Rigorousness and clarity were necessary, failing a paragraph 2 E *bis* separate from paragraph 2 E and the attachment of the notion of "extreme circumstance of self-defence" to the more general problem of self-defence dealt with in paragraph 2 C. Paragraph 2 C covers all the cases of the right to use force by reference to the provisions of the Charter (Arts. 2 and 4 and Art. 51). *A priori* nothing prohibits an interpretation giving precedence to the rules of self-defence, including nuclear self-defence, over the rules of humanitarian law, a difficulty which leads consequentially to the second criticism. Secondly, the criticism is addressed to the acceptance of this concept of "extreme circumstance of self-defence, in which the very survival of a State would be at stake". There is no doubt that the meaning of this concept is expressed in the normal meaning of the words, but this observation is not sufficient for the purposes of legal qualification.

The principal difficulty of the interpretation of the second clause of paragraph 2 E lies in the true nature of the exception of "extreme circumstance of self-defence" to the application of humanitarian law and the law of armed conflict. Neither the case-law of the International Court or

of any other court nor the doctrine offer any authority to confirm the existence of a distinction between the general case of application of the rules of the law of armed conflict and the exceptional case exempting a belligerent from fulfilling the obligations imposed by those rules.

If such a rule must exist, it can be deduced only from the intention of the States authors of and parties to these instruments. The fact that the case of nuclear weapons was deliberately not addressed during the negotiation and conclusion of the major conventions on the law of armed conflict has been repeatedly stressed. Accordingly, it is difficult to see how these plenipotentiaries could envisage exceptions of such importance to the principles governing the law of armed conflict. These principles were intended to be applied in all cases of conflict without any particular consideration of the status of the parties to the conflict — whether they were victims or aggressors. If an exceptional authorization had been envisaged, the authors of these instruments could have referred to it, for example by incorporating limits or exceptions to their universal application.

The distinction proposed by the Court would certainly be difficult to apply and in the end would only render even more complicated a problem which is already difficult to handle in law. O. Schachter has drawn up an inventory of the cases in which, quite apart from any question of aggression, a State has claimed the privilege of self-defence. These are:

> "(1) the use of force to rescue political hostages believed to face imminent danger of death or injury;
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> (2) the use of force against officials or installations in a foreign state believed to support terrorist acts directed against nationals of the state claiming the right of defense;
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> (3) the use of force against troops, planes, vessels or installations believed to threaten imminent attack by a state with declared hostile intent;
>
> (4) the use of retaliatory force against a government or military force so as to deter renewed attacks on the state taking such action;
>
> (5) the use of force against a government that has provided arms or technical support to insurgents in a third state;
>
> (6) the use of force against a government that has allowed its territory to be used by military forces of a third state considered to be a threat to the state claiming self-defense;
>
> (7) the use of force in the name of collective defense (or counter-intervention) against a government imposed by foreign forces and faced with large-scale military resistance by many of its

people." (O. Schachter, "Self-defense over the Rule of Law", *AJIL*, 1989, p. 271.)

The question is to decide in which category the case of an extreme circumstance of self-defence, in which the very survival of a State is at stake, must be placed to justify recourse to the ultimate weapon and the paralysis of the application of the rules of humanitarian law and the law applicable in armed conflict. This question must be answered in the negative: the obligation of each belligerent to respect the rules of humanitarian law applicable in armed conflict is in no way limited to the case of self-defence; the obligation exists independently of the status of aggressor or victim. Furthermore, no evidence of the existence of a "clean nuclear weapon" was presented to the Court, and States merely argued that there was indeed a problem of compatibility between the legality of the use of nuclear weapons and the rules of humanitarian law. In my view, these criticisms strip the exception of "extreme circumstance of self-defence" of all logical and juridical foundation.

However, the respect in which I hold the Court prompts me to acknowledge that the principal judicial organ of the United Nations was not unaware of these criticisms or of the reproaches which the professionals of the juridical and judicial worlds would certainly offer. But I still believe that the close interrelationship of all the elements of this decision requires that the second clause of paragraph 2 E should be read in the light of paragraph 2 C. It must be acknowledged that in the final analysis the Court does affirm that the exercise of self-defence cannot be envisaged outside the framework of the rule of law. Paragraphs 2 C and 2 E define the prior legal constraints on the exercise of this right under such conditions that, in the light of paragraphs 2 C, 2 D and 2 E, the legality of its exercise is more than improbable in actuality. The most important element, however, is the ordering of the legal guarantees. Paragraph 2 E leaves open in these extreme circumstances the question of legality or illegality; it thus sets aside the possibility of creating predefined or predetermined blocks of legality or illegality. A reply can be envisaged only *in concreto* in the light of the conditions of the preceding paragraphs 2 C and 2 D. This conclusion must be emphasized, for if the Court had addressed only one of the alternatives, the solution of indirect legality, the second clause would have nullified the subject-matter of the first clause. By addressing the two branches of the question the Court opens the way to a debate on illegality and legality with respect to international law, as the Nuremberg Tribunal had already stated:

> "Whether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation or adjudication if international law is ever to be enforced." (O. Schachter, *op. cit.*, p. 262.)

This complicated construction ultimately limits the unilateral exercise of self-defence. Moreover, by reserving its definitive reply, therefore in

principle, the Court is creating a possible sphere of competence hitherto inconceivable owing to the effect of the combined mechanism of unilateral qualification and the right of veto. The difficulty of the terms of the problem did not, however, induce the Court to agree to assert the primacy of the requirements of the survival of a State over the obligation to respect the rules of international humanitarian law applicable in armed conflict.

In conclusion, if the two clauses of paragraph 2 E had appeared as separate paragraphs, I would have voted without hesitation in favour of the first clause and, if the provisions of the Statute and the Rules of the Court so allowed, I would have abstained on the second clause. The joinder of these two propositions caused me to vote in all conscience in favour of the whole, for the essence of the law is safe and the prohibition of nuclear weapons is a question of the responsibility of all and everyone, the Court having made its modest contribution by questioning each subject and actor of international life on the basis of the law. I hope that no court will ever have to rule on the basis of the second clause of paragraph 2 E.

(Signed) Raymond RANJEVA.