DISSENTING OPINION OF VICE-PRESIDENT SCHWEBEL

More than any case in the history of the Court, this proceeding presents a titanic tension between State practice and legal principle. It is accordingly the more important not to confuse the international law we have with the international law we need. In the main, the Court's Opinion meets that test. I am in essential though not entire agreement with much of it, and shall, in this opinion, set out my differences. Since however I profoundly disagree with the Court's principal and ultimate holding, I regret to be obliged to dissent.

The essence of the problem is this. Fifty years of the practice of States does not debar, and to that extent supports, the legality of the threat or use of nuclear weapons in certain circumstances. At the same time, principles of international humanitarian law which antedate that practice govern the use of all weapons including nuclear weapons, and it is extraordinarily difficult to reconcile the use — at any rate, some uses — of nuclear weapons with the application of those principles.

One way of surmounting the antinomy between practice and principle would be to put aside practice. That is what those who maintain that the threat or use of nuclear weapons is unlawful in all circumstances do. Another way is to put aside principle, to maintain that the principles of international humanitarian law do not govern nuclear weapons. That has not been done by States, including the nuclear-weapon States, in these proceedings nor should it be done. These principles — essentially proportionality in the degree of force applied, discrimination in the application of force as between combatants and civilians, and avoidance of unnecessary suffering of combatants — evolved in the pre-nuclear age. They do not easily fit the use of weaponry having the characteristics of nuclear weapons. At the same time, it is the fact that the nuclear Powers and their allies have successfully resisted applying further progressive development of humanitarian law to nuclear weapons; the record of the conferences that concluded the Geneva Conventions of 1949 and its Additional Protocols of 1977 establishes that. Nevertheless to hold that inventions in weaponry that post-date the formation of such fundamental principles are not governed by those principles would vitiate international humanitarian law. Nor is it believable that in fashioning these principles the international community meant to exclude their application to post-invented weaponry. The Martens Clause implies the contrary.

Before considering the extent to which the chasm between practice and principle may be bridged — and is bridged by the Court's Opinion — observations on their content are in order.

STATE PRACTICE

State practice demonstrates that nuclear weapons have been manufactured and deployed by States for some 50 years; that in that deployment inheres a threat of possible use; and that the international community, by treaty and through action of the United Nations Security Council, has, far from proscribing the threat or use of nuclear weapons in all circumstances, recognized in effect or in terms that in certain circumstances nuclear weapons may be used or their use threatened.

Not only have the nuclear Powers avowedly and for decades, with vast effort and expense, manufactured, maintained and deployed nuclear weapons. They have affirmed that they are legally entitled to use nuclear weapons in certain circumstances and to threaten their use. They have threatened their use by the hard facts and inexorable implications of the possession and deployment of nuclear weapons; by a posture of readiness to launch nuclear weapons 365 days a year, 24 hours of every day; by the military plans, strategic and tactical, developed and sometimes publicly revealed by them; and, in a very few international crises, by threatening the use of nuclear weapons. In the very doctrine and practice of deterrence, the threat of the possible use of nuclear weapons inheres.

This nuclear practice is not a practice of a lone and secondary persistent objector. This is not a practice of a pariah Government crying out in the wilderness of otherwise adverse international opinion. This is the practice of five of the world's major Powers, of the permanent members of the Security Council, significantly supported for almost 50 years by their allies and other States sheltering under their nuclear umbrellas. That is to say, it is the practice of States — and a practice supported by a large and weighty number of other States — that together represent the bulk of the world's military and economic and financial and technological power and a very large proportion of its population. This practice has been recognized, accommodated and in some measure accepted by the international community. That measure of acceptance is ambiguous but not meaningless. It is obvious that the alliance structures that have been predicated upon the deployment of nuclear weapons accept the legality of their use in certain circumstances. But what may be less obvious is the effect of the Non-Proliferation Treaty and the structure of negative and positive security assurances extended by the nuclear Powers and accepted by the Security Council in pursuance of that Treaty, as well as of reser-

vations by nuclear Powers adhering to regional treaties that govern the possession, deployment and use of nuclear weapons.

THE NUCLEAR NON-PROLIFERATION TREATY

The Treaty on the Non-Proliferation of Nuclear Weapons (NPT), concluded in 1968 and indefinitely extended by 175 States parties in 1995, is of paramount importance. By the terms of Article I, "Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons . . . or control over such weapons" nor to assist "any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons . . .". By the terms of Article II, each non-nuclear-weapon State undertakes not to receive nuclear weapons and not to manufacture them. Article III provides that each non-nuclear-weapon State shall accept safeguards to be negotiated with the International Atomic Energy Agency with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons. Article IV preserves the right of all parties to develop peaceful uses of nuclear energy, and Article V provides that potential benefits from peaceful applications of nuclear explosions will be made available to non-nuclear-weapon States parties. Article VI provides:

> "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."

Article VII provides:

> "Nothing in this Treaty affects the right of any group of States to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories."

Article VIII is an amendment clause. Article IX provides that the Treaty shall be open to all States and that, for the purposes of the Treaty,

> "a nuclear-weapon State is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967".

Article X is an extraordinary withdrawal clause which also contains provision on the basis of which a conference of the parties may be called to extend the Treaty.

The NPT is thus concerned with the possession rather than the use of nuclear weapons. It establishes a fundamental distinction between States possessing, and States not possessing, nuclear weapons, and a balance of responsibilities between them. It recognizes the possibility of the presence of nuclear weapons in territories in which their total absence has not been prescribed. Nothing in the Treaty authorizes, or prohibits, the use or threat of use of nuclear weapons. However, the Treaty recognizes the legitimacy of the possession of nuclear weapons by the five nuclear Powers, at any rate until the achievement of nuclear disarmament. In 1968, and in 1995, that possession was notoriously characterized by the development, refinement, maintenance and deployment of many thousands of nuclear weapons. If nuclear weapons were not maintained, they might be more dangerous than not; if they were not deployed, the utility of possession would be profoundly affected. Once a Power possesses, maintains and deploys nuclear weapons and the means of their delivery, it places itself in a posture of deterrence.

What does the practice of such possession of nuclear weapons thus import? Nuclear Powers do not possess nuclear arms to no possible purpose. They develop and maintain them at vast expense; they deploy them in their delivery vehicles; and they made and make known their willingness to use them in certain circumstances. They pursue a policy of deterrence, on which the world was on notice when the NPT was concluded and is on notice today. The policy of deterrence differs from that of the threat to use nuclear weapons by its generality. But if a threat of possible use did not inhere in deterrence, deterrence would not deter. If possession by the five nuclear Powers is lawful until the achievement of nuclear disarmament; if possession is the better part of deterrence; if deterrence is the better part of threat, then it follows that the practice of States — including their treaty practice — does not absolutely debar the threat or use of nuclear weapons.

Thus the régime of the Non-Proliferation Treaty constitutes more than acquiescence by the non-nuclear States in the reality of possession of nuclear weapons by the five nuclear Powers. As the representative of the United Kingdom put it in the oral hearings,

> "The entire structure of the Non-Proliferation Treaty . . . presupposes that the parties did not regard the use of nuclear weapons as being proscribed in all circumstances."

To be sure, the acquiescence of most non-nuclear-weapon States in the fact of possession of nuclear weapons by the five nuclear Powers — and

the ineluctable implications of that fact — have been accompanied by vehement protest and reservation of rights, as successive resolutions of the General Assembly show. It would be too much to say that acquiescence in this case gives rise to *opinio juris* establishing the legality of the threat or use of nuclear weapons. What it — and the State practice described — does do is to abort the birth or survival of *opinio juris* to the contrary. Moreover, there is more than the practice so far described and the implications of the Nuclear Non-Proliferation Treaty to weigh.

Negative and Positive Security Assurances Endorsed by the Security Council

In connection with the conclusion of the Treaty in 1968 and its indefinite extension in 1995, three nuclear Powers in 1968 and five in 1995 extended negative and positive security assurances to the non-nuclear States parties to the NPT. In resolution 984 (1995), co-sponsored by the five nuclear Powers, and adopted by the Security Council on 11 April 1995 by unanimous vote,

> "*The Security Council,*
>
> . . . . . .
>
> *Recognizing* the legitimate interest of non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons to receive security assurances,
>
> . . . . . .
>
> *Taking* into consideration the legitimate concern of non-nuclear-weapon States that, in conjunction with their adherence to the Treaty on the Non-Proliferation of Nuclear Weapons, further appropriate measures be undertaken to safeguard their security,
>
> . . . . . .
>
> *Considering further* that, in accordance with the relevant provisions of the Charter of the United Nations, any aggression with the use of nuclear weapons would endanger international peace and security,
>
> . . . . . .
>
> 1. *Takes note* with appreciation of the statements made by each of the nuclear-weapon States . . ., in which they give security assurances against the use of nuclear weapons to non-nuclear-weapon States that are Parties to the Treaty on the Non-Proliferation of Nuclear Weapons;
>
> 2. *Recognizes* the legitimate interest of non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons to receive assurances that the Security Council, and above all its

nuclear-weapon State permanent members, will act immediately in accordance with the relevant provisions of the Charter of the United Nations, in the event that such States are the victim of an act of, or object of a threat of, aggression in which nuclear weapons are used;

3. *Recognizes further* that, in case of aggression with nuclear weapons or the threat of such aggression against a non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons, any State may bring the matter immediately to the attention of the Security Council to enable the Council to take urgent action to provide assistance, in accordance with the Charter, to the State victim of an act of, or object of a threat of, such aggression; and *recognizes also* that the nuclear-weapon State permanent members of the Security Council will bring the matter immediately to the attention of the Council and seek Council action to provide, in accordance with the Charter, the necessary assistance to the State victim;

. . . . . .

7. *Welcomes* the intention expressed by certain States that they will provide or support immediate assistance, in accordance with the Charter, to any non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons that is a victim of an act of, or an object of a threat of, aggression in which nuclear weapons are used;

. . . . . .

9. *Reaffirms* the inherent right, recognized under Article 51 of the Charter, of individual and collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security;

. . . . . ."

It is plain — especially by the inclusion of operative paragraph 9 in its context — that the Security Council, in so taking note "with appreciation" in operative paragraph 1 of the negative security assurances of the nuclear Powers, and in so welcoming in operative paragraph 7 "the intention expressed" by the positive security assurances of the nuclear Powers, accepted the possibility of the threat or use of nuclear weapons, particularly to assist a non-nuclear-weapon State that, in the words of paragraph 7 — "s a victim of an act of, or an object of a threat of, aggression in which nuclear weapons are used".

This is the plainer in view of the terms of the unilateral security assurances made by four of the nuclear-weapon States which are, with the exception of those of China, largely concordant. They expressly contemplate the use of nuclear weapons in specified circumstances. They implicitly do not debar the use of nuclear weapons against another nuclear

Power (or State not party to the NPT), and explicitly do not debar their use against a non-nuclear-weapon State party that acts in violation of its obligations under the NPT.

For example, the United States reaffirms that it will not use nuclear weapons against non-nuclear-weapon States parties to the NPT

> "except in the case of an invasion or other attack on the United States . . . its armed forces, its allies, or on a State towards which it has a security commitment, carried out or sustained by such a non-nuclear-weapon State in association or alliance with a nuclear-weapon State".

The exception clearly contemplates the use of nuclear weapons in the specified exceptional circumstances. The United States assurances add: "parties to the Treaty on the Non-Proliferation of Nuclear Weapons must be in compliance" with "their obligations under the Treaty" in order to be "eligible for any benefits of adherence to the Treaty". The United States further "affirms its intention to provide or support immediate assistance" to any non-nuclear-weapon State "that is a victim of an act of, or an object of a threat of, aggression in which nuclear weapons are used". It reaffirms the inherent right of individual or collective self-defence under Article 51 of the Charter "if an armed attack, including a nuclear attack, occurs against a Member of the United Nations . . .". Such affirmations by it — and their unanimous acceptance by the Security Council — demonstrate that nuclear Powers have asserted the legality and that the Security Council has accepted the possibility of the threat or use of nuclear weapons in certain circumstances.

OTHER NUCLEAR TREATIES

As the Court's Opinion recounts, a number of treaties in addition to the NPT limit the acquisition, manufacture, and possession of nuclear weapons; prohibit their deployment or use in specified areas; and regulate their testing. The negotiation and conclusion of these treaties only makes sense in the light of the fact that the international community has not comprehensively outlawed the possession, threat or use of nuclear weapons in all circumstances, whether by treaty or through customary international law. Why conclude these treaties if their essence is already international law, indeed, as some argue, *jus cogens?*

The fact that there is no comprehensive treaty proscribing the threat or use of nuclear weapons in all circumstances is obvious. Yet it is argued that the totality of this disparate treaty-making activity demonstrates an

emergent *opinio juris* in favour of the comprehensive outlawry of the threat or use of nuclear weapons; that, even if nuclear weapons were not outlawed decades ago, they are today, or are on the verge of so becoming, by the cumulation of such treaties as well as resolutions of the United Nations General Assembly.

The looseness of that argument is no less obvious. Can it really be supposed that, in recent months, nuclear Powers have adhered to a protocol to the Treaty of Raratonga establishing a nuclear-free zone in the South Pacific because they believe that the threat or use of nuclear weapons already is outlawed in all circumstances and places, there as elsewhere? Can it really be believed that as recently as 15 December 1995, at Bangkok, States signed a Treaty on the South-East Asia Nuclear-Weapon-Free Zone, and on 11 April 1996 the States of Africa took the considerable trouble to conclude at Cairo a treaty for the creation of a nuclear-weapons-free zone in Africa, on the understanding that by dint of emergent *opinio juris* customary international law already requires that all zones of the world be nuclear-free?

On the contrary, the various treaties relating to nuclear weapons confirm what the practice described above imports: the threat or use of nuclear weapons is not — certainly, not yet — prohibited in all circumstances, whether by treaty or customary international law. This is the clearer in the light of the terms of the Treaty of Tlatelolco for the Prohibition of Nuclear Weapons in Latin America of 14 February 1967 and the declarations that accompanied adherence to an Additional Protocol under the Treaty of the five nuclear-weapon States. All of the five nuclear-weapon States in so adhering undertook not to use or threaten to use nuclear weapons against the Contracting Parties to the Treaty. But they subjected their undertakings to the possibility of the use of nuclear weapons in certain circumstances, as recounted above in paragraph 59 of the Court's Opinion. None of the Contracting Parties to the Tlatelolco Treaty objected to the declarations of the five nuclear-weapon States, which is to say that the Contracting Parties to the Treaty recognized the legality of the use of nuclear weapons in certain circumstances.

Resolutions of the General Assembly

In its Opinion, the Court concludes that the succession of resolutions of the General Assembly on nuclear weapons "still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons" (para. 71). In my view, they do not begin to do so. The seminal resolution, resolution 1653 (XVI) of 24 November 1961, declares that the use of nuclear weapons is "a direct violation of the Charter of the United Nations" and "is contrary to the rules of international law and to the

laws of humanity", and that any State using nuclear weapons is to be considered "as committing a crime against mankind and civilization". It somewhat inconsistently concludes by requesting consultations to ascertain views on the possibility of convening a conference for signing a convention on the prohibition of the use of nuclear weapons for war purposes. Resolution 1653 (XVI) was adopted by a vote of 55 to 20, with 26 abstentions. Four of the five nuclear Powers voted against it. Succeeding resolutions providing, as in resolution 36/92 I, that "the use or threat of use of nuclear weapons should . . . be prohibited . . .", have been adopted by varying majorities, in the teeth of strong, sustained and qualitatively important opposition. Any increase in the majority for such resolutions is unimpressive, deriving in some measure from an increase in the membership of the Organization. The continuing opposition, consisting as it does of States that bring together much of the world's military and economic power and a significant percentage of its population, more than suffices to deprive the resolutions in question of legal authority.

The General Assembly has no authority to enact international law. None of the General Assembly's resolutions on nuclear weapons are declaratory of existing international law. The General Assembly can adopt resolutions declaratory of international law only if those resolutions truly reflect what international law is. If a resolution purports to be declaratory of international law, if it is adopted unanimously (or virtually so, qualitatively as well as quantitively) or by consensus, and if it corresponds to State practice, it may be declaratory of international law. The resolutions of which resolution 1653 is the exemplar conspicuously fail to meet these criteria. While purporting to be declaratory of international law (yet calling for consultations about the possibility of concluding a treaty prohibition of what is so declared), they not only do not reflect State practice, they are in conflict with it, as shown above. Forty-six States voted against or abstained upon the resolution, including the majority of the nuclear Powers. It is wholly unconvincing to argue that a majority of the Members of the General Assembly can "declare" international law in opposition to such a body of State practice and over the opposition of such a body of States. Nor are these resolutions authentic interpretations of principles or provisions of the United Nations Charter. The Charter contains not a word about particular weapons, about nuclear weapons, about *jus in bello*. To declare the use of nuclear weapons a violation of the Charter is an innovative interpretation of it, which cannot be treated as an authentic interpretation of Charter principles or provisions giving rise to obligations binding on States under international law. Finally, the repetition of resolutions of the General Assembly in this vein, far from giving rise, in the words of the Court, to "the nascent *opinio juris*", rather demonstrates what the law is not. When faced with continuing and significant opposition, the repetition of General Assembly

resolutions is a mark of ineffectuality in law formation as it is in practical effect.

PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW

While it is not difficult to conclude that the principles of international humanitarian law — above all, proportionality in the application of force, and discrimination between military and civilian targets — govern the use of nuclear weapons, it does not follow that the application of those principles to the threat or use of nuclear weapons "in any circumstance" is easy. Cases at the extremes are relatively clear; cases closer to the centre of the spectrum of possible uses are less so.

At one extreme is the use of strategic nuclear weapons in quantities against enemy cities and industries. This so-called "countervalue" use (as contrasted with "counterforce" uses directed only against enemy nuclear forces and installations) could cause an enormous number of deaths and injuries, running in some cases into the millions; and, in addition to those immediately affected by the heat and blast of those weapons, vast numbers could be affected, many fatally, by spreading radiation. Large-scale "exchanges" of such nuclear weaponry could destroy not only cities but countries, and render continents, perhaps the whole of the earth, uninhabitable, if not at once then through longer-range effects of nuclear fallout. It cannot 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, have profoundly pernicious effects in space and time, and render uninhabitable much or all of the earth, could be lawful.

At the other extreme is the use of tactical nuclear weapons against discrete military or naval targets so situated that substantial civilian casualties would not ensue. For example, the use of a nuclear depth-charge to destroy a nuclear submarine that is about to fire nuclear missiles, or has fired one or more of a number of its nuclear missiles, might well be lawful. By the circumstance of its use, the nuclear depth-charge would not give rise to immediate civilian casualties. It would easily meet the test of proportionality; the damage that the submarine's missiles could inflict on the population and territory of the target State would infinitely outweigh that entailed in the destruction of the submarine and its crew. The submarine's destruction by a nuclear weapon would produce radiation in the sea, but far less than the radiation that firing of its missiles would pro-

duce on and over land. Nor is it as certain that the use of a conventional depth-charge would discharge the mission successfully; the far greater force of a nuclear weapon could ensure destruction of the submarine whereas a conventional depth-charge might not.

An intermediate case would be the use of nuclear weapons to destroy an enemy army situated in a desert. In certain circumstances, such a use of nuclear weapons might meet the tests of discrimination and proportionality; in others not. The argument that the use of nuclear weapons is inevitably disproportionate raises troubling questions, which the British Attorney-General addressed in the Court's oral proceedings in these terms:

> "If one is to speak of 'disproportionality', the question arises: disproportionate to what? The answer must be 'to the threat posed to the victim State'. It is by reference to that threat that proportionality must be measured. So one has to look at all the circumstances, in particular the scale, kind and location of the threat. To assume that any defensive use of nuclear weapons must be disproportionate, no matter how serious the threat to the safety and the very survival of the State resorting to such use, is wholly unfounded. Moreover, it suggests an overbearing assumption by the critics of nuclear weapons that they can determine in advance that no threat, including a nuclear, chemical or biological threat, is ever worth the use of any nuclear weapon. It cannot be right to say that if an aggressor hits hard enough, his victim loses the right to take the only measure by which he can defend himself and reverse the aggression. That would not be the rule of law. It would be an aggressor's charter."

For its part, the body of the Court's Opinion is cautious in treating problems of the application of the principles of international humanitarian law to concrete cases. It evidences a measure of uncertainty in a case in which the tension between State practice and legal principle is unparalleled. It concludes, in paragraph 2 E of the *dispositif,* that,

> "It follows from the above-mentioned requirements 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 international humanitarian law."

That conclusion, while imprecise, is not unreasonable. The use of nuclear weapons is, for the reasons examined above, exceptionally difficult to reconcile with the rules of international law applicable in armed conflict, particularly the principles and rules of international humanitarian law. But that is by no means to say that the use of nuclear weapons, in any and all circumstances, would necessarily and invariably conflict

with those rules of international law. On the contrary, as the *dispositif* in effect acknowledges, while they might "generally" do so, in specific cases they might not. It all depends upon the facts of the case.

EXTREME CIRCUMSTANCES OF SELF-DEFENCE AND STATE SURVIVAL

The just-quoted first paragraph of paragraph 2 E of the holdings is followed by the Court's ultimate, paramount — and sharply controverted — conclusion in the case, narrowly adopted by the President's casting vote:

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

This is an astounding conclusion to be reached by the International Court of Justice. Despite the fact that its Statute "forms an integral part" of the United Nations Charter, and despite the comprehensive and categorical terms of Article 2, paragraph 4, and Article 51 of that Charter, the Court concludes on the supreme issue of the threat or use of force of our age that it has no opinion. In "an extreme circumstance of self-defence, in which the very survival of a State would be at stake", the Court finds that international law and hence the Court have nothing to say. After many months of agonizing 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 Charter of the United Nations 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.

Neither predominant legal theory (as most definitively developed by Lauterpacht in *The Function of Law in the International Community*, 1933) nor the precedent of this Court admit a holding of *non liquet*, still less a holding — or inability to hold — of such a fundamental character. Lauterpacht wrote most pertinently (and, as it has turned out, presciently):

> "There is not the slightest relation between the content of the right to self-defence and the claim that it is above the law and not amenable to evaluation by law. Such a claim is self-contradictory,

> inasmuch as it purports to be based on legal right, and as, at the same time, it dissociates itself from regulation and evaluation by the law. Like any other dispute involving important issues, so also the question of the right of recourse to war in self-defence is in itself capable of judicial decision . . ." (*Op. cit.*, p. 180.)

Indeed, the drafters of the Statute of the Permanent Court of International Justice crafted the provisions of Article 38 of its Statute — provisions which Article 38 of the Statute of this Court maintains — in order, in the words of the President of the Advisory Committee of Jurists, to avoid "especially the blind alley of *non liquet*". To do so, they adopted the Root-Phillimore proposal to empower the Court to apply not only international conventions and international custom but "the general principles of law recognized by civilized nations" (Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16th-July 24th, 1920*, The Hague, 1920, pp. 332, 344. See also pp. 296 ("A rule must be established to meet this eventuality, to avoid the possibility of the Court declaring itself incompetent *(non liquet)* though lack of applicable rules"), 307-320 and 336 (the reference to general principles "was necessary to meet the possibility of a *non liquet*").

Moreover, far from justifying the Court's inconclusiveness, contemporary events rather demonstrate the legality of the threat or use of nuclear weapons in extraordinary circumstances.

Desert Storm

The most recent and effective threat of the use of nuclear weapons took place on the eve of "Desert Storm". The circumstances merit exposition, for they constitute a striking illustration of a circumstance in which the perceived threat of the use of nuclear weapons was not only eminently lawful but intensely desirable.

Iraq, condemned by the Security Council for its invasion and annexation of Kuwait and for its attendant grave breaches of international humanitarian law, had demonstrated that it was prepared to use weapons of mass destruction. It had recently and repeatedly used gas in large quantities against the military formations of Iran, with substantial and perhaps decisive effect. It had even used gas against its own Kurdish citizens. There was no ground for believing that legal or humanitarian scruple would prevent it from using weapons of mass destruction — notably chemical, perhaps bacteriological or nuclear weapons — against the coalition forces arrayed against it. Moreover, it was engaged in extraordinary efforts to construct nuclear weapons in violation of its obligations as a party to the Non-Proliferation Treaty.

General Norman Schwarzkopf stated on 10 January 1996 over national public television in the United States on *Frontline*:

> "My nightmare scenario was that our forces would attack into Iraq and find themselves in such a great concentration that they became targeted by chemical weapons or some sort of rudimentary nuclear device that would cause mass casualties.
>
> That's exactly what the Iraqis did in the Iran-Iraq war. They would take the attacking masses of the Iranians, let them run up against their barrier system, and when there were thousands of people massed against the barrier system, they would drop chemical weapons on them and kill thousands of people." (*Frontline*, Show No. 1408, "The Gulf War", *Transcript of Journal Graphics, Inc.*, Part II, p. 5.)

To exorcise that nightmare, the United States took action as described by then Secretary of State James A. Baker in the following terms, in which he recounts his climactic meeting of 9 January 1990 in Geneva with the then Foreign Minister of Iraq, Tariq Aziz:

> "I then made a point 'on the dark side of the issue' that Colin Powell had specifically asked me to deliver in the plainest possible terms. 'If the conflict involves your use of chemical or biological weapons against our forces', I warned, 'the American people will demand vengeance. We have the means to exact it. With regard to this part of my presentation, that is not a threat, it is a promise. If there is any use of weapons like that, our objective won't just be the liberation of Kuwait, but the elimination of the current Iraqi regime, and anyone responsible for using those weapons would be held accountable.'
>
> The President had decided, at Camp David in December, that the best deterrent of the use of weapons of mass destruction by Iraq would be a threat to go after the Ba'ath regime itself. He had also decided that U.S. forces would not retaliate with chemical or nuclear response if the Iraqis attacked with chemical munitions. There was obviously no reason to inform the Iraqis of this. In hope of persuading them to consider more soberly the folly of war, I purposely left the impression that the use of chemical or biological agents by Iraq could invite tactical nuclear retaliation. (We do not really know whether this was the reason there appears to have been no confirmed use by Iraq of chemical weapons during the war. My own view is that the calculated ambiguity how we might respond has to be part of the reason.)" (*The Politics of Diplomacy — Revolution, War and Peace, 1989-1992*, by James A. Baker III, 1995, p. 359.)

In *Frontline*, Mr. Baker adds:

> "The president's letter to Saddam Hussein, which Tariq Aziz read in Geneva, made it very clear that if Iraq used weapons of mass destruction, chemical weapons, against United States forces that the American people would — would demand vengeance and that we had the means to achieve it." (*Loc. cit.*, Part I, p. 13.)

Mr. Aziz is then portrayed on the screen immediately thereafter as saying:

> "I read it very carefully and then when I ended reading it, I told him, 'Look, Mr. Secretary, this is not the kind of correspondence between two heads of state. This is a letter of threat and I cannot receive from you a letter of threat to my president', and I returned it to him." *(Ibid.)*

At another point in the programme, the following statements were made:

> "NARRATOR: The Marines waited for a chemical attack. It never came.
>
> TARIQ AZIZ: We didn't think that it was wise to use them. That's all what I can say. That was not — was not wise to use such kind of weapons in such kind of a war with — with such an enemy." (*Loc. cit.*, Part II, p. 7.)

In *The Washington Post* of 26 August 1995, an article datelined "United Nations, 25 August", was published as follows:

> "Iraq has released to the United Nations new evidence that it was prepared to use deadly toxins and bacteria against U.S. and allied forces during the 1991 Persian Gulf War that liberated Kuwait from its Iraqi occupiers, U.N. Ambassador Rolf Ekeus said today.
>
> Ekeus, the chief U.N. investigator of Iraq's weapons programs, said Iraqi officials admitted to him in Baghdad last week that in December 1990 they loaded three types of biological agents into roughly 200 missile warheads and aircraft bombs that were then distributed to air bases and a missile site.
>
> The Iraqis began this process the day after the U.N. Security Council voted to authorize using 'all necessary means' to liberate Kuwait, Ekeus said. He said the action was akin to playing 'Russian roulette' with extraordinarily dangerous weapons on the eve of war.
>
> U.S. and U.N. officials said the Iraqi weapons contained enough biological agents to have killed hundreds of thousands of people and spread horrible diseases in cities or military bases in Israel, Saudi

Arabia or wherever Iraq aimed the medium-range missiles or squeaked a bomb-laden aircraft through enemy air defenses.

Ekeus said Iraqi officials claimed they decided not to use the weapons after receiving a strong but ambiguously worded warning from the Bush administration on Jan. 9, 1991, that any use of unconventional warfare would provoke a devastating response.

Iraq's leadership assumed this meant Washington would retaliate with nuclear weapons, Ekeus said he was told. U.N. officials said they believe the statement by Iraqi Deputy Prime Minister Tariq Aziz is the first authoritative account for why Iraq did not employ the biological or chemical arms at its disposal.

. . . . . .

Iraqi officials said the documents were hidden by Hussein Kamel Hassan Majeed, the director of Iraq's weapons of mass destruction program who fled to Jordan on Aug. 7 and whose defection prompted Iraq to summon Ekeus to hear the new disclosures . . .

Iraq admitted to filling a total of 150 aircraft bombs with botulinum toxin and bacteria capable of causing anthrax disease, each of which is among the most deadly substances known and can kill in extremely small quantities, Ekeus said. It also claimed to have put the two agents into 25 warheads to be carried by a medium-range rocket.

According to what Aziz told Ekeus on Aug. 4, then-Secretary of State James A. Baker III delivered the U.S. threat of grievous retaliation that caused Iraq to hold back during a tense, four-hour meeting in Geneva about five weeks before the beginning of the U.S.-led Desert Storm military campaign. Baker hinted at a U.S. response that would set Iraq back years by reducing its industry to rubble.

Ekeus said that Aziz told him Iraq 'translated' the warning into a threat that Washington would respond with nuclear arms. In fact, then-Joint Chiefs of Staff Chairman Colin L. Powell and other U.S. military leaders had decided early on that nuclear weapons were not needed and no such retaliatory plans existed." (*The Washington Post*, 26 August 1995, p. A1. See also the report in *The New York Times*, 26 August 1995, p. 3. For a contrasting contention by Iraq that "authority to launch biological and chemical war-heads was pre-delegated in the event that Baghdad was hit by nuclear weapons during the Gulf war", see the 8th Report to the Security Council by

the Executive Chairman of the Special Commission (Ambassador Ekeus), United Nations document S/1995/864 of 11 October 1995, p. 11. That Report continues: "This pre-delegation does not exclude the alternative use of such capability and therefore does not constitute proof of only intentions concerning second use." *(Ibid.)*)

Finally, there is the following answer by Ambassador Ekeus to a question in the course of testimony in hearings on global proliferation of weapons of mass destruction of 20 March 1996:

". . . I have had conversation with the Deputy Prime Minister of Iraq, Tariq Aziz, in which he made references to his meeting with Secretary of State James Baker in Geneva just before the outbreak of war. He, Tariq Aziz, says that Baker told him to the effect that if such [chemical or biological] weapons were applied there would be a very strong reaction from the United States.

Tariq Aziz did not imply that Baker mentioned what type of reaction. But he told me that the Iraqi side took it for granted that it meant the use of maybe nuclear weapons against Baghdad, or something like that. And that threat was decisive for them not to use the weapons.

But this is the story he, Aziz, tells. I think one should be very careful about buying it. I don't say that he must be wrong, but I believe there are strong reasons that this may be an explanation he offers of why Iraq lost the war in Kuwait. This is the story which they gladly tell everyone who talks to them. So I think one should be cautious at least about buying that story. I think still it is an open question." (Testimony of Ambassador Rolf Ekeus before the Senate Permanent Subcommittee on Investigations of the Committee on Governmental Affairs of the United States Senate, *Hearings on the Global Proliferation of Weapons of Mass Destruction,* in press.)

Thus there is on record remarkable evidence indicating that an aggressor was or may have been deterred from using outlawed weapons of mass destruction against forces and countries arrayed against its aggression at the call of the United Nations by what the aggressor perceived to be a threat to use nuclear weapons against it should it first use weapons of mass destruction against the forces of the coalition. Can it seriously be maintained that Mr. Baker's calculated — and apparently successful — threat was unlawful? Surely the principles of the United Nations Charter were sustained rather than transgressed by the threat. "Desert Storm" and the resolutions of the Security Council that preceded and followed it may represent the greatest achievement of the principles of collective

security since the founding of the League of Nations. The defeat of this supreme effort of the United Nations to overcome an act of aggression by the use of weapons of mass destruction against coalition forces and countries would have been catastrophic, not only for coalition forces and populations, but for those principles and for the United Nations. But the United Nations did triumph, and to that triumph what Iraq perceived as a threat to use nuclear weapons against it may have made a critical contribution. Nor is this a case of the end justifying the means. It rather demonstrates that, in some circumstances, the threat of the use of nuclear weapons — as long as they remain weapons unproscribed by international law — may be both lawful and rational.

Furthermore, had Iraq employed chemical or biological weapons — prohibited weapons of mass destruction — against coalition forces, that would have been a wrong in international law giving rise to the right of belligerent reprisal. Even if, *arguendo,* the use of nuclear weapons were to be treated as also prohibited, their proportionate use by way of belligerent reprisal in order to deter further use of chemical or biological weapons would have been lawful. At any rate, this would be so if the terms of a prohibition of the use of nuclear weapons did not debar use in reprisal or obligate States "never under any circumstances" to use nuclear weapons, as they will be debarred by those terms from using chemical weapons under Article I of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction of 1993, should it come into force. In paragraph 46 of its Opinion, the Court states that, on the question of belligerent reprisals, "any" right of such recourse would, "like self-defence, be governed *inter alia* by the principle of proportionality". The citation of that latter principle among others is correct, but any doubt that the Court's reference may raise about the existence of a right of belligerent reprisal is not. Such a doubt would be unsupported not only by the customary law of war and by military manuals of States issued in pursuance of it, which have long affirmed the principle and practice of belligerent reprisal, but by the terms of the Geneva Conventions and its Additional Protocols, which prohibit reprisals not generally but in specific cases (against prisoners-of-war, the wounded, civilians, certain objects and installations, etc.) The far-reaching additional restrictions on reprisals of Protocol I, which bind only its parties, not only do not altogether prohibit belligerent reprisals; those restrictions as well as other innovations of Protocol I were understood at the time of their preparation and adoption not to govern nuclear weapons.

There is another lesson in this example, namely, that as long as what are sometimes styled as "rogue States" menace the world (whether they are or are not parties to the NPT), it would be imprudent to set policy on the basis that the threat or use of nuclear weapons is unlawful "in any circumstance". Indeed, it may not only be rogue States but criminals or fanatics whose threats or acts of terrorism conceivably may require a nuclear deterrent or response.

ARTICLE VI OF THE NON-PROLIFERATION TREATY

Finally, I have my doubts about the Court's last operative conclusion in paragraph 2 F:

> "There exists 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."

If this obligation is that only of "Each of the Parties to the Treaty" as Article VI of the Non-Proliferation Treaty states, this is another anodyne asseveration of the obvious, like those contained in operative paragraphs 2 A, 2 B, 2 C and 2 D. If it applies to States not party to the NPT, it would be a dubious holding. It would not be a conclusion that was advanced in any quarter in these proceedings; it would have been subjected to no demonstration of authority, to no test of advocacy; and it would not be a conclusion that could easily be reconciled with the fundamentals of international law. In any event, since paragraph 2 F is not responsive to the question put to the Court by the General Assembly, it is to be treated as *dictum*.

(Signed) Stephen M. SCHWEBEL.