DISSENTING OPINION OF JUDGE SHAHABUDDEEN

The Charter was signed on 26 June 1945. A less troubled world was its promise. But the clash of arms could still be heard. A new weapon was yet to come. It must first be tested. The date was 12 July 1945; the place Alamogordo. The countdown began. The moment came: *"The radiance of a thousand suns."* That was the line which came to the mind of the leader of the scientific team. He remembered also the end of the ancient verse: *"I am become death, The Shatterer of Worlds"*[1].

By later standards, it was a small explosion. Bigger bombs have since been made. Five declared nuclear-weapon States possess them. The prospect of mankind being destroyed through a nuclear war exists. The books of some early peoples taught that the use of a super weapon which might lead to excessively destructive results was not allowed. What does contemporary international law have to say on the point?

That, in substance, is the General Assembly's question. The question raises the difficult issue as to whether, in the special circumstances of the use of nuclear weapons, it is 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 does not imperil the survival of the human species. If a reconciliation is not possible, which side should give way? Is the problem thus posed one of law? If so, what lines of legal enquiry suggest themselves?

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Overruling preliminary arguments, the Court, with near unanimity, decided to comply with the General Assembly's request for an advisory opinion on the question whether "the threat or use of nuclear weapons [is] in any circumstance permitted under international law". By a bare majority, it then proceeded to reply to the General Assembly's question by taking the position, on its own showing, that it cannot answer the substance of the question. I fear that the contradiction between promise and performance cannot, really, be concealed. With respect, I am of the view

[1] Peter Michelmore, *The Swift Years, The Robert Oppenheimer Story*, 1969, p. 110. Oppenheimer could read the verse in the original Sanskrit of the *Bhagavad-Gita*.

that the Court should and could have answered the General Assembly's question — one way or another.

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From the point of view of the basic legal principles involved, the reply of the Court, such as it is, is set out in the first part of subparagraph E of paragraph 2 of the operative paragraph of its Advisory Opinion. Subject to a reservation about the use of the word "generally", I agree with the Court

> "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".

My difficulty is with the second part of subparagraph E of paragraph 2 of the operative paragraph of the Court's Advisory Opinion. If the use of nuclear weapons is lawful, the nature of the weapon, combined with the requirements of necessity and proportionality which condition the exercise of the inherent right of self-defence, would suggest that such weapons could only be lawfully used "in an extreme circumstance of self-defence, in which the very survival of a State would be at stake"; and this, I think, notwithstanding variations in formulation and flexible references to "vital security interests", is the general theme underlying the position taken by the nuclear-weapon States. That in turn must be the main issue presented for consideration by the Court. But this is exactly the issue that the Court says it cannot decide, with the result that the General Assembly has not received an answer to the substance of its question.

I have the misfortune to be unable to subscribe to the conclusion so reached by the Court, and the more so for the reason that, when that conclusion is assessed by reference to the received view of the *"Lotus"* case, the inference could be that the Court is saying that there is a possibility that the use of nuclear weapons could be lawful in certain circumstances and that it is up to States to decide whether that possibility exists in particular circumstances, a result which would give me difficulty. In my respectful view, "the current state of international law, and . . . the elements of fact at its disposal" permitted the Court to answer one way or another.

As the two parts of subparagraph E cannot be separated for the purpose of voting, I have been regretfully constrained to withhold support from this subparagraph. Further, as the point of disagreement goes to the heart of the case, I have elected to use the style "dissenting opinion", even though voting for most of the remaining items of the operative paragraph.

A second holding which I am unable to support is subparagraph B of paragraph 2 of the operative paragraph. The specificity conveyed by the words "as such" enables me to recognize that "[t]here is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such". But the words "as such" do not outweigh a general suggestion that there is no prohibition at all of the use of nuclear weapons. The circumstance that there is no "comprehensive and universal prohibition of the threat or use of nuclear weapons as such" in customary or conventional international law does not conclude the question whether the threat or use of such weapons is lawful; more general principles have to be consulted. Further, for reasons to be given later, the test of prohibition does not suffice to determine whether there is a right to do an act with the magnitude of global implications which would be involved in such use. Finally, the holding in this subparagraph is a step in the reasoning; it does not properly form part of the Court's reply to the General Assembly's question.

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As remarked above, I have voted for the remaining items of the operative paragraph of the Court's Advisory Opinion. However, a word of explanation is appropriate. The Court's voting practice does not always allow for a precise statement of a judge's position on the elements of a *dispositif* to be indicated through his vote; how he votes would depend on his perception of the general direction taken by such an element and of any risk of his basic position being misunderstood. A declaration, separate opinion or dissenting opinion provides needed opportunity for explanation of subsidiary difficulties. This I now give below in respect of those parts of the operative paragraph for which I have voted.

As to subparagraph A of paragraph 2 of the operative paragraph, I take the view, to some extent implicit in this subparagraph, that, at any rate in a case of this kind, the action of a State is unlawful unless it is authorized under international law; the mere absence of prohibition is not enough. In the case of nuclear weapons, there is no authorization, whether specific or otherwise. However, subparagraph A is also a step in the reasoning; it is not properly part of the Court's reply to the General Assembly's question.

As to subparagraph C of paragraph 2 of the operative paragraph, there is an implication here that a "threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter" may nevertheless be capable of complying with some or all of the requirements of Article 51 and would in that event be lawful. I should have thought that something which was "contrary" to the former was *ipso facto* illegal and not capable of being redeemed by meet-

ing any of the requirements of the latter. Thus, an act of aggression, being contrary to Article 2, paragraph 4, is wholly outside of the framework of Article 51, even if carried out with antiquated rifles and in strict conformity with humanitarian law. Further, it is difficult to see how the Court can allow itself to be suggesting here that there are circumstances in which the threat or use of nuclear weapons is lawful in view of the fact that in subparagraph E of paragraph 2 of the operative paragraph it has not been able to come to a definitive conclusion on the main issue as to whether the threat or use of such weapons is lawful or unlawful in the circumstances stated there.

As to subparagraph D of paragraph 2 of the operative paragraph, the statement that a "threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict . . ." suggests the possibility of cases of compatibility and consequently of legality. As mentioned above, it is difficult to see how the Court can take this position in view of its inability to decide the real issue of legality. The word "should" is also out of place in a finding as to what is the true position in law.

As to subparagraph F of paragraph 2 of the operative paragraph, I have voted for this as a general proposition having regard to the character of nuclear weapons. The particular question as to the legal implications of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons ("NPT") is not before the Court; it does not form part of the General Assembly's question. It could well be the subject of a separate question as to the effect of that Article of the NPT, were the General Assembly minded to present one.

Going beyond the operative paragraph, I have hesitations on certain aspects of the *consideranda* but do not regard it as convenient to list them all. I should however mention paragraph 104 of the Advisory Opinion. To the extent that this reproduces the standing jurisprudence of the Court, I do not see the point of the paragraph. If it ventures beyond, I do not agree. The operative paragraph of the Court's Advisory Opinion has to be left to be interpreted in accordance with the settled jurisprudence on the point.

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Returning to subparagraph E of paragraph 2 of the operative paragraph of the Court's Advisory Opinion, I propose to set out below my reasons for agreeing with this holding in so far as I agree with it and for disagreeing with it in so far as I disagree. The limited objective will be to show that, contrary to the Court's major conclusion, "the current state of international law, and . . . the elements of fact at its disposal" were sufficient to enable it to "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".

With this end in view, I propose, after noticing some introductory and miscellaneous matters in Part I, to deal, in Part II, with the question whether States have a right to use nuclear weapons having regard to the general principles which determine when States are to be considered as having a power, and, in Part III, with the position under international humanitarian law. In Part IV, I consider whether a prohibitory rule, if it existed at the commencement of the nuclear age, was modified or rescinded by the emergence of a subsequent rule of customary international law. I pass on in Part V to consider denuclearization treaties and the NPT. The conclusion is reached in Part VI.

PART I. INTRODUCTORY AND MISCELLANEOUS MATTERS

1. The Main Issue

The commencement of the nuclear age represents a legal benchmark for the case in hand. One argument was that, at that point of time, the use of nuclear weapons was not prohibited under international law, but that a prohibitory rule later emerged, the necessary *opinio juris* developing under the twin influences of the general prohibition of the use of force laid down in Article 2, paragraph 4, of the Charter and of growing appreciation of and sensitivity to the power of nuclear weapons. In view of the position taken by the proponents of the legality of the use of nuclear weapons ("proponents of legality") over the past five decades, it will be difficult to establish that the necessary *opinio juris* later crystallized, if none existed earlier. That argument was not followed by most of the proponents of the illegality of the use of nuclear weapons ("proponents of illegality").

The position generally taken by the proponents of illegality was that a prohibitory rule existed at the commencement of the nuclear age, and that subsequent developments merely evidenced the continuing existence of that rule. For their part, the proponents of legality took the position that such a prohibitory rule never existed, and that what subsequent developments did was to evidence the continuing non-existence of any such rule and a corresponding right to use nuclear weapons. There was no issue as to whether, supposing that a prohibitory rule existed at the commencement of the nuclear age, it might have been reversed or modified by the development of a later rule in the opposite direction[2]; supposing that that had been argued, the position taken by the proponents

[2] For the possibility of a rule of customary international law being modified by later inconsistent State practice, see *Military and Paramilitary Activities in and against Nicaragua, Merits, I.C.J. Reports 1986*, p. 109, para. 207.

of illegality would bar the development of the *opinio juris* necessary for the subsequent emergence of any such permissive rule, and more particularly so if the earlier prohibitory rule had the quality of *jus cogens*. This would have been the case if any humanitarian principles on which the earlier prohibitory rule was based themselves had the quality of *jus cogens*, a possibility left open by paragraph 83 of the Court's Advisory Opinion.

State practice is important. But it has to be considered within the framework of the issues raised. Within the framework of the issues raised in this case, State practice subsequent to the commencement of the nuclear age does not have the decisive importance suggested by the focus directed to it during the proceedings: it is not necessary to consider it in any detail beyond and above what is reasonably clear, namely, that the opposition shown by the proponents of legality would have prevented the development of a prohibitory rule if none previously existed, and that the opposition shown by the proponents of illegality would have prevented the development of a rescinding rule if a prohibitory rule previously existed. In either case, the legal situation as it existed at the commencement of the nuclear age would continue in force. The question is, what was that legal situation?

The real issue, then, is whether at the commencement of the nuclear age there was in existence a rule of international law which prohibited a State from creating effects of the kind which could later be produced by the use of nuclear weapons. If no such rule then existed, none has since come into being, and the case of the proponents of legality succeeds; if such a rule then existed, it has not since been rescinded, and the case of the proponents of illegality succeeds.

2. The Charter Assumes That Mankind and Its Civilization Will Continue

International law includes the principles of the law of armed conflict. These principles, with roots reaching into the past of different civilizations, were constructed on the unspoken premise that weapons, however destructive, would be limited in impact, both in space and in time. That assumption held good throughout the ages. New and deadlier weapons continued to appear, but none had the power to wage war on future generations or to threaten the survival of the human species. Until now.

Is a legal problem presented? I think there is; and this for the reason that, whatever may be the legal position of the individual in international law, if mankind in the broad is annihilated, States disappear and, with them, the basis on which rights and obligations exist within the international community. How might the problem be approached?

Courts, whether international or national, have not had to deal with the legal implications of actions which could annihilate mankind. Yet in

neither system should there be difficulty in finding an answer; both systems must look to the juridical foundations on which they rest. What do these suggest?

In his critical study of history, Ibn Khaldûn referred to "the explanation that laws have their reason in the purposes they are to serve". Continuing, he noted that "the jurists mention that . . . injustice invites the destruction of civilization with the necessary consequence that the species will be destroyed", and that the laws "are based upon the effort to preserve civilization"[3]. Thus, the preservation of the human species and of civilization constitutes the ultimate purpose of a legal system. In my opinion, that purpose also belongs to international law, as this is understood today.

This conclusion is not at variance with the Charter of the United Nations and the Statute of the Court, by which the Court is bound. The first preambular paragraph of the Charter recorded that "the Peoples of the United Nations" were "[d]etermined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind . . .". A world free of conflict was not guaranteed; but, read in the light of that and other statements in the Charter, Article 9 of the Statute shows that the Court was intended to serve a civilized society. A civilized society is not one that knowingly destroys itself, or knowingly allows itself to be destroyed. A world without people is a world without States. The Charter did not stipulate that mankind would continue, but it at least assumed that it would; and the assumption was not the less fundamental for being implicit.

3. The Use of Nuclear Weapons Is Unacceptable to the International Community

It is necessary to consider the character of nuclear weapons. It was said on the part of the proponents of legality that there are "tactical", "battlefield", "theatre" or "clean" nuclear weapons which are no more destructive than certain conventional weapons. Supposing that this is so, then *ex hypothesi* the use of nuclear weapons of this kind would be as lawful as the use of conventional weapons. It was in issue, however, whether the material before the Court justified that hypothesis, the argument of the proponents of illegality being that the use of any nuclear weapon, even if directed against a lone nuclear submarine at sea or against an isolated military target in the desert, results in the emission of radiation and nuclear fall-out and carries the risk of triggering a chain of events which could lead to the annihilation of the human species. The eleventh preambular paragraph of the 1968 NPT, which was extended "indefinitely" in 1995, records that the States parties desired "the liquidation of all their

[3] Ibn Khaldûn, *The Muqaddimah, An Introduction to History*, trans. Franz Rosenthal, edited and abridged by N. J. Dawood, 1981, p. 40.

existing stockpiles, and the elimination from national arsenals of nuclear weapons . . .". Presumably the elimination so foreshadowed comprehended all "nuclear weapons" and, therefore, "tactical", "battlefield", "theatre" or "clean" nuclear weapons also. The parties to the NPT drew no distinction. On the material before it, the Court could feel less than satisfied that the suggested exceptions exist.

The basic facts underlying the resolutions of the General Assembly as to the nature of a nuclear war, at least a full-scale one, are difficult to controvert. Since 1983 the technology has advanced, but the position even at that stage was put thus by the Secretary-General of the United Nations, Mr. Javier Pérez de Cuéllar:

> "The world's stockpile of nuclear weapons today is equivalent to 16 billion tons of TNT. As against this, the entire devastation of the Second World War was caused by the expenditure of no more than 3 million tons of munitions. In other words, we possess a destructive capacity of more than 5,000 times what caused 40 to 50 million deaths not too long ago. It should suffice to kill every man, woman and child 10 times over."[4]

Thus, nuclear weapons are not just another type of explosive weapons, only occupying a higher position on the same scale: their destructive power is exponentially greater. Apart from blast and heat, the radiation effects over time are devastating. To classify these effects as being merely a by-product is not to the point; they can be just as extensive as, if not more so than, those immediately produced by blast and heat. They cause unspeakable sickness followed by painful death, affect the genetic code, damage the unborn, and can render the earth uninhabitable. These extended effects may not have military value for the user, but this does not lessen their gravity or the fact that they result from the use of nuclear weapons. This being the case, it is not relevant for present purposes to consider whether the injury produced is a by-product or secondary effect of such use.

Nor is it always a case of the effects being immediately inflicted but manifesting their consequences in later ailments; nuclear fallout may exert an impact on people long after the explosion, causing fresh injury to them in the course of time, including injury to future generations. The

[4] Javier Pérez de Cuéllar, Statement at the University of Pennsylvania, 24 March 1983, in *Disarmament*, Vol. VI, No. 1, p. 91.

weapon continues to strike for years after the initial blow, thus presenting the disturbing and unique portrait of war being waged by a present generation on future ones — on future ones with which its successors could well be at peace.

The first and only military use of nuclear weapons which has so far been made took place at Hiroshima on 6 August 1945 and at Nagasaki on 9 August 1945. A month later, the International Committee of the Red Cross ("ICRC") considered the implications of the use of newly developed weapons. In a circular letter to national Red Cross committees, dated 5 September 1945 and signed by Mr. Max Huber as acting President, the ICRC wrote this:

> "Totalitarian war has brought new technics into being. Does this mean that we must accept that the individual will no longer be protected by the law and will henceforth only be seen as a mere element of collectivities involved in a conflict? This would imply the collapse of the principles underlying international law, which aims to promote the physical and spiritual protection of the individual. Even in time of war, a law of a strictly egotistical and utilitarian nature, only inspired by fortuitous interests, could never offer lasting security. If warfare fails to accept the value and dignity of the human being, it will proceed irresistibly to destructions without limit, as the spirit of mankind, which is taking possession of the forces of the universe, seems by its creations to be accelerating that devastating impetus." *[Translation by the Registry.]*

Do the rules stand set aside? Or do they still apply to protect the individual? If they do not, the seizure by man of the forces of the universe propels war irresistibly and progressively in the direction of destruction without limit, including the extinction of the human species. In time, the nuclear-weapon States ("NWS") and most of the non-nuclear-weapon States ("NNWS") would subscribe to statements acknowledging the substance of this result.

The concerns raised by the ICRC did not go unechoed. As was pointed out by several States, four months later the General Assembly unanimously adopted a resolution by which it established a commission charged with the responsibility of making "specific proposals . . . *(c)* for the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction" (General Assembly resolution 1 (I), para. 5, of 24 January 1946). It is too limited a view to restrict the significance of the resolution to the mere establishment of the commission; the bases on which the commission was established are also important.

In line with this, on 20 September 1961 an agreement, known as "The McCloy-Zorin Accords", was signed by representatives of the United States of America and the Soviet Union, the two leading NWS. The Accords recommended eight principles as guidance for disarmament negotiations. The fifth principle read: "Elimination of all stockpiles of

nuclear, chemical, bacteriological, and other weapons of mass destruction, and cessation of the production of such weapons." On 20 December 1961 that agreement was unanimously welcomed by the General Assembly on the joint proposition of those two States (General Assembly resolution 1722 (XVI) of 20 December 1961).

The first preamble to the 1968 NPT refers to "the devastation that would be visited upon all mankind by a nuclear war . . .". The preamble to the NPT (inclusive of that statement) was reaffirmed in the first paragraph of the preamble to Decision No. 2 adopted by the 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons. The overwhelming majority of States are parties to these instruments.

The Final Document adopted by consensus in 1978 by the Tenth Special Session of the General Assembly (on the subject of disarmament) opened with these words: "Alarmed by the threat to the very survival of mankind posed by the existence of nuclear weapons and the continuing arms race . . .". Paragraph 11 stated:

> "Mankind today is confronted with an unprecedented threat of self-extinction arising from the massive and competitive accumulation of the most destructive weapons ever produced. Existing arsenals of nuclear weapons alone are more than sufficient to destroy all life on earth . . ."

Paragraph 47 of the Final Document noted that "[n]uclear weapons pose the greatest danger to mankind and to the survival of civilization". All of these words, having been adopted by consensus, may be regarded as having been uttered with the united voice of the international community.

Important regional agreements also testify to the character of nuclear weapons. See the Agreement of Paris of 23 October 1954 on the entry of the Federal Republic of Germany into the North Atlantic Treaty Organization, Article 1 *(a)* of Annex II to Protocol No. III on the Control of Armaments, indicating that nuclear weapons are weapons of mass destruction. The preamble to the 1967 Treaty of Tlatelolco, Additional Protocol II of which was signed and ratified by the five NWS, declared that the Parties were convinced

> "That the incalculable destructive power of nuclear weapons has made it imperative that the legal prohibition of war should be strictly observed in practice if the survival of civilization and of mankind itself is to be assured.
>
> That nuclear weapons, whose terrible effects are suffered, indiscriminately and inexorably, by military forces and civilian population alike, constitute, through the persistence of the radioactivity they release, an attack on the integrity of the human species and ultimately may even render the whole earth uninhabitable."

The first two preambular paragraphs of the 1985 South Pacific Nuclear Free Zone Treaty (the Treaty of Rarotonga), Protocol 2 of which has been signed and ratified by two of the five NWS and signed by the remaining three, likewise recorded that the parties were

> "Gravely concerned that the continuing nuclear arms race presents the risk of nuclear war which would have devastating consequences for all people;
>
> Convinced that all countries have an obligation to make every effort to achieve the goal of eliminating nuclear weapons, the terror which they hold for humankind and the threat which they pose to life on earth."

The Court has also referred to the more recently signed treaties on nuclear-free zones relating to South-East Asia and Africa.

A position similar in principle to those mentioned above was taken in agreements between two of the NWS. In the preamble to a 1971 Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War, the United States of America and the Soviet Union stated that they were "[t]aking into account the devastating consequences that nuclear war would have for all mankind". The substance of that statement was repeated in later agreements between those States, namely, in the 1972 Anti-Ballistic Missile Treaty, in a 1973 Agreement on the Prevention of Nuclear War, in a 1979 Treaty on the Limitation of Strategic Offensive Arms, and in the 1987 Intermediate-Range and Shorter-Range Missiles Treaty.

It was argued by some States that the purpose of possessing nuclear weapons is, paradoxically, to ensure that they are never used, and that this is shown by the circumstance that it has been possible to keep the peace, as among the NWS, during the last 50 years through policies of nuclear deterrence. Other States doubted the existence of the suggested link of causation, attributing that result to luck or chance, pointing to occasions when such weapons were nearly used, and adverting to a number of wars and other situations of armed conflict which have in fact occurred outside of the territories of the NWS. Assuming, however, that such a link of causation can be shown, a question which remains is why should policies of nuclear deterrence have kept the peace as among the NWS. A reasonable answer is that each NWS itself recognized that it faced the risk of national destruction. The record before the Court indicates that that destruction will not stop at the frontiers of warring States, but can extend to encompass the obliteration of the human species.

Other weapons are also members of the category of weapons of mass destruction to which nuclear weapons belong. However, nuclear weapons are distinguishable in important ways from all other weapons, including other members of that category. In the words of the Court:

> "[N]uclear weapons are explosive devices whose energy results from the fusion or fission of the atom. By its very nature, that process, in nuclear weapons as they exist today, releases not only immense quantities of heat and energy, but also powerful and prolonged radiation. According to the material before the Court, the first two causes of damage are vastly more powerful than the damage caused by other weapons, while the phenomenon of radiation is said to be peculiar to nuclear weapons. These characteristics render the nuclear weapon potentially catastrophic. The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet." (Advisory Opinion, para. 35.)

And a little later:

> "[I]t is imperative for the Court 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." (*Ibid.*, para. 36.)

Even if it is possible that, scientifically considered, other weapons of mass destruction, such as biological and chemical weapons, can also annihilate mankind, the question is not merely whether a weapon can do so, but whether the evidence shows that the international community considers that it can. The evidence was not specifically directed to this purpose in the case of other weapons; in the case nuclear weapons, it was, however, directed to that purpose and, the Court could find, successfully so directed. Similar remarks would apply to other weapons, such as flame-throwers and napalm, which, though not capable of annihilating mankind, can undoubtedly cause shocking harm. Unlike the case of nuclear weapons, there was no material before the Court to suggest that, however appalling may be the effects produced by the use of such other weapons, the international community was on record as considering their use to be repugnant to its conscience.

It may be added that, once it is shown that the use of a weapon could annihilate mankind, its repugnance to the conscience of the international community is not materially diminished by showing that it need not have that result in every case; it is not reasonable to expect that the conscience of the international community will, both strangely and impossibly, wait

on the event to see if the result of any particular use is the destruction of the human species. The operative consideration is the risk of annihilation. That result may not ensue in all cases, but the risk that it can inheres in every case. The risk may be greater in some cases, less in others; but it is always present in sufficient measure to render the use of nuclear weapons unacceptable to the international community in all cases. In my view, the answer to the question of repugnance to the conscience of the international community governs throughout.

In sum, the Court could conclude, in accordance with its findings in paragraph 35 of its Advisory Opinion, that the international community as a whole considers that nuclear weapons are not merely weapons of mass destruction, but that there is a clear and palpable risk that their use could accomplish the destruction of mankind, with the result that any such use would be repugnant to the conscience of the community. What legal consequences follow will be examined later.

4. Neutrality

A question was raised as to whether damage resulting to a neutral State from use of nuclear weapons in the territory of a belligerent State is a violation of the former's neutrality. I accept the affirmative answer suggested in Nauru's statement in the parallel case brought by the World Health Organization, as set out in paragraph 88 of the Court's Advisory Opinion. A number of incidents collected in the books does not persuade me to take a different view[5].

The principle, as stated in Article 1 of Hague Convention No. 5 of 1907 Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, is that "[t]he territory of neutral powers is inviolable". The principle has not been understood to guarantee neutral States absolute immunity from the effects of armed conflict; the original purpose, it is said, was to preclude military invasion or bombardment of neutral territory, and otherwise to define complementary rights and obligations of neutrals and belligerents.

It is difficult, however, to appreciate how these considerations can operate to justify the use of nuclear weapons where the radiation effects which they emit extend to the inhabitants of neutral States and cause damage to them, their offspring, their natural resources, and possibly put them under the necessity to leave their traditional homelands. The state-

[5] See, for example, Roberto Ago, Addendum to the Eighth Report on State Responsibility, *Yearbook of the International Law Commission*, 1980, Vol. II, Part I, pp. 35-36, para. 50.

ment of an inhabitant of the Marshall Islands left little to be imagined. Considered in relation to the more dramatic catastrophe immediately produced and the military value to the user State, these effects may be spoken of as by-products of the main event; but, as argued above, that classification is without legal pertinence. The "by-products" are not remote economic or social consequences. Whether direct or indirect effects, they result from the use of nuclear weapons, for it is a property of such weapons that they emit radiation; their destructive effect on the enemy is largely due to their radiation effects. Such radiation has a high probability of transboundary penetration.

To say that these and other transboundary effects of the use of nuclear weapons do not violate the neutrality of third States in the absence of belligerent incursion or transboundary bombardment is to cast too heavy a burden on the proposition that neutrality is not an absolute guarantee of immunity to third States against all possible effects of the conduct of hostilities. The Fifth Hague Convention of 1907 does not define inviolability; nor does it say that the territory of a neutral State is violated only by belligerent incursion or bombardment. Accepting nevertheless that the object of the architects of the provision was to preclude military incursion or bombardment of neutral territory, it seems to me that that purpose, which was related to the then state of warfare, does not conclude the question whether, in terms of the principle, "the territory of neutral powers" is violated where that territory and its inhabitants are physically harmed by the effects of the use elsewhere of nuclear weapons in the ways in which it is possible for such harm to occur. The causes of the consequential suffering and the suffering itself are the same as those occurring in the zone of battle.

It was said, no doubt correctly, that no case was known in which a belligerent State had been held responsible for collateral damage in neutral territory for lawful acts of war committed outside of that territory. It may be recalled, however, that the possibilities of damage by nuclear fallout did not previously exist; because of technological limitations, damage on neutral territory, as a practical matter, could only be committed by incursion or bombardment, in which cases there would be acts of war committed on the neutral territory itself. To the extent that the *Trail Smelter* type of situation was likely to be a significant consequence of acts of war, the occurrence of concrete situations in the pre-nuclear period has not been shown to the Court. Thus, while no case may have occurred in which a belligerent State has been held responsible for collateral damage in neutral territory for lawful acts of war committed outside of that territory, that is decisive of the present case only if it can be shown that there is no responsibility even where substantial physical effects of acts of war carried out elsewhere demonstrably extend to neutral territory. That cannot be persuasively shown; principle is against

it. The causative act of war would have had the consequence of physically violating the territory of the neutral State. The 1907 Hague principle that the territory of a neutral State is inviolable would lose much of its meaning if in such a case it was not considered to be breached.

5. *Belligerent Reprisal*

The question was argued whether, assuming that the use of nuclear weapons was otherwise unlawful, such use might nevertheless be lawful for the exceptional purposes of belligerent reprisal (i.e., as distinguished from reprisals in situations other than those of armed conflict). It seems to me, however, that there is not any necessity to examine this aspect in an opinion devoted to showing that "the current state of international law, and . . . the elements of fact at its disposal" did not prevent the Court from concluding

> "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" (Advisory Opinion, para. 105 (2) E).

The use of nuclear weapons in belligerent reprisal, if lawful, would be equally open to an aggressor State and to a State acting in self-defence. This being so, an enquiry into the lawfulness of the use of such weapons in belligerent reprisal would not materially promote analysis of the question whether they may be lawfully used in self-defence, this being the question presented by the Court's holding.

6. *There Is No* Non Liquet

The commentators suggest that some decisions of the Court could be understood as implying a *non liquet*. It is possible that the second part of subparagraph E of paragraph 2 of the operative paragraph of the Court's Advisory Opinion will be similarly interpreted. If that is the correct interpretation, I respectfully differ from the position taken by the Court.

To attract the idea of a *non liquet* in this case, it would have to be shown that there is a gap in the applicability of whatever may be the correct principles regulating the question as to the circumstances in which a State may be considered as having or as not having a right to act.

If, as it is said, international law has nothing to say on the subject of the legality of the use of nuclear weapons, this necessarily means that

international law does not include a rule prohibiting such use. On the received view of the *"Lotus"* decision, absent such a prohibitory rule, States have a right to use nuclear weapons.

On the other hand, if that view of *"Lotus"* is incorrect or inadequate in the light of subsequent changes in the international legal structure, then the position is that States have no right to use such weapons unless international law authorizes such use. If international law has nothing to say on the subject of the use of nuclear weapons, this necessarily means that international law does not include a rule authorizing such use. Absent such authorization, States do not have a right to use nuclear weapons.

It follows that, so far as this case at any rate is concerned, the principle on which the Court acts, be it one of prohibition or one of authorization, leaves no room unoccupied by law and consequently no space available to be filled by the *non liquet* doctrine or by arguments traceable to it. The fact that these are advisory proceedings and not contentious ones makes no difference; the law to be applied is the same in both cases.

7. The General Assembly's Call for a Convention

Putting aside the question of the possible law-making effect or influence of General Assembly resolutions, did its resolutions on this matter really take the position that the use of nuclear weapons was contrary to existing law? Arguing that that was not the position taken, some States point to the fact that the resolutions also called for the conclusion of a convention on the subject.

However, as the case of the Genocide Convention shows, the General Assembly could well consider that certain conduct would be a crime under existing law and yet call for the conclusion of a convention on the subject. Its resolution 96 (I) of 11 December 1946, which called for the preparation of "a draft convention on the crime of genocide", also affirmed "that genocide is a crime under international law . . ." It was likewise that, in its resolution of 14 December 1978, the General Assembly declared

> "that
>
> *(a)* the use of nuclear weapons will be a violation of the Charter of the United Nations and a crime against humanity;
>
> *(b)* the use of nuclear weapons should therefore be prohibited, pending nuclear disarmament".

It was on this basis that the resolution then passed on to mention the future discussion of an international convention on the subject.

A convention may be useful in focusing the attention of national bodies on the subject, particularly in respect of any action which may have to be taken by them; it may also be helpful in clarifying and settling details required to implement the main principle, or more generally for the purpose of laying down a régime for dealing with the illegality in question. A call for a convention to prohibit a particular kind of conduct does not necessarily imply that the conduct was not already forbidden.

A further argument is that some of the later General Assembly resolutions adopted a more qualified formulation than that of earlier ones (see paragraph 71 of the Advisory Opinion). I do not assign much weight to this as indicative of a resiling from the position taken in earlier General Assembly resolutions to the effect that such use was contrary to existing international law. The later resolutions proceeded on the basis that that position had already and sufficiently been taken; they therefore contented themselves with simply recalling the primary resolution on the subject, namely, resolution 1653 (XVI) of 1961. Thus, while the language employed in the resolutions has varied from time to time, it is to be observed that in resolution 47/53 of 9 December 1992 the General Assembly reaffirmed "that the use of nuclear weapons would be a violation of the Charter of the United Nations and a crime against humanity, as declared in its resolutions 1653 (XVI) of 24 November 1961", and other cited resolutions.

The General Assembly's resolutions may reasonably be interpreted as taking the position that the threat or use of nuclear weapons was forbidden under pre-existing international law. The question is whether there is a sufficiency of fact and law to enable the Court to decide whether the position so taken by the General Assembly was correct. To the giving of an answer I proceed below.

PART II. WHETHER THE COURT COULD HOLD THAT STATES HAVE A RIGHT TO USE NUCLEAR WEAPONS HAVING REGARD TO THE GENERAL PRINCIPLES WHICH DETERMINE WHEN A STATE IS TO BE CONSIDERED AS HAVING A POWER

The General Assembly's question presents the Court, as a World Court, with a dilemma: to hold that States have a right to use nuclear weapons is to affirm that they have a right to embark on a course of conduct which could result in the extinction of civilization, and indeed in the dissolution of all forms of life on the planet, both flora and fauna. On the other hand, to deny the existence of that right may seem to contradict the *"Lotus"* principle, relied on by some States, to the effect that States have a sovereign right to do whatever is not prohibited under international

law, in this respect it being said that there is no principle of international law which prohibits the use of such weapons. The dilemma[6] was the subject of close debate. In my view, it was open to the Court to consider four possible solutions.

*

The first possible solution proceeds on the basis of the *"Lotus"* principle that a State has a right to do whatever is not prohibited, but it argues that an act which could lead to the extinction of mankind would necessarily involve the destruction of neutral States. This being so, the act cannot be justified under the rubric of self-defence. Therefore, even if, *quod non*, it is otherwise admissible under the *jus in bello*, the Court could hold that it is not covered by the *jus ad bellum* and is prohibited under Article 2, paragraph 4, of the Charter. The question of neutrality is dealt with in Part I, Section 4, above.

*

The second possible solution also proceeds on the basis of the *"Lotus"* principle. However, it argues that, due effect being given to the Charter and the Statute of the Court thereto annexed, by both of which the Court is bound, these instruments are not consistent with a State having a right to do an act which would defeat their fundamental assumption that civilization and mankind would continue: the Court could hold that, by operation of law, any such inconsistent act stands prohibited by the Charter.

*

The third possible solution also proceeds on the basis of the *"Lotus"* principle that a State has a right to do whatever is not prohibited under international law, but (as anticipated in Part I, Section 2, above) it argues that, even in the absence of a prohibition, that residual right does not extend to the doing of things which, by reason of their essential nature, cannot form the subject of a right, such as actions which could destroy mankind and civilization and thus bring to an end the basis on which

[6] The dilemma recalls that which confronted the learned judges of Persia when, asked by King Cambyses whether he could marry his sister, they made prudent answer "that though they could discover no law which allowed brother to marry sister, there was undoubtedly a law which permitted the king of Persia to do what he pleased". See *Herodotus, The Histories*, trans. Aubrey de Sélincourt, Penguin Books, 1959, p. 187. So here, an affirmative answer to the General Assembly's question would mean that, while the Court could discover no law allowing a State to put the planet to death, there is undoubtedly a law which permits the State to accomplish the same result through an exercise of its sovereign powers.

States exist and in turn the basis on which rights and obligations exist within the international community.

There is not any convincing ground for the view that the *"Lotus"* Court moved off on a supposition that States have an absolute sovereignty which would entitle them to do anything however horrid or repugnant to the sense of the international community, provided that the doing of it could not be shown to be prohibited under international law. The idea of internal supremacy associated with the concept of sovereignty in municipal law is not neatly applicable when that concept is transposed to the international plane. The existence of a number of sovereignties side by side places limits on the freedom of each State to act as if the others did not exist. These limits define an objective structural framework within which sovereignty must necessarily exist[7]; the framework, and its defining limits, are implicit in the reference in *"Lotus"* to "co-existing independent communities" (*P.C.I.J., Series A, No. 10*, p. 18), an idea subsequently improved on by the Charter, a noticeable emphasis on co-operation having been added.

Thus, however far-reaching may be the rights conferred by sovereignty, those rights cannot extend beyond the framework within which sovereignty itself exists; in particular, they cannot violate the framework. The framework shuts out the right of a State to embark on a course of action which would dismantle the basis of the framework by putting an end to civilization and annihilating mankind. It is not that a State is prohibited from exercising a right which, but for the prohibition, it would have; a State can have no such right to begin with.

So a prior question in this case is this: even if there is no prohibition, is there anything in the sovereignty of a State which would entitle it to embark on a course of action which could effectively wipe out the existence of all States by ending civilization and annihilating mankind? An affirmative answer is not reasonable; that sovereignty could not include such a right is suggested by the fact that the acting State would be one of what the Permanent Court of International Justice, in the language of the times, referred to as "co-existing independent communities", with a consequential duty to respect the sovereignty of other States. It is difficult for the Court to uphold a proposition that, absent a prohibition, a State has

[7] The idea is evoked by the following remark of one writer:

> "For some authors, the existence of a *corpus juris* governing a decentralized, 'classless' society partakes of a miracle. I would rather say that it partakes of necessity. It is not in spite of, but on account of the heterogeneity of States in a society of juxtaposition that international law was brought into being and has developed. If international law did not exist, it would have to be invented." *[Translation by the Registry.]* Prosper Weil, "Le droit international en quête de son identité. Cours général de droit international public", *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 237 (1992-VI), p. 36.

a right in law to act in ways which could deprive the sovereignty of all other States of meaning.

*

The fourth possible solution is this: if the *"Lotus"* principle leaves a State free to embark on any action whatsoever provided it is not prohibited — a proposition strongly supported by some States and as strenuously opposed by others — then, for the purposes of these proceedings at any rate, that case may be distinguished. The case did not relate to any act which could bring civilization to an end and annihilate mankind. It does not preclude a holding that there is no right to do such an act unless the act is one which is authorized under international law.

This fourth solution calls for fuller consideration than the others. It will be necessary to take account of three developments which bear on the extent to which modes of legal thought originating in an earlier age are applicable in today's world.

First, as set out in Article 2, paragraph 4, of the Charter, and following on earlier developments, the right of recourse to force has come under a major restriction. This is a significant movement away from the heavy emphasis on individual sovereignty which marked international society as it earlier existed. The point was stressed by the Philippines and Samoa.

Second, there have been important developments concerning the character of the international community and of inter-State relations. While the number of States has increased, international relations have thickened; the world has grown closer. In the process, there has been a discernible movement from a select society of States to a universal international community. Thus it was that in 1984 a Chamber of the Court could speak of "the co-existence and vital co-operation of the members of the international community" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984*, p. 299, para. 111). The earlier legal outlook has not lost all relevance. It is reasonably clear, however, that the previous stress on the individual sovereignty of each State considered as *hortus conclusus* has been inclining before a new awareness of the responsibility of each State as a member of a more cohesive and comprehensive system based on co-operation and interdependence.

These new developments have in part been consecrated by the Charter, in part set in motion by it. Their effect and direction were noticed by Judge Alvarez (*Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), 1948, I.C.J. Reports 1947-1948*, p. 68, separate opinion). Doubts about his plea for a new international law did not obscure the fact that he was not alone in his central theme. Other judges observed that it was

"an undeniable fact that the tendency of all international activities in

> recent times has been towards the promotion of the common welfare of the international community with a corresponding restriction of the sovereign power of individual States" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 46, joint dissenting opinion of Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo).

Though elsewhere critical of "the theory which reduces the rights of States to competences assigned and portioned by international law"[8], Judge De Visscher, for his part, observed that "[t]he Charter has created an international system", and added:

> "[I]n the interpretation of a great international constitutional instrument, like the United Nations Charter, the individualistic concepts which are generally adequate in the interpretation of ordinary treaties, do not suffice." (*International Status of South West Africa, I.C.J. Reports 1950*, p. 189, dissenting opinion.)

The Charter did not, of course, establish anything like world government; but it did organize international relations on the basis of an "international system"; and fundamental to that system was an assumption that the human species and its civilization would continue.

But, third, there have been developments working in the opposite direction, in the sense that it now, and for the first time, lies within the power of some States to destroy the entire system, and all mankind with it.

What lesson is to be drawn from these developments, the third being opposed to the first and the second?

The notions of sovereignty and independence which the *"Lotus"* Court had in mind did not evolve in a context which visualized the possibility that a single State could possess the capability of wiping out the practical existence both of itself and of all other States. The Court was dealing with a case of collision at sea and the criminal jurisdiction of States in relation thereto — scarcely an earth-shaking issue. Had its mind been directed to the possibility of the planet being destroyed by a minority of warring States, it is not likely that it would have left the position which it took without qualification. No more than this Court would have done when in 1986 it said that

> "in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1986*, p. 135, para. 269).

[8] Charles De Visscher, *Theory and Reality in Public International Law*, revised edition, trans. P. E. Corbett, 1968, p. 104.

The situation did not relate to the use of nuclear weapons; the Court's statement was directed to the right of a State to possess a level of armaments about the use of which no issue of legality had been raised. Caution needs to be exercised in extending the meaning of a judicial dictum to a field which was not in contemplation. The fact that he was dissenting does not diminish the value of Judge Badawi Pasha's reminder of problems which could arise

> "when a rule is removed from the framework in which it was formed, to another of different dimensions, to which it cannot adapt itself as easily as it did to its proper setting" (*Reparation for Injuries Suffered in the Service of the United Nations I.C.J. Reports 1949*, p. 215).

It is worth remembering, too, that, in his dissenting opinion in *"Lotus"*, Judge Finlay understood the *compromis* to present an issue not as to whether there was "a rule forbidding" the prosecution, but as to "whether the principles of international law authorize" it (*P.C.I.J., Series A, No. 10*, p. 52). In the early post-Charter period, Judge Alvarez specifically challenged the principle that States have "the right . . . to do everything which is not expressly forbidden by international law". In his view, "This principle, formerly correct, in the days of absolute sovereignty, is no longer so at the present day." (*Fisheries, I.C.J. Reports 1951*, p. 152, separate opinion.)

I do not consider now whether so general a challenge is maintainable. This is because it appears to me that there is a particular area in which *"Lotus"* is distinguishable. On what point does this limited distinction turn? It is this. Whichever way the issue in *"Lotus"* was determined, the Court's determination could be accommodated within the framework of an international society consisting of "co-existing independent communities". Not so as regards the issue whether there is a right to use nuclear weapons. Were the Court to uphold such a right, it would be upholding a right which could be used to destroy that framework and which could not therefore be accommodated within it. However extensive might be the powers available to a State, there is not any basis for supposing that the Permanent Court of International Justice considered that, in the absence of a prohibition, they included powers the exercise of which could extinguish civilization and annihilate mankind and thus destroy the framework of the international community; powers of this kind were not in issue. To the extent that a course of action could be followed by so apocalyptic a consequence, the case is distinguishable; it does not stand in the way of this Court holding that States do not have a right to embark on such a course of action unless, which is improbable, it can be shown that the action is authorized under international law.

It is the case that the formulations (and in particular the title) employed in various draft conventions appended to a number of General Assembly resolutions on the subject of nuclear weapons were cast in the terminology of prohibition. However, assuming that the correct theory is that

authorization under international law has to be shown for the use of nuclear weapons, this would not prevent States from concluding a formal prohibitory treaty; the fact that the draft conventions were directed to achieving a prohibition does not invalidate the view that authorization has to be shown.

The terminology of prohibition is also to be found in the reasoning of the Tokyo District Court in *Shimoda* v. *The State*[9]. I do not consider that much can be made of this. The Tokyo District Court, being satisfied that the dropping of the bombs was prohibited under international law, was not called upon to consider whether, if there was no prohibition, it was necessary for an authorization to be shown; the received statement of the law being, in its view, sufficient for a holding of unlawfulness, a sense of judicial economy could make it unnecessary for the Court to enquire whether the same holding could be sustained on another basis.

Can the required authorization be shown in this case? It seems not. The Court is a creature of the Charter and the Statute. If it finds, as it should, that both the Charter and the Statute posit the continued existence of civilization and of mankind, it is difficult to see how it can avoid a holding that international law does not authorize a State to embark on a course of action which could ensue in the destruction of civilization and the annihilation of mankind.

PART III. WHETHER THE COURT COULD HOLD THAT THE USE OF NUCLEAR WEAPONS IS PROHIBITED BY HUMANITARIAN LAW

I propose now to consider the question of the legality of the use of nuclear weapons from the standpoint of some of the leading principles of humanitarian law (a term now generally used) which were in force at the commencement of the nuclear age. These principles relate to the right to choose means of warfare, the unnecessary suffering principle, and the Martens Clause.

1. The Methods or Means of Warfare

This customary international law principle is restated in Article 35, paragraph 1, of Additional Protocol I of 1977 to the Geneva Conventions of 1949 as follows: "In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited." The principle has come under pressure from the continuing emergence of weapons with increasing destructive power, the tendency being to accept higher levels of destructiveness with growing powers of destruction. Its value would be further eroded if, as it is sometimes argued, all it does is to leave open the possibility that a weapon may be banned under some

[9] *The Japanese Annual of International Law*, No. 8, 1964, p. 235.

law other than that setting out the principle itself; but that argument cannot be right since, if it is, the principle would not be laying down a norm of State conduct and could not therefore be called a principle of international law. Paragraph 77 of the Court's Advisory Opinion recognizes that the principle is one of international law; it is not meaningless. Nor is it spent; its continuing existence was attested to by General Assembly resolution 2444 (XXIII), adopted unanimously on 19 December 1968. By that resolution the General Assembly affirmed

> "resolution XXVIII of the XXth International Conference of the Red Cross held at Vienna in 1965, which laid down, *inter alia*, the following principles for observance by all governmental and other authorities responsible for action in armed conflicts:
>
> *(a)* that the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;
> *(b)* that it is prohibited to launch attacks against the civilian populations as such;
> *(c)* that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible."

As is suggested by subparagraph *(a)*, the principle limiting the right to choose means of warfare subsists. Notwithstanding an impression of non-use, it is capable of operation. In what way? The principle may be interpreted as intended to exclude the right to choose some weapons. What these might be was not specified, and understandably so. Yet, if, as it seems, the principle can apply to bar the use of some weapons, it is difficult to imagine how it could fail to bar the use of nuclear weapons; difficulties which may exist in applying the rule in less obvious cases disappear as more manifest ones appear. But, of course, imagination is not enough; a juridical course of reasoning has to be shown. How?

A useful beginning is to note that what is in issue is not the existence of the principle, but its application in a particular case. Its application does not require proof of the coming into being of an *opinio juris* prohibiting the use of the particular weapon; if that were so, one would be in the strange presence of a principle which could not be applied without proof of an *opinio juris* to support each application.

But how can the principle apply in the absence of a stated criterion? If the principle can operate to prohibit the use of some means of warfare, it necessarily implies that there is a criterion on the basis of which it can be determined whether a particular means is prohibited. What can that implied criterion be? As seems to be recognized by the Court, humani-

tarian considerations are admissible in the interpretation of the law of armed conflict (see paragraphs 86 and 92 of the Court's Advisory Opinion). Drawing on those considerations, and taking an approach based on the principle of effectiveness, it is reasonable to conclude that the criterion implied by the principle in question is set by considering whether the use of the particular weapon is acceptable to the sense of the international community; it is difficult to see how there could be a right to choose a means of warfare the use of which is repugnant to the sense of the international community.

In relation to some weapons, it may be difficult to establish, with evidential completeness, what is the sense of the international community. But the use of nuclear weapons falls, as it were, at the broad end of a range of possibilities, where difficulties of that kind evaporate. Unlike the case of conventional weapons, the use of nuclear weapons can result in the annihilation of mankind and of civilization. As it has been remarked, if all the explosive devices used throughout the world since the invention of gunpowder were to detonate at the same time, they could not result in the destruction of civilization; this could happen if recourse were made to the use of nuclear weapons, and with many to spare. The principle limiting the right to choose means of warfare assumed that, whatever might be the means of warfare lawfully used, it would continue to be possible for war to be waged on a civilized basis in future. Thus, however free a State may be in its choice of means, that freedom encounters a limiting factor when the use of a particular type of weapon could ensue in the destruction of civilization.

It may be added that, in judging of the admissibility of a particular means of warfare, it is necessary, in my opinion, to consider what the means can do in the ordinary course of warfare, even if it may not do it in all circumstances. A conclusion as to what nuclear weapons can do in the ordinary course of warfare is not speculative; it is a finding of fact. In advisory proceedings, the Court can make necessary determinations of fact (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, p. 27). For the reasons given, there is no difficulty in making one in this case.

In making a finding as to what is the sense of the international community, it is of course essential for the Court to consider the views held by States, provided that, for the reasons given above, there is no slippage into an assumption that, so far as concerns the particular principle in question, it is necessary to establish an *opinio juris* supportive of the existence of a specific rule prohibiting the use of nuclear weapons.

The views of States are available. The first General Assembly resolution, which was unanimously adopted on 24 January 1946, bears the interpretation that the General Assembly considered that the use of

nuclear weapons is unacceptable to the international community; it is referred to above. Also there are the 1968 NPT and associated arrangements, dealt with more fully below. The Court may interpret these as amounting to a statement made both by the NWS and the NNWS to the effect that the actual use of nuclear weapons would be unacceptable to the international community, and that it is for this reason that efforts should be made to contain their spread under arrangements which committed all parties to work, in good faith, towards their final elimination. If the actual use of nuclear weapons is acceptable to the international community, it is difficult to perceive any credible basis for an arrangement which would limit the right to use them to some States, and more particularly if the latter could in some circumstances exercise that right against States not enjoying that exclusive right.

In the year following the conclusion of the NPT, the Institute of International Law, at its 1969 session in Edinburgh, had occasion to note that "existing international law prohibits the use of all weapons" (nuclear weapons being understood to be included) "which, by their nature, affect indiscriminately both military objectives and non-military objects, or both armed forces and civilian population". Whatever may be said of other such weapons, that view, expressed with near unanimity, is helpful not only for its high professional value, but also for its independent assessment of the unacceptability to the international community of the use of nuclear weapons. That assessment accurately reflected the basis on which the NPT arrangements had been concluded in the preceding year.

Other weapons share with nuclear weapons membership of the category of weapons of mass destruction. As mentioned above, however, it is open to the Court to take the view that the juridical criterion is not simply how destructive a weapon is, but whether its destructiveness is such as to cause the weapon to be considered by the international community to be unacceptable to it. The material before the Court (some of which was examined in Part I, Section 3, above) is sufficient to enable the Court to conclude that, in the case of nuclear weapons, the revulsion of the international community is an established fact. Thus, the legal consequences in the specific case of nuclear weapons need not be the same for other weapons of mass destruction not already banned by treaty.

In *Shimoda* v. *The State* the plaintiffs' claims were dismissed on grounds not now material; the case remains the only judicial decision, national or international, in the field. It was decided by the Tokyo District Court on 7 December 1963. Though not of course binding, it ranks as a judicial decision under Article 38, paragraph 1 *(d)*, of the Statute of the Court; it qualifies for consideration. A judicial conclusion different

from that reached by the Tokyo District Court would need to explain why the reasoning of that Court was not acceptable.

The Tokyo District Court was deliberating over the proposition (based on expert legal opinion) "that the means which give unnecessary pain in war and inhumane means are prohibited as means of injuring the enemy" [10]. The proposition reflected two grounds invoked by Japan in its Note of protest of 10 August 1945, in which it said:

> "It is a fundamental principle of international law in time of war that a belligerent has not an unlimited right in choosing the means of injuring the enemy, and should not use such weapons, projectiles, and other material as cause unnecessary pain; and these are each expressly stipulated in the annex of the Convention respecting the Laws and Customs of War on Land and articles 22 and 23 *(e)* of the Regulations respecting the Laws and Customs of War on Land." [11]

Article 22 of those Regulations concerned the right to adopt means of injuring the enemy, while Article 23 *(e)* concerned the unnecessary suffering principle.

The Tokyo District Court's reasoning dealt with both branches of the proposition before it, on an interrelated basis. It accepted that

> "international law respecting war is not formed only by humane feelings, but it has as its basis both military necessity and efficiency and humane feelings, and is formed by weighing these two factors" [12].

Consequently,

> "however great the inhumane result of a weapon may be, the use of the weapon is not prohibited by international law, if it has a great military efficiency" [13].

Nevertheless, the Tokyo District Court thought that it could

> "safely see that besides poison, poison gas and bacterium the use of the means of injuring the enemy which causes at least the same or more injury is prohibited by international law" [14].

The Tokyo District Court confined itself to the issue whether the particular use of atomic weapons at Hiroshima and Nagasaki was lawful,

[10] *The Japanese Annual of International Law*, No. 8, 1964, p. 240.
[11] *Ibid.*, p. 252.
[12] *Ibid.*, p. 240.
[13] *Ibid.*, p. 241.
[14] *Ibid.*

noticing but not deciding "an important and very difficult question", namely, "whether or not an atomic bomb having such a character and effect is a weapon which is permitted in international law as a so-called nuclear weapon . . ."[15]. Nevertheless, it is clear that in deciding the former issue, relating to the particular use, the Court's reasoning flowed from its consideration of the latter issue, relating to the legal status of such weapons. Thus, although the Tokyo District Court did not so decide, it followed from its reasoning that nuclear weapons would not be an admissible means of warfare. It is the reasoning of the Tokyo District Court that this Court is concerned with.

The material before this Court is sufficient to enable it to make a finding of fact that the actual use of nuclear weapons is not acceptable to the sense of the international community; on the basis of such a finding of fact, it would lie within its judicial mission to hold that such weapons are not admissible "means of warfare" within the meaning of the law.

2. Unnecessary Suffering

Then as to the customary international law prohibition of superfluous and unnecessary suffering. As restated in Article 35, paragraph 2, of the 1977 Additional Protocol I to the 1949 Geneva Conventions, the principle reads:

> "It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."

The case of a weapon, such as the "dum-dum" bullet[16], which is deliberately crafted so as to cause unnecessary suffering, does not exhaust the interpretation and application of the prohibition. That may be regarded as a particular instance of the working of a broader underlying idea that suffering is superfluous or unnecessary if it is materially in excess of the degree of suffering which is justified by the military advantage sought to be achieved. A mechanical or absolute test is excluded: a balance has to be struck between the degree of suffering inflicted and the military advantage in view. The greater the military advantage, the greater will be the willingness to tolerate higher levels of suffering. And, of course, the balance has to be struck by States. The Court cannot usurp their judgment; but, in this case, it has a duty to find what that judgment is. In appreciating what is the judgment of States as to where the balance is to be

[15] *The Japanese Annual of International Law*, No. 8, 1964, p. 234.

[16] "[T]he projectile known under the name of 'dum-dum' was made in the arsenal of that name near Calcutta." See *The Proceedings of the Hague Peace Conferences, The Conference of 1899*, 1920, p. 277, *per* General Sir John Ardagh.

struck, the Court may properly consider that, in striking the balance, States themselves are guided by the public conscience. The Court has correctly held that "the intrinsically humanitarian character of the legal principles in question . . . permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons . . ." (Advisory Opinion, para. 86). It is not possible to ascertain the humanitarian character of those principles without taking account of the public conscience.

It was thus open to the Court to take the view that the public conscience could consider that no conceivable military advantage could justify the degree of suffering caused by a particular type of weapon. Poison gas was, arguably, a more efficient way of deactivating the enemy in certain circumstances than other means in use during the First World War. That did not suffice to legitimize its use; the prohibition rested on an appreciation, as set out in the first preamble to the 1925 Geneva Gas Protocol, that "the use in war of asphyxiating, poisonous or other gases has been justly condemned by the general opinion of the civilized world". In effect, the use of a weapon which caused the kind of suffering that poison gas caused was simply repugnant to the public conscience, and so unacceptable to States whatever might be the military advantage sought to be achieved. That reasoning has not given birth to a comprehensive and universal prohibitory treaty provision in this case; it is nonetheless helpful in estimating the acceptability to the public conscience of the suffering that could be inflicted by the use of nuclear weapons on both combatants and civilians, on distant peoples, and on generations yet unborn.

On the material before it, the Court could reasonably find that the public conscience considers that the use of nuclear weapons causes suffering which is unacceptable whatever might be the military advantage derivable from such use. On the basis of such a finding, the Court would be entitled, in determining what in turn is the judgment of States on the point, to proceed on the basis of a presumption that the judgment of States would not differ from that made by the public conscience.

The "unnecessary suffering" principle falls within the framework of principles designed for the protection of combatants. If the use of nuclear weapons would violate the principle in relation to them, that is sufficient to establish the illegality of such use. However, is it possible that the principle, when construed in the light of developing military technology and newer methods of waging war, has now come to be regarded as capable of providing protection for civilians also?

In the "expanding" bullet phase in which the principle made its appearance in the second half of the nineteenth century, it was no doubt visualized that "unnecessary suffering" would only be inflicted on soldiers in the battlefield; the effects of the use of weapons which could then cause such suffering would not extend to civilians. But the framework of mili-

tary operations is now different: if nuclear weapons can cause unnecessary suffering to soldiers, they can obviously have the same effect on civilians within their reach. The preamble to the Treaty of Tlatelolco correctly declared that the "terrible effects [of nuclear weapons] are suffered, indiscriminately and inexorably, by military forces and civilian population alike . . .".

It may be said that the substance of the principle of unnecessary suffering operates for the benefit of civilians through the medium of other principles, such as that which prohibits indiscriminate attacks, but that the principle itself does not operate in relation to them. What, however, is the position where it is contended that an apparently indiscriminate attack on civilians is validated by recourse to the collateral damage argument? In a case in which the collateral damage principle (whatever its true scope) would justify injury to civilians, the contradictory result of confining the unnecessary suffering principle to combatants would be that such injury may be prohibited by that principle in respect of combatants but not in respect of civilians who are equally affected; thus, an act which causes injury to combatants and non-combatants equally may be unlawful in relation to the former but lawful in relation to the latter. If combatants and non-combatants are both victims of the same act, it is difficult to see why the act should be unlawful in the former case but lawful in the latter.

In *Shimoda*, the Tokyo District Court said,

> "[I]t is not too much to say that the pain brought by the atomic bombs is severer than that from poison and poison-gas, and . . . that the act of dropping such a cruel bomb is contrary to the fundamental principle of the laws of war that unnecessary pain must not be given."[17]

So, in this part of its reasoning, the Tokyo District Court relied on the "fundamental principle" of "unnecessary pain"; it did so in relation to injuries caused to civilians. Assisted by three experts who were professors of international law, as well as by a full team of advocates for the parties in a closely contested case, the Court did not seem to be aware of a view that the principle of unnecessary suffering was restricted to injuries caused to combatants. And yet that view, if correct, should have been central to a case which concerned injury to civilians.

However, even if the unnecessary suffering principle is restricted to combatants, the question remains whether the principle is breached in so

[17] *The Japanese Annual of International Law*, No. 8, 1964, pp. 241-242.

far as combatants are affected by the use of nuclear weapons. For the reasons given above, the Court could hold that it is.

3. The Martens Clause

Some States argued that the Martens Clause depends on proof of the separate existence of a rule of customary international law prohibiting the use of a particular weapon, and that there is no such prohibitory rule in the case of nuclear weapons. The proposition is attractive.

However, an initial difficulty is this. As is recognized in paragraphs 78 and 84 of the Court's Advisory Opinion, it is accepted that the Martens Clause is a rule of customary international law. That means that it has a normative character — that it lays down some norm of State conduct. It is difficult to see what norm of State conduct it lays down if all it does is to remind States of norms of conduct which exist wholly *dehors* the Clause. The argument in question would be directed not to ascertaining the field of application of an acknowledged rule, but to denying the existence of any rule. Would an argument which produces this infirmity be right?

As set out in the 1899 Hague Convention Respecting the Laws and Customs of War on Land, the Martens Clause came at the end of a preambular passage reading as follows:

> "According to the view of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, so far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.
>
> It has not, however, been found possible at present to concert regulations covering all the circumstances which arise in practice.
>
> On the other hand, the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.
>
> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

These statements support an impression that the Martens Clause was intended to fill gaps left by conventional international law and to do so in a practical way. How?

The Martens Clause bears the marks of its period; it is not easy of

interpretation. One acknowledges the distinction between usages and law[18]. However, as the word "remain" shows, the provision implied that there were already in existence certain principles of the law of nations which operated to provide practical protection to "the inhabitants and the belligerents" in the event of protection not being available under conventional texts. In view of the implications of that word, the Clause could not be confined to principles of the law of nations waiting, uncertainly, to be born in future. The reference to the principles of the law of nations derived from the mentioned sources was descriptive of the character of existing principles of the law of nations and not merely a condition of the future emergence of such principles. It may be added that, in its 1977 formulation, the relevant phrase now reads, "derived from established custom, from the principles of humanity and from the dictates of public conscience". Since "established custom" alone would suffice to identify a rule of customary international law, a cumulative reading is not probable. It should follow that "the principles of international law" (the new wording) could also be sufficiently derived "from the principles of humanity and from the dictates of public conscience"; as mentioned above, those "principles of international law" could be regarded as including principles of international law already derived "from the principles of humanity and from the dictates of public conscience".

In effect, the Martens Clause provided authority for treating the principles of humanity and the dictates of public conscience as principles of international law, leaving the precise content of the standard implied by these principles of international law to be ascertained in the light of changing conditions, inclusive of changes in the means and methods of warfare and the outlook and tolerance levels of the international community. The principles would remain constant, but their practical effect would vary from time to time: they could justify a method of warfare in one age and prohibit it in another. In this respect, M. Jean Pictet was right in emphasizing, according to Mr. Sean McBride,

> "that the Declarations in the *Hague Conventions* . . . by virtue of the de Martens Clause, imported into humanitarian law principles that went much further than the written convention; it thus gave them a dynamic dimension that was not limited by time"[19].

Nor should this be strange. Dealing with the subject of "Considerations of Humanity" as a source of law, Sir Gerald Fitzmaurice remarked that

[18] For "usages of war" maturing into rules of customary international law, see L. Oppenheim, *International Law, A Treatise*, Vol. II, 7th ed. by H. Lauterpacht, 1952, p. 226, para. 67, and p. 231, para. 69.

[19] Sean McBride, "The Legality of Weapons for Societal Destruction", in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, 1984, p. 402.

> "all the implications of this view — i.e., in exactly what circumstances and to what extent considerations of humanity give rise in *themselves* to obligations of a legal character — remain to be worked out"[20].

The reservation does not neutralize the main proposition that "considerations of humanity give rise in *themselves* to obligations of a legal character". The substance of the proposition seems present in the judgment given in 1948 in *Krupp*'s case, in which the United States Military Tribunal sitting at Nuremberg said:

> "The Preamble [of Hague Convention No. IV of 1907] is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare."[21]

A similar view of the role of considerations of humanity appears in the *Corfu Channel* case. There Judge Alvarez stated that the "characteristics of an *international delinquency* are that it is an act contrary to the sentiments of humanity" (*I.C.J. Reports 1949*, p. 45, separate opinion); and the Court itself said that Albania's

> "obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; . . ." (*I.C.J. Reports 1949*, p. 22).

Thus, Albania's obligations were "based . . . on . . . elementary considerations of humanity . . .", with the necessary implication that those considerations can themselves exert legal force. In 1986 the Court considered that "the conduct of the United States may be judged according to the fundamental general principles of humanitarian law"; and it expressed the view that certain rules stated in common Article 3 of the 1949 Geneva Conventions were "rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity' (*Corfu Channel, Merits, I.C.J. Reports 1949*, p. 22)" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, I.C.J. Reports 1986*, pp. 113-114, para. 218). Consistent with the foregoing is the earlier observation by the Naulilaa Tribunal

[20] Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. 1, 1986, p. 17, note 4, emphasis as in the original; and see *ibid.*, p. 4.

[21] *Annual Digest and Reports of Public International Law Cases*, 1948, p. 622.

that the right of reprisals "is *limited* by the experiences of mankind . . ." *[translation by the Registry]*[22].

I am not persuaded that the purpose of the Martens Clause was confined to supplying a humanitarian standard by which to interpret separately existing rules of conventional or customary international law on the subject of the conduct of hostilities; the Clause was not needed for that purpose, for considerations of humanity, which underlie humanitarian law, would in any event have supplied that service (see paragraph 86 of the Court's Advisory Opinion). It is also difficult to accept that all that the Martens Clause did was to remind States of their obligations under separately existing rules of customary international law. No doubt, the focus of the Clause in the particular form in which it was reproduced in the 1949 Geneva Conventions was on reminding States parties that denunciation of these humanitarian treaties would not relieve them of the obligations visualized by the Clause; but the Clause in its more usual form was not intended to be a mere reminder[23]. The basic function of the Clause was to put beyond challenge the existence of principles of international law which residually served, with current effect, to govern military conduct by reference to "the principles of humanity and . . . the dictates of public conscience". It was in this sense that

> "civilians and combatants (would) remain under the protection and authority of the principles of international law derived . . . from the principles of humanity and from the dictates of public conscience".

The word "remain" would be inappropriate in relation to "the principles of humanity and . . . the dictates of public conscience" unless these were conceived of as presently capable of exerting normative force to control military conduct.

Thus, the Martens Clause provided its own self-sufficient and conclusive authority for the proposition that there were already in existence principles of international law under which considerations of humanity could themselves exert legal force to govern military conduct in cases in which no relevant rule was provided by conventional law. Accordingly, it was not necessary to locate elsewhere the independent existence of such principles of international law; the source of the principles lay in the Clause itself.

This was probably how the matter was understood at the Hague Peace Conference of 1899. After Mr. Martens's famous declaration was adopted, the "senior delegate from Belgium, Mr. Beernaert, who had previously objected to the adoption of Articles 9 and 10 (1 and 2 of the new

[22] *Reports of International Arbitral Awards*, Vol. 2, p. 1026.

[23] For differences between the 1949 Martens Clause and its classical formulation, see Georges Abi-Saab, "The Specificities of Humanitarian Law", in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, 1984, p. 275.

draft), immediately announced that he could because of this declaration vote for them"[24]. The senior Belgian delegate, as were other delegates, was not satisfied with the protection guaranteed by the particular provisions of the draft[25]. Eventually, he found himself able to vote for the provisions. Why? Not because the required additional protection was available under independently existing customary international law; such protection would be available in any case. The reason he was able to vote for the provisions was because he took the view, not dissented from by other delegates, that the Martens Clause would itself be capable of exerting normative force to provide the required additional protection by appropriately controlling military behaviour.

"One is entitled to test the soundness of a principle by the consequences which would flow from its application." (*Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 220, para. 106, Judge Jessup, separate opinion.) Hence, it is useful to consider the implications of the view that the Martens Clause is not by itself relevant to the issue of legality of the use of nuclear weapons. It is clear that the use of nuclear weapons could result, even in the case of neutral countries, in destruction of the living, in sickness and forced migration of survivors, and in injury to future generations to the point of causing serious illness, deformities and death, with the possible extinction of all life. If nothing in conventional or customary international law forbids that, on the view taken by the proponents of legality of the meaning of the *"Lotus"* case, States would be legally entitled to bring about such cataclysmic consequences. It is at least conceivable that the public conscience may think otherwise. But the "dictates of public conscience" could not translate themselves into a normative prohibition unless this was possible through the Martens Clause.

It is not, I think, a question of the Court essaying to transform public opinion into law: that would lead to "government by judges", which, as Judge Gros rightly observed, "no State would easily accept" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984*, p. 385, para. 41, dissenting opinion)[26]. Existing international law, in the form of the Martens Clause, has already established the necessary legal norm. The Court does not have to find whether there is an *opinio juris*. Its task is that of evaluating a standard embodied in an existing principle by way of making a finding as to what it is that the "principles of humanity and . . . the dictates of public conscience" require of military conduct in a given situation. In the last analysis, the answer will depend

[24] *The Proceedings of the Hague Peace Conferences, The Conference of 1899*, 1920, pp. 54 and 419.

[25] See the *Krupp* case, *supra*, p. 622.

[26] But see *I.C.J. Pleadings, Northern Cameroons*, p. 352, M. Weil, "to exorcise demons, it is sometimes a good idea to call them by name", i.e. "the spectre of government by judges". *[Translation by the Registry.]*

on what are the views of States themselves; but, so far as the Martens Clause is concerned, the views of States are relevant only for their value in indicating the state of the public conscience, not for the purpose of determining whether an *opinio juris* exists as to the legality of the use of a particular weapon.

The task of determining the effect of a standard may be difficult, but it is not impossible of performance; nor is it one which a court of justice may flinch from undertaking where necessary. The law is familiar with instances in which a court has to do exactly that, namely, to apply a rule of law which embodies a standard through which the rule exerts its force in particular circumstances[27].

Some appreciation of a factual nature may be required. The standard being one which is set by the public conscience, a number of pertinent matters in the public domain may be judicially noticed. This is apart from the fact that the Court is not bound by the technical rules of evidence found in municipal systems; it employs a flexible procedure. That, of course, does not mean that it may go on a roving expedition; it must confine its attention to sources which speak with authority. Among these there is the General Assembly. Reference has already been made to its very first resolution of 24 January 1946. That resolution, unanimously adopted, may fairly be construed by the Court as expressive of the conscience of the international community as to the unacceptability of the use of nuclear weapons. So too with the Final Document adopted by consensus in 1978 by the Tenth Special Session of the General Assembly on the subject of disarmament. A number of related General Assembly resolutions preceded and followed that Final Document. In one, adopted in 1983, the General Assembly stated that it "[r]esolutely, unconditionally and for all time condemns nuclear war as being contrary to human conscience and reason . . ." (General Assembly resolution 38/75 of 15 December 1983). Though not unanimously adopted, the resolution was validly passed by the General Assembly, acting within its proper province in the field of disarmament. Whatever may be the position as regards the possible law-making effects or influence of General Assembly resolutions, the Court would be correct in giving weight to the Assembly's finding on the point of fact as to the state of "human conscience and reason" on the subject of the acceptability of the use of nuclear weapons, and more particularly in view of the fact that that finding accords with the general tendency of other material before the Court.

[27] See *I.C.J. Pleadings, South West Africa*, Vol. VIII, p. 258, argument of Mr. Gross; *Fisheries Jurisdiction, I.C.J. Reports 1974*, pp. 56-57, footnote 1, separate opinion of Judge Dillard; and Julius Stone, *Legal System and Lawyers' Reasonings*, 1964, pp. 59, 68, 263-264, 299, 305-306, 320 and 346.

The Court may look to another source of evidence of the state of the public conscience on the question of the acceptability of the use of nuclear weapons. It may interpret the NPT to mean that the public conscience, as demonstrated in the positions taken by all parties to that treaty, considers that the use of nuclear weapons would involve grave risks, and that these risks would make such use unacceptable in all circumstances. The better view, I think, is that the Court cannot correctly interpret the treaty to mean that it was agreed by all parties that those risks may be both effectively and responsibly managed by five States but not by others. Nor could it be the case that the public conscience, as manifested in the positions taken by the parties to that treaty, *now* says that, after final elimination has been achieved, nuclear weapons could not be used, while *now* also saying that they could be acceptably used until final elimination has been achieved. On a matter touching the survival of mankind, the public conscience could not at one and the same time be content to apply one standard of acceptability as of now and another as of a later time. That would involve a contradiction in its views as to the fundamental unacceptability of the weapon as a means of warfare which could destroy civilization. No basis appears for ascribing such a contradiction to the public conscience; there is not much merit in prohibiting civilization from being destroyed in the future, while at the same time accepting that it may, with impeccable legality, be destroyed now.

If the above is correct, the Martens Clause helps to meet the objection, raised by the proponents of legality, that the General Assembly's question would require the Court to speculate on a number of matters. The Court could not say in advance what would be the exact effect of any particular use of nuclear weapons. Examples of possible situations relate to proportionality, the duty to discriminate between combatants and civilians, escalation of conflict, neutrality, genocide and the environment. The Court could however find, and find as a fact, that the use of nuclear weapons involves real risks in each of these areas. It could then look to the public conscience for its view as to whether, in the light of those risks, the use of such weapons is acceptable in any circumstances; the view of the public conscience could in turn be found to be that, in the light of those risks, such use is unacceptable in all circumstances. The public conscience thus has a mediating role through which it enjoys a latitude of evaluation not available to the Court.

In the result, on the basis of what the Court finds to be the state of the public conscience, it will be able to say whether the Martens Clause operates to prohibit the use of nuclear weapons in all circumstances. On the available material, it would be open to the Court to hold that the Clause operates to impose such a prohibition.

PART IV. WHETHER A PRIOR PROHIBITORY RULE, IF IT EXISTED, WAS MODIFIED OR RESCINDED BY THE EMERGENCE OF A SUBSEQUENT RULE

1. The Position as at the Commencement of the Nuclear Age

Underlying the Court's holding in the second part of subparagraph E of paragraph 2 of the operative paragraph of its Advisory Opinion that it "cannot conclude definitively" on the issue there referred to, is a contention by some States that the Court was being invited by the General Assembly's question to speculate on possible "scenarios". If that means that the Court could not decide on the basis of conjectures, I would uphold the contention. But I would not feel able to go the further step of accepting (if this other proposition was also intended) that there are no circumstances in which the Court may properly have recourse to the use of hypotheses. It would not, I think, be correct to say, as it is sometimes said, that the interpretation and application of the law always abjures hypotheses. Within reasonable limits, a hypothesis, as in other fields of intellectual endeavour, may be essential to test the limits of a theory or to bring out the true meaning of a rule. When, in a famous statement, it was said *"hypotheses non fingo"*, that only excluded propositions going beyond actual data[28]. The actual data may themselves suggest possibilities which need to be explored if the correct inference is to be drawn from the data.

The position as it stood immediately before the commencement of the nuclear age was that, since nuclear weapons did not exist, *ex hypothesi* there was, and could have been, no rule in conventional or customary international law which prohibited the use of nuclear weapons "as such". But it cannot be a serious contention that the effects produced by the use of nuclear weapons, when they were later invented, were beyond the reach of the pre-existing law of armed conflict (see paragraphs 85-86 of the Advisory Opinion and *Shimoda, supra*, pp. 235-236); the "novelty of a weapon does not by itself convey with it a legitimate claim to a change in the existing rules of war"[29].

Thus, if, immediately before the commencement of the nuclear age, the question was asked whether effects of the kind that would be later produced by the use of nuclear weapons would constitute a breach of the law of armed conflict, the Court could well hold that the answer would inevi-

[28] "For whatever is not deduc'd from the phaenomena, is to be called an hypothesis." See Sir Isaac Newton, *The Mathematical Principles of Natural Philosophy*, Book III, Vol. II, trans. Andrew Motte, 1968, p. 392; and Derek Gjertsen, *The Newton Handbook*, 1986, p. 266.

[29] L. Oppenheim, *International Law, A Treatise*, Vol. II, 7th ed. by H. Lauterpacht, p. 469, para. 181a.

tably have been in the affirmative. If the effects so produced would have been forbidden by that law, it follows that nuclear weapons, when they later materialized, could not be used without violating that law — not, that is to say, unless that law was modified by the subsequent evolution of a law operating in the opposite direction, a point considered below.

2. The Position Subsequent to the Commencement of the Nuclear Age

A "froward retention of custom is as turbulent a thing as an innovation", says Bacon[30]. So, on the assumption that a prohibitory rule existed at the commencement of the nuclear age, it would remain to consider whether that rule was later modified or reversed by the emergence of a new rule operating in the opposite direction: would the "froward retention" of the previous prohibition of the use of nuclear weapons have been judged a "turbulent" thing?

It is necessary to have regard to the structure of the debate. The argument of some States is that there is not and never was a rule prohibitory of the use of nuclear weapons. In determining the issue so raised, a useful benchmark is the commencement of the nuclear age. The position as at that time has to be determined by reference to the law as it then stood. Subsequent developments do not form part of any process creative of any rule on the subject as at that time. If a correct finding is that, on the law as it existed at the commencement of the nuclear age, a prohibitory rule then existed, evidence of subsequent State practice cannot serve to contradict that finding by showing that, contrary to that finding, no prohibitory rule then existed. What subsequent State practice can do is to create an *opinio juris* supportive of the emergence of a new rule modifying or reversing the old rule. But it has not been suggested that, if a prohibitory rule existed at the commencement of the nuclear age, it was modified or reversed by the emergence of a later rule operating in the opposite direction. This being the case, it follows that if a prohibitory rule existed at the commencement of the nuclear age, that rule continues in force.

The same conclusion is reached even if it were in fact argued that any prior prohibitory rule was reversed by the emergence of a later rule operating in the opposite direction. The substantial and long-standing opposition within the ranks of the NNWS to the proposition that there is a right in law to use nuclear weapons would have sufficed to prevent the evolution of the *opinio juris* required to support the birth of any such new rule, and more particularly so if the earlier rule had the status of *jus cogens*. This would have been the case if the humanitarian principles on which the earlier rule was based had that status, a possibility left open by paragraph 83 of the Advisory Opinion.

[30] "Of Innovations", in J. Spedding, R. L. Ellis and D. D. Heath (eds.), *The Works of Francis Bacon*, 1890, Vol. VI, p. 433.

One last point. Argument was made that the NWS were "States whose interests are specially affected" within the meaning of the principle relating to the creation of customary international law, as enunciated by the Court in 1969 (*North Sea Continental Shelf, I.C.J. Reports 1969*, p. 43, para. 74), and that, indeed, "in the present case, a practice involving the threat or use of nuclear weapons could proceed only from States recognized as possessing the status of nuclear-weapon States" (CR 95/24, p. 3). The argument is interesting, but not persuasive. Where what is in issue is the lawfulness of the use of a weapon which could annihilate mankind and so destroy all States, the test of which States are specially affected turns not on the ownership of the weapon, but on the consequences of its use. From this point of view, all States are equally affected, for, like the people who inhabit them, they all have an equal right to exist.

For these reasons, granted the prior existence of a prohibitory rule, it was open to the Court to hold that the position taken by a considerable number of the NNWS, if not the majority, would have operated to bar the development of the *opinio juris* necessary to support the creation of a new rule rescinding the old. The old prohibitory rule would therefore have continued up to the present time.

PART V. THE DENUCLEARIZATION TREATIES AND THE NPT

Some States rely on regional denuclearization treaties and on the NPT and associated arrangements as State practice evidencing the non-existence of a prohibitory rule. Those arrangements, they argue, are only explicable on the assumption that the use of nuclear weapons was regarded by the negotiating States as lawful. They emphasize that for 50 years the NWS have been openly possessing and deploying nuclear weapons under one form or another of a policy of nuclear deterrence; that it is well known that several NNWS have been sheltering under the nuclear umbrella of a NWS; that the NWS and other States sheltering under a nuclear umbrella constitute a substantial and important part of the international community; that elements of the negative and positive security assurances given by the NWS necessarily imply recognition by the NNWS that nuclear weapons may be lawfully used; that Security Council resolution 984 (1995) expressed the Council's appreciation of the statements through which the NWS gave those assurances; and that no NNWS protested against those assurances or with the appreciation thus expressed. How should these matters be evaluated?

The position as at the beginning of the nuclear age was either that there was no rule prohibiting States from producing effects of the kind which could later be produced by nuclear weapons, or that there was such a prohibitory rule. If there was no such prohibitory rule, it is not necessary to consider in detail whether subsequent State practice introduced one, for the known position of the NWS and those of the NNWS sheltering under a nuclear umbrella, representing a substantial and important part of the international community, would have prevented the crystallization of the *opinio juris* required to create such a rule: the non-existence of a prohibitory rule would continue to this day, and the case of the proponents of legality succeeds.

On the opposite view that there was a prior prohibitory rule, there is equally no need to consider subsequent State practice in any detail. As has been argued, if, on the basis of the law as it stood at the commencement of the nuclear age, it is found that there then existed a prohibitory rule, that finding as to what was the then state of the law cannot be contradicted by later developments. Later developments may only be considered for the purpose of determining whether they represented a State practice which brought into being a new rule modifying or rescinding the prior prohibitory rule. But then the known position of the majority of the NNWS, also representing a substantial and important part of the international community, would have barred the development of the *opinio juris* required for the creation of a modifying or rescinding rule: the prior prohibitory rule would thus continue to this day, and the case of the proponents of illegality succeeds.

On either view, it is accordingly not necessary to consider later developments in any detail. As there has been much debate over regional denuclearization treaties and the NPT, I shall nevertheless say something about these. In my opinion, the Court could hold that they do not show that the proponents of illegality accepted the legality of the use of nuclear weapons.

* *

First, as to the regional denuclearization treaties. It will be convenient to deal with one only, namely, the Treaty of Tlatelolco of 1967. The preamble to this treaty stated that "the proliferation of nuclear weapons" seemed "inevitable unless States, in the exercise of their sovereign rights, impose restrictions on themselves in order to prevent it". The treaty being concerned with both possession and use, there is force in the argument that that statement recognized that there was a sovereign right in law to use such weapons. That inference does not however necessarily follow when regard is had to the fact that the preamble also said that the use of such a weapon could result in "an attack on the integrity of the human species and ultimately may even render the whole earth uninhabitable".

The better interpretation of the treaty is that it was, objectively, directed to the establishment of a régime to ensure that Latin America would be nuclear-free, given that nuclear weapons in fact existed and might in fact be used; the treaty did not rest on an assumption that there existed a right in law to use weapons which could "render the whole earth uninhabitable". Reservations or declarations made by the NWS on signing or ratifying Protocol II to the treaty did rest on an assumption that there was a right of use; but it is risky to infer that, by remaining silent, States parties to the treaty acquiesced in that assumption in the light of the fact that, both before and after the conclusion of the treaty, many of them were on record as affirming through the General Assembly and otherwise that the use of such weapons would be a crime.

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Next as to the NPT. This calls for fuller discussion; the arguments were more intense. Some States, or one or another of them, argued that a right to use nuclear weapons formed part of the inherent right of self-defence; that the inherent right of self-defence was inalienable; that it had a fundamental and overriding character; that it was the most fundamental right of all; but that it could be restricted by express treaty provisions. It followed that some States could retain their right to use nuclear weapons, while others could competently agree to forego it. The argument adds that acceptance of a right to possess such weapons under the NPT implies acknowledgment of a right of use.

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These arguments are weighty; they demand careful consideration. A difficulty lies, however, in the characterization of a right to use nuclear weapons as being a part of the right of self-defence. If the characterization is correct, it is not easy to appreciate how the proponents of illegality, which were parties to the NPT, would have intended voluntarily to forego an important part of their inherent right of self-defence whilst agreeing that the right would be retained in full by the NWS. The third preambular paragraph of the NPT showed that the treaty was concluded in

> "conformity with resolutions of the United Nations General Assembly calling for the conclusion of an agreement on the prevention of wider dissemination of nuclear weapons".

Those resolutions would include General Assembly resolution 2028 (XX) of 19 November 1965, paragraph 2 *(b)* of which laid it down that a non-proliferation treaty "should embody an acceptable balance of mutual responsibilities and obligations of the nuclear and non-nuclear Powers". It is hard to see how that prescription could find an acceptable reflection in an asymmetrical enjoyment of so fundamental a right as the inherent right of self-defence.

There would be difficulty also in following how it is that what is inalienable for some States is alienable for others. It is an attribute of sovereignty that a State may by agreement restrain the exercise of its competence; yet how far it may do so without losing its status as a State is another question[31]. Since the right of self-defence is "inherent" in a State, it is not possible to conceive of statehood which lacks that characteristic. See the illustration in General Assembly resolution 49/10 of 3 November 1994,

> "[r]eaffirming . . . that as the Republic of Bosnia and Herzegovina is a sovereign, independent State and a Member of the United Nations, it is entitled to all rights provided for in the Charter of the United Nations, including the right to self-defence under Article 51 thereof".

Arrangements for the exercise of the right of self-defence are a different matter. But, so far as the right itself is concerned, if the right includes a right to use nuclear weapons, the latter is not a small part of the former. It was no doubt for this reason that, in the parallel case brought by the World Health Organization, it was argued that to "deny the victim of aggression the right to use the only weapons which might save it would be to make a mockery of the inherent right of self-defence"[32]. The argument is understandable, granted the premise that the right to use nuclear weapons is part of the inherent right of self-defence. The question is whether the premise is correct. For, if it is correct, then, by the same token, there is difficulty in seeing how the NNWS which were parties to the NPT could have wished to part with so crucially important a part of their inherent right of self-defence.

It is possible to see the NNWS agreeing that, because of the dangers represented by nuclear weapons, they would not acquire such weapons, on the basis that the NWS, which already had such weapons, would take steps to eliminate them. It is less easy to see how the NNWS would, on the ground of such dangers, agree to deprive themselves of the opportu-

[31] See argument of M. Yasseen in *I.C.J. Pleadings, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, pp. 298-299.

[32] Statement of the Government of the United Kingdom (para. 24), in the case concerning *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Request for Advisory Opinion).

nity of using such weapons in exercise of their inherent right of self-defence whilst nevertheless agreeing that such weapons, notwithstanding the same dangers, could be legally used by the NWS in exercise of their own inherent right of self-defence and used in some circumstances against the NNWS. The Court could not uphold so unbalanced a view of the scheme of the NPT without endorsing the controversial thesis that its real thrust was not so much to prevent the spread of a dangerous weapon, as to ensure that enjoyment of its use was limited to a minority of States. The difference in perceived objectives is material to the correctness of the interpretation to be placed on the treaty.

A further area of nuclear weapon discrepancy could arise as between non-NPT States and the NNWS which are parties to the NPT. On the argument for legality, the former would have a right in law to use nuclear weapons in self-defence, whereas the latter would have foregone the exercise of that right even in relation to the former. For, since a NNWS, which is a party to the NPT, cannot possess nuclear weapons without breaching the treaty, it follows that it cannot threaten or use nuclear weapons even in relation to non-parties to the treaty, although the latter, not being bound by the treaty, may have gone on to develop, acquire and possess such weapons. In the result, a NNWS which is a party to the NPT would be prevented by the treaty from exercising the full measure of its inherent right of self-defence under Article 51 of the Charter, notwithstanding that the non-party to the treaty would be entitled to use such weapons in exercise of its own inherent right of self-defence under that Article.

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These difficulties suggest that it is necessary to distinguish between the inherent right of self-defence and the means by which the right is exercisable. A State using force in self-defence is acting legally under the *jus ad bellum*. But, whether a State is acting legally or illegally under the *jus ad bellum*, if it is in fact using force it must always do so in the manner prescribed by the *jus in bello*. It is the *jus in bello* which lays down whether or not a particular means of warfare is permissible. Thus, where the use of a particular weapon is proscribed by the *jus in bello*, the denial of the use of that weapon is not a denial of the right of self-defence of the attacked State: the inherent right of self-defence spoken of in Article 51 of the Charter simply does not comprehend the use of the weapon in

question. The legal answer to the possible plight of the victim State is given by the principle, as enunciated by the United States Military Tribunal at Nuremberg on 19 February 1948, that "the rules of international law must be followed even if it results in the loss of a battle or even a war. Expediency or necessity cannot warrant their violation . . ."[33].

A reasonable view is that the proponents of illegality which were parties to the NPT did not consider that they were contracting away an important part of their inherent right of self-defence, but that they acted on the view that a State's inherent right of self-defence did not include a right to use nuclear weapons. If they considered that a right to use nuclear weapons was an integral part of so fundamental a right as the inherent right of self-defence, it is difficult to see why they should have intended to agree that such weapons could be used only by some, and not by all. On the other hand, if they acted on the basis that a right to use such weapons was not part of the inherent right of self-defence, this governs, or at any rate qualifies and explains, the NPT arrangements, inclusive of the 1995 extension, the positive and negative assurances, and the Security Council statements set out in its resolution 984 (1995). As was pointed out by Solomon Islands, all of these arrangements formed part of a declared process for eliminating nuclear weapons; it is not persuasive to interpret them as implying acceptance by the NNWS of the legality of the use of such weapons. Answering an argument that, through the NPT, the "nuclear-weapon States were being given a legal basis for the maintenance of their nuclear arsenals", New Zealand submitted, correctly in my view, that

> "the very raison d'être of the Treaty . . . is based on a recognition that nuclear weapons are different. The judgment made was that, in view of the uniquely destructive potential of such weapons, and human nature being what it is, the only option for humanity was to rid itself of these weapons entirely. The threat that the weapons represent hangs over the security of the whole international community. They also constitute a threat, and a challenge, to the international legal order." (CR 95/28, p. 36.)

In the light of the foregoing, the Court could read the NPT this way. As stated in the preamble, all parties, both the NWS and the NNWS,

[33] The *List* case, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Vol. XI, 1950, p. 1272; and see, *ibid.*, pp. 1236 and 1254. See also the remarks of the United States Military Tribunal at Nuremberg in *Krupp*'s case, *Annual Digest and Reports of Public International Law Cases*, 1948, p. 628.

recognized "the devastation that would be visited upon all mankind by a nuclear war . . .". The spread of nuclear weapons should therefore be halted, and States which, by their own declarations, already possessed them should eliminate them. As this would take time, the NWS would of necessity continue in possession until final elimination. This was recognition of a fact which could not suddenly be wished away, and tolerance of that fact transitionally; it was not acquiescence in a right of use. Such an acknowledgment would have been at variance with the repeated affirmation by many NNWS, through General Assembly resolutions and otherwise, and made both before and after the conclusion of the NPT, that the use of such weapons would be contrary to the Charter, to the rules of international law and the laws of humanity, and a crime against mankind and civilization.

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It remains to consider whether this conclusion is impaired by the security assurances given by the NWS to the NNWS. In contrast with the reservations made by four of the five NWS in their negative assurances of a right to use nuclear weapons against the NNWS in certain circumstances, the positive assurances did not include a commitment to use nuclear weapons in defence of a NNWS attacked with nuclear weapons and therefore did not imply a claim to a right to use nuclear weapons. A claim to a right to use nuclear weapons is however clearly implied in the negative assurances; that need not be discussed. The question is whether the claim to such a right has been accepted by the international community.

It will be convenient to take, first, the reaction of the Security Council. Paragraph 1 of its resolution 984 (1995), adopted unanimously, recorded that the Council

> "[t]akes note with appreciation of the statements made by each of the nuclear-weapon States (S/1995/261, S/1995/262, S/1995/263, S/1995/264, S/1995/265), 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".

It is argued that the "appreciation" with which the Security Council noted the statements made by each of the NWS implied an acknowledgment by it of a right in law to use nuclear weapons, and more particularly in the light of a reaffirmation in paragraph 9 of the resolution of the inherent right of self-defence under Article 51 of the Charter. The argu-

ment, which is a forceful one, makes it necessary to consider what it was that the Council's "appreciation" referred to.

Viewed in context and in particular in the light of the preamble to the resolution, the focus of paragraph 1 of the resolution was directed to the objective fact that negative security assurances had been given in the cited statements; the paragraph referred to the statements of the NWS as statements "in which they give security assurances against the use of nuclear weapons to non-nuclear-weapon States . . .". The resolution did not refer to the statements as statements in which the NWS "reserved a right to use nuclear weapons against the NNWS in certain circumstances", as it could have done had the Council intended to indicate that its expression of appreciation extended thus far. The Council could not say so in respect of all five of the NWS because one of them, namely, China, did not reserve such a right (see paragraph 59 *(c)* of the Court's Advisory Opinion). On the contrary, in paragraph 2 of its statement, China said, "China undertakes not to use or threaten to use nuclear weapons against non-nuclear-weapon States or nuclear weapon-free zones at any time or under any circumstances"; this was the opposite of the reservation of such a right. It may be argued that the statement nonetheless implied the existence of a right to use nuclear weapons. The question, however, is how was the Security Council's expression of "appreciation" to be understood. The Court could not reasonably say that the Council's "appreciation" was to be understood as extending to the reservations made by four of the five NWS of a right to use nuclear weapons against the NNWS without also saying that it extended to China's undertaking, to the opposite effect, not to use nuclear weapons against the NNWS "at any time or under any circumstances".

In the result, the proponents of illegality, reading the text of the resolution, would not have thought that the "appreciation" expressed by the Security Council extended to those aspects of the statements in which four of the five NWS reserved a right to use nuclear weapons against the NNWS in certain circumstances, which included a situation in which there was no prior use of nuclear weapons against the NWS reserving and exercising such a right. On its part, the Court could not understand the "appreciation" expressed by the Security Council as intended to affirm the existence of such a right without also understanding it to be affirming that, in the view of the Security Council, there were two groups of States legally differentiated in the important sense that one group was entitled in law to use nuclear weapons against the other in certain circumstances, without the latter being correspondingly entitled in law to use such weapons against the former in any circumstances. The Court

would need to pause before imputing such a view to the Security Council. In circumstances in which it was known that the existence of a right to use nuclear weapons was in contest, the "appreciation" expressed by the Security Council in its resolution can reasonably be understood as directed to the fact that the NWS had given "security assurances against the use of nuclear weapons to non-nuclear-weapon States . . .", as stated in the resolution itself, without being intended to give recognition to the existence of a legal right of use by indirectly passing on the debated issue as to whether there was such a right.

An argument of some strength is based on the fact that, in paragraph 9 of its resolution, the Security Council reaffirmed

> "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".

Although this statement did not refer to a right to use nuclear weapons, the argument is that, in the context in which it was made, it implied that, in the view of the Security Council, the inherent right of self-defence included a right to use nuclear weapons. It would not appear, however, that the correctness of any such implication of paragraph 9 of the resolution was accepted by those of the NNWS who spoke before the Security Council. What Malaysia said was that that "paragraph sidesteps the question of the legality of the use of nuclear weapons because it justifies the use or threat of nuclear weapons in cases of 'self-defence'" (S/PV.3514, 11 April 1995, p. 15). Thus, however much paragraph 9 may be understood as seeking to justify the threat or use of nuclear weapons in cases of self-defence, in the view of Malaysia the paragraph did not succeed in doing so but only side-stepped the question. Egypt associated itself with Indonesia as "speaking . . . on behalf of the non-aligned States"; the statement made by Indonesia does not suggest an intention to abandon the known position of that group of States on the subject of legality. India specifically recalled that at

> "the forty-ninth session of the General Assembly, the international community decided to seek an advisory opinion from the International Court of Justice on whether the threat or use of nuclear weapons is permissible under international law in any circumstances" (*ibid.*, p. 6).

India added:

> "One would hope that by offering a draft resolution of this kind, the nuclear-weapon States are not telling the non-members of the NPT that they, the nuclear-weapon States, are free to use nuclear

> weapons against them, because this would have implications which are too frightening to contemplate." (S/PV.3514, p. 6.)

Hence, even if the resolution of the Security Council contained any implication that the Council considered the use of nuclear weapons to be lawful, the argument that the proponents of illegality accepted the correctness of that implication is not well founded.

Next, the matter may be looked at from the more general standpoint of the conduct of the proponents of illegality in relation to the security assurances. Did that conduct manifest acquiescence in the claim by the NWS to the existence of a right in law to use of nuclear weapons? In particular, was such an acquiescence demonstrated by the fact that the NNWS thought it necessary to obtain such assurances?

A reasonable appreciation of the position seems to be the following. The continuing, if temporary, possession of nuclear weapons by the NWS obviously presented risks to the NNWS. The sensible thing would be to obtain assurances against any threat or use. Malaysia and Zimbabwe submitted that, in like manner, non-aggression pacts "were the common currency of international relations well after the illegality of aggression had entered the body of customary law" (joint answers by Malaysia and Zimbabwe to questions asked by Vice-President Schwebel on 3 November 1995, response to the second question). Realities may need to be dealt with in a practical way; but not every arrangement designed to deal with them accepts their legality. Especially is this so in international relations. When regard is also had to the power of the weapons concerned, the Court could find that there is not any contradiction between the position taken by the NNWS in the General Assembly that the use of nuclear weapons is a crime, and the assurances which they accepted from States which nevertheless possessed such weapons that these would not be used against them. It is useful to remember Judge Alvarez's observation that "[r]eason, pushed to extremes, may easily result in absurdity" (*Anglo-Iranian Oil Co., Preliminary Objection, I.C.J. Reports 1952*, p. 126, dissenting opinion). The practice of putting aside a legal problem in order to make progress towards a desirable goal is a familiar one in international relations. My understanding of the position taken by some of the NWS is that it was on this basis that they participated in certain negotiations in the field of humanitarian law.

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It is also important to have in mind that bare proof of acts or omissions allegedly constituting State practice does not remove the need to interpret such acts or omissions. The fact that States may feel that realities leave them no choice but to do what they do does not suffice to

exclude what they do from being classified as part of State practice, provided, however, that what they do is done in the belief that they were acting out of a sense of legal obligation. "The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*." (*North Sea Continental Shelf, I.C.J. Reports 1969*, p. 44.) Speaking of actions which could evidence an *opinio necessitatis juris*, Lauterpacht excepts conduct which "was not accompanied by any such intention"[34]. So intention is material. Whether it exists is to be determined not on a microscopic inspection of disjointed features of a large and shifting picture, but by looking at the picture as a whole. When the whole of the picture is regarded in the circumstances of this case, the Court could find that the matters relied on to evidence an acknowledgment by the proponents of illegality that there is a right in law to use nuclear weapons fall short of demonstrating an intention to make that acknowledgment.

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I should add that I am not persuaded that Security Council resolution 255 (1968) of 19 June 1968, to which reference is made in paragraphs 59 and 61 of the Court's Advisory Opinion, takes the matter any further. The question remains whether the resolution was dealing with the objective fact that nuclear weapons existed and could in fact be used, or whether it was affirming, directly or indirectly, the existence of a legal right of use.

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To sum up, putting at the highest all of the matters relied on by the proponents of legality, the Court could find that those matters do not suffice to cancel out the continuing assertion of the proponents of illegality that the threat or use of nuclear weapons is illegal. It would follow that the basic difficulties noticed above would remain. If, as I consider, a correct finding is that, on the law as it stood at the commencement of the nuclear age, a prohibitory rule then existed, that finding, as to what was the then law, cannot be contradicted by subsequent inconsistent State practice; the most that subsequent inconsistent State practice could do would be to generate a new rule rescinding or modifying the old rule. But the position taken by most of the NNWS would make it impossible to establish that the necessary *opinio juris* emerged to support the creation of a new rule having the effect of reversing the old, and more particularly if the latter had the status of *jus cogens*. The prior prohibitory rule would thus continue to the present time.

[34] Sir Hersch Lauterpacht, *The Development of International Law by the International Court*, 1958, p. 380.

PART VI. CONCLUSION

A holding that there is a right in law to use nuclear weapons would bear a difficult relationship to the Court's finding that the

> "destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet." (Advisory Opinion, para. 35.)

The affirmation of the existence of a right the exercise of which could yield such grim results would come as near as might be to a literal application of the maxim *fiat justitia ruat coelum*. Judge Carneiro's view was "that no judge nowadays can blindly follow the obsolete rule *fiat justitia, pereat mundus*" (*Minquiers and Ecrehos, I.C.J. Reports 1953*, p. 109, separate opinion). It would, at any rate, seem curious that a World Court should consider itself compelled by the law to reach the conclusion that a State has the legal right, even in limited circumstances, to put the planet to death. May it be that the maxim more properly attracted by its high mission is *fiat justitia ne pereat mundus*?

The danger of the maxim last referred to is that it could seduce the Court into acting as a legislator. In the course of the proceedings, the Court was rightly reminded that it cannot do that. To use the words of the United States Military Tribunal in the *List* case, "it is not our province to write international law as we would have it; we must apply it as we find it"[35]. And thus, as Judge Lauterpacht remarked, "Reluctance to encroach upon the province of the legislature is a proper manifestation of judicial caution." However, as he added,

> "If exaggerated, it may amount to unwillingness to fulfil a task which is within the orbit of the functions of the Court as defined by its Statute." (*Admissibility of Hearings of Petitioners by the Committee on South West Africa, I.C.J. Reports 1956*, p. 57, separate opinion.)

The danger of legislating arises not only where a court essays to make law where there is none, but also where it fails to apply such law as exists; the failure may well be regarded as amounting to judicial legislation directed to repealing the existing law.

International law does indeed concern relations between sovereign States. However, as it has been remarked, sovereignty does not mean that those relations are between billiard balls which collide but do not co-operate. There is at work a process of cohesion-building. It is not, and possibly never will be, sufficiently advanced to attract the full force of Cicero's observation that "the solidity of a State is very largely bound up

[35] *List* case, *supra*, footnote 33, p. 1249.

with its judicial decisions"[36]. Nevertheless, the broad import of the statement is not altogether amiss: the role of the Court need not be overestimated; neither should its responsibility be misunderstood. There is disciplined room for recalling the obligations of international lawyers. As it was put by Jenks, "We are not dealing with the routine of the established certainties of life but must frequently come to grips with the great unsettled issues on which the future of the world depends."[37] The case at bar is the supreme illustration of this truth.

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To recall what was said at the beginning of this opinion, the great unsettled issue on which the future of the world depends is how to reconcile the imperative need of a State to defend itself with the no less imperative need to ensure that, in doing so, it does not imperil the survival of the human species. Humanitarian law, it is said, must be read as being subject to an exception which allows a State to use nuclear weapons in self-defence when its survival is at stake, that is to say, even if such use would otherwise breach that law, and this for the reason that no system of law obliges those subject to it to commit suicide. That is the argument which underlies the second part of subparagraph E of paragraph 2 of the operative paragraph of the Court's Advisory Opinion.

The implication of that part of the Court's holding is that, in the view of the Court, it is possible that the use of nuclear weapons could be lawful "in an extreme circumstance of self-defence, in which the very survival of a State would be at stake", and hence even if humanitarian law would otherwise be violated. What the Court so sought to leave on the basis of a possibility takes on a firmer aspect in the light of the *"Lotus"* case, as generally understood. In saying that it cannot definitively decide, the Court is saying that it cannot definitively say whether or not a prohibitory rule exists. If the Court is in a position in which it cannot definitively say whether or not a prohibitory rule exists, the argument can be made that, on the basis of that case, the presumption is in favour of the right of States to act unrestrained by any such rule. Accordingly, the meaning of the Court's position would be that States have a right in law to use nuclear weapons. If this was not the intended result, the Court's holding was not well conceived.

Thus, however gross or excessive the suffering, the presence of the stated circumstances could create an exception to the application of

[36] *Cicero, Selected Works*, trans. Michael Grant, 1960, p. 36.
[37] C. W. Jenks, *The Common Law of Mankind*, 1958, p. 416.

humanitarian law, as indeed is visualized by the word "generally" in the first part of that subparagraph of the Court's holding. A law may, of course, provide for exceptions to its application. At the moment, however, there is nothing to suggest that humanitarian law provides for an exception to accommodate the circumstances visualized by the Court. It seems to me that to take the position that humanitarian law can be set aside in the stated circumstances would sit oddly with the repeated and correct submissions on the part of both sides to the argument that the Court should apply the law and not make new law.

One further point. Despite variations in formulation and references to the concept of "vital security interests", an "extreme circumstance of self-defence, in which the very survival of a State would be at stake", as defined by the Court, is the main circumstance in which the proponents of legality advance a claim to a right to use nuclear weapons. This is so for the reason that, assuming that the use of nuclear weapons is lawful, the nature of the weapons, combined with the limitations imposed by the requirements of necessity and proportionality which condition the exercise of the right of self-defence, will serve to confine their lawful use to that "extreme circumstance". It follows that to hold that humanitarian law does not apply to the use of nuclear weapons in the main circumstance in which a claim to a right of use is advanced is to uphold the substance of the thesis that humanitarian law does not apply at all to the use of nuclear weapons. That view has long been discarded; as the Court itself recalls, the NWS themselves do not advocate it. I am not persuaded that that disfavoured thesis can be brought back through an exception based on self-defence.

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And thus I return to the real meaning of the General Assembly's question. The essence of the question is whether the exercise of the right of self-defence can be taken to the point of endangering the survival of mankind. To this the Court responds 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" (Advisory Opinion, para. 105 (2) E).

That is the material holding on which this opinion hinges. In so far as that holding suggests that there is a deficiency in the law, I do not think there is; in so far as it suggests that the facts are not sufficient to attract

an application of the law, I am not able to agree. In my opinion, there was a sufficient legal and factual basis on which the Court could have proceeded to answer the General Assembly's question — one way or another. And hence my respectful dissent from its conclusion that it cannot.

(Signed) Mohamed SHAHABUDDEEN.