Nuclear weapons: a weighty matter for the International Court of Justice

JURA NON NOVIT CURIA?

by Luigi Condorelli

1. It is easy to heap scorn on the Advisory Opinion handed down by the International Court of Justice on 8 July 1996 on the legality of the threat or use of nuclear weapons. No great cerebral effort is required; one need only choose any of the numerous and often harsh criticisms to be found in the declarations and the separate or dissenting opinions that all fourteen judges present took care to formulate, whether they agreed with the whole of the decision or voted against any of its paragraphs.

Indeed, one may well feel bemused when reading the views expressed by the judges as to the merits of the question asked by the General Assembly, and when one tries to relate those views to the title — declaration, separate opinion or dissenting opinion — chosen by each judge for his or her document and to the way the voting went. The Advisory Opinion is full of surprises, particularly as regards the critical paragraph of the decision (para. 2E, clause 2), in which the Court states that it is unable to say 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". For the purposes of this article it should be said at once that although those words indisputably

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lend themselves to various interpretations, at least one thing is certain, namely that by a tiny majority the Court did indeed refuse to reject the nuclear powers' argument that in such circumstances the use of nuclear weapons would not be prohibited by law.

The fact is that any attempt to understand for exactly what reasons the judges who voted for the paragraph in question did so leads to the astonishing discovery that those reasons are not only disparate, but actually contradict each other. Of the seven judges who formed the majority on this point thanks to the President's casting vote (Bedjaoui, Shi, Vereshchetin, Fleischhauer, Herczegh, Ferrari Bravo and Ranjeva), the three last-named more or less disapprove of that refusal, and put their opposition — whether clear or qualified — on record either in a Declaration (Herczegh,[1] Ferrari Bravo[2]) or in a Separate Opinion (Ranjeva[3]). Of the judges who voted against, however, three (Schwebel, Guillaume and Higgins), plus one (Oda[4]), are basically in favour of the implication arising from the position adopted by the Court, that is, that there may be extreme circumstances in which the use of nuclear weapons can certainly not be said to be outlawed. Nevertheless, three of the four (Schwebel, Higgins and Oda) express their substantial agreement in Dissenting Opinions which, incidentally, are strongly critical, and the fourth (Guillaume) does so in a Separate Opinion in which he blames the Court only for failing to say explicitly what it admitted implicitly. The Dissenting Opinions of the three remaining judges who voted against

[1] "The fundamental principles of international humanitarian law (...) categorically and unequivocally prohibit the use of weapons of mass destruction and, among these, nuclear weapons" (ICRC translation). See para. 2 of Judge Herczegh's Declaration.

[2] Judge Ferrari Bravo's position is in fact extremely difficult to classify. First of all he concludes: "I think that there is not as yet any precise and specific rule that prohibits atomic weapons and takes into account all the consequences of such a prohibition". That opinion seems essentially in agreement with the vote cast. But he goes on to say that the events of the Cold War "merely prevented the *implementation* of the ban (...) whereas the ban itself, the ban pure and simple, so to speak, still stands and is still in effect ...". (Declaration, pp. 3-4: ICRC translation.) But if the ban, pure and simple or otherwise, exists, it is hard to see why the use of the weapon covered by it should not also be called ("purely and simply" no doubt) illegal.

[3] In the first place Judge Ranjeva stresses that "... there can be no doubt as to the validity of the principle of unlawfulness in the law of armed conflict", and a little further on gives the reasons that "... in my view make the exception of 'extreme self-defence' baseless both in logic and in law". (Declaration, pp. 6-7: ICRC translation.)

[4] Judge Oda was alone in affirming that the Court should not have answered the question posed by the General Assembly. His Dissenting Opinion, however, clearly indicates his position on the issue.

(Shahabuddeen, Weeramantry and Koroma) show clearly that they so voted for diametrically opposite reasons, namely their firm conviction that the threat or use of nuclear weapons is always prohibited. As already seen, that conviction does not appear to be poles apart from the view expressed in the written statements (but not the votes) of three of the judges who voted with the President.

In short, it is often quite hard to understand why each judge voted as he or she did, or why — in answer to questions which were sometimes strangely split up or coupled together — they found themselves voting in the same way as colleagues holding views contrary to their own. This is ample evidence of the Court's difficulties in handling the problem — a legal one, certainly, but above all a highly political one, undeniably and by far the most daunting of modern times. Faced with two utterly irreconcilable positions, each upheld by such influential sectors of the international community, the Court must certainly have realized that it would cost it dear to endorse either one of them. It therefore decided to seek a compromise whereby it could escape from its dilemma without fully committing itself, and took refuge in a sort of *non liquet* — the confession (a baffling one, coming from a judge) that as regards nuclear weapons the Court did not feel able to say exactly where to draw the line between what was lawful and what was not. In other words, *jura non novit curia*![5] But closer examination shows that this is not a compromise at all, and that the *non liquet* is only apparent.

The apparent compromise was as follows: having been asked to endorse one of two conflicting arguments, the first being that the threat

[5] It should be pointed out that, as will be seen below, the Court gives as reasons for its uncertainty first the insufficiency of the elements of fact made known to it, and secondly what it calls (as opposed to the "elements of fact at its disposal"), "the present state of international law viewed as a whole" (para. 97 of the Opinion). In other words, the Court does not take cover solely behind the inadequacy of the factual data placed before it (paras. 94 and 95). The Court also indicates very clearly that it cannot come to a conclusion because the legal data pertinent to the issue appear to be fundamentally ambiguous and contradictory (paras. 95 and 96). It is in this latter connection that one can well ask what has become of the principle *jura novit curia*, translated by the Court itself as follows: "... the law lies within the judicial knowledge of the Court" (*Fisheries Jurisdiction Case*, Judgment of 24 July 1974, ICJ Reports, 1974, p. 9, para. 17). It is indeed undeniable that the Court "... states the existing law and does not legislate" (as the Advisory Opinion under discussion stresses in para. 18), given that "its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable" (*ibid.*). But if this is "its normal judicial function", and if it must be pursued according to the principle of *jura novit curia*, it is surely nothing less than an act of abdication for the Court to confess that it is not able to say what legal regime applies to a given activity, what is lawful and what is not, what is allowable and what is prohibited.

or use of nuclear weapons is unlawful in all circumstances, and the second that it could be permitted in certain exceptional circumstances, the Court did not accept either, alleging that the state of the law and of the facts did not allow it to decide which thesis was valid and which was invalid. Clever, no doubt, but very disappointing and surprising. A judge is after all expected to be able to "state the law"! But is it really a reply which fails to say whether either party is right or wrong? Did the Court really distance itself equally from both parties, leaving everyone equally dissatisfied? Surely and obviously not!

In my view, the mere fact that, for whatever reason, the Court did not decide that nuclear weapons are always forbidden implies that those who held them to be illegal have been totally defeated. They did not get what they wanted, that is, a ruling by the Court that the nuclear powers are not in any circumstances entitled to use the weapon they possess. And vice versa: the very fact that the Court did not rule that the threat or use of nuclear weapons is prohibited in all circumstances means that those who hold it to be legal — mainly the nuclear powers — in effect triumphed. Their dearest wish (that their policy of nuclear deterrence should not be labelled *hic* et *nunc* illegal) was granted to the full.

The same applies to the *non liquet.* Anyone who believes that the Court did not really answer the question put to it is deceived by appearances. True, the words "... the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful ..." leave the question unanswered, but only in so far as it is phrased strictly in terms of lawfulness (or, in the words of the General Assembly, in terms of what is "permitted").[6] On the other hand, those words certainly do answer — in the negative — a question phrased as follows: "Can the Court affirm that the threat or use of nuclear weapons is prohibited in all circumstances?"[7] Indeed, interna-

[6] General Assembly resolution 49/75 K of 15 December 1994 posed the question in the following terms: "Is the threat or use of nuclear weapons in any circumstance *permitted* under international law?" (emphasis added).

[7] In the light of these remarks and in view of the (exceptional) fact that all fourteen judges explained their personal views, I cannot resist making a guess — pure speculation based on an interpretation of each judge's opinion — as to what the result might have been if the following single question had been put to the vote: "Is the threat or use of nuclear weapons always prohibited, or might it not be prohibited in an extreme circumstance of self-defence in which the very survival of the State would be at stake?" According to my calculations, there would probably have been five votes in favour of the absolute prohibition of such weapons (Ranjeva, Herczegh, Shahabuddeen, Weeramantry and Koroma), or perhaps six (Ferrari Bravo), and eight votes for their "conditional" prohibition (Bedjaoui, Shi, Fleischhauer, Vereshchetin, Schwebel, Oda, Guillaume and Higgins), or perhaps nine (Ferrari Bravo).

tional public opinion has not been taken in; it is common knowledge that the Advisory Opinion delighted the nuclear powers and bitterly disappointed[8] those in favour of illegality. In such circumstances, looking beyond the appearances, is it honestly possible to talk of a *non liquet*?

2. I must say that the most impressive and most crucial of the innumerable criticisms addressed by individual judges to the Court (in regard, of course, to what it *really* decided) would seem to be one of those put forward by Judge Shahabuddeen. He expresses surprise that the Court, although recognizing that the destructive power of nuclear weapons cannot be contained in either space or time, and that they have the potential to destroy all civilization and the entire ecosystem of the planet (para. 35 of the Opinion), gives the key role in its reasoning to "the fundamental right of every State to survival, and thus its right to resort to self-defence (...) when its survival is at stake" (para. 96). "It would, at any rate, seem curious", he says in a remarkable understatement, "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" (page 34 of the Dissenting Opinion).

That is true; it is more than "curious". The law — whose basic function, students are told, should be to make coexistence and cooperation possible among the members of the society it is supposed to govern, would be absurd if it legalized an act leading to the destruction of that society, by allowing any one of its members, for whatever reason, to eliminate *in radice* the very possibility of coexistence and cooperation. The question arises, however, whether law, especially international law, really has to be logical and coherent; whether, in fact, law that contradicts itself still deserves to be called law. In his general course on private international law given at The Hague Academy in 1961, Professor Wengler raised some disturbing issues by pointing out that until very recently the penal law of several legal systems forbade duelling, whereas their military law inflicted severe penalties on any officer who refused to fight a duel. The latter lost his honour and rank and could even be expelled from the military career,

[8] The role played by para. 2F of the decision (and paras. 98-103 of the Opinion) deserves mention in this context. Here the Court goes so far as to affirm that States are under a real obligation to bring to a conclusion negotiations leading to nuclear disarmament. What the scope and legal effects of such an obligation might be is not clear. Evidently, in making such a statement the Court is answering a question it was never asked; quite apart from the formal implications (is this a case of *ultra petita*? and does that concept apply to advisory proceedings?) one might wonder whether the Court was not trying to sugar the pill that those supporting the illegality of nuclear weapons have had to swallow.

but was not sent to prison. An officer who fought a duel, on the other hand, was packed off to prison but his honour as a soldier remained intact.

The point I wish to make in this connection is that, however weighty it may be, an argument based primarily on logic (that is, one that relies on the "coherence of the system" and therefore hinges on the "principle of non-contradiction") can hardly be called definitive and exhaustive if it is contradicted by specific rules that proceed in an opposite direction. Where such rules exist, the fact of having to consider them as incoherent, pernicious and immoral, as the case may be, does indeed justify opposing them (that is, making every effort to amend or revoke them), but does not justify denying their existence. In law as in other areas, to deny the existence of something because it is bad never has any merit; such a course merely misleads.

Leaving behind these general remarks and turning to the main argument of the Advisory Opinion, it naturally has to be made perfectly clear, as indeed the Court does in paragraph 2E, clause 1, of its decision, that the use of nuclear weapons would be entirely contrary to a whole series of major principles of international humanitarian law. But that would not be sufficient grounds for concluding that the use of such weapons is absolutely prohibited by law, in view of the fact that a highly significant group of States (the nuclear powers and States sheltering under their "deterrent" umbrella) have openly set up formidable systems of nuclear deterrence, and have not only refused to consider any specific treaty prohibition but also and coherently and persistently[9] resisted the introduction and consolidation of any general rule of international law having such specific content (para. 2B of the decision). This seems all the more significant since, for various reasons and in various contexts, many other States have ultimately had to heed the nuclear powers' attitude.[10]

In sum, if the situation is really as described by the Court, the only possible conclusion is that the international legal order is remarkably

[9] Vice-President Schwebel is right to stress (in pp. 1 and 2 of his Dissenting Opinion) that the situation here has nothing to do with that of the "persistent objector", the attitude and practice are those "... of five of the world's major Powers, of the permanent Members of the Security Council, significantly supported for almost 50 years by their allies and other States sheltering under their nuclear umbrellas".

[10] Incidentally, the *Lotus* principle seems no more relevant to this discussion than the "persistent objector" principle mentioned in note 9 above. The point is not what is to be thought of the time-honoured axiom "Anything that is not forbidden is allowed"; the real problem here is whether a rule of international law can come into being and bind substantial groups of States against their will.

self-contradictory, ill-conceived and open to criticism. A determined effort is therefore needed to overhaul the system, bringing it into line with the principles of humanitarian law and ensuring that these are unconditionally and universally observed. It does no good to assert that the law is better than it really is. That merely encourages comforting delusions and, as always when people are deluded, might even have very serious consequences: it would confer on international lawmakers a seal of approval that — let it be said loud and clear — they do not in the least deserve.

3. Putting aside for the moment the central matter so far discussed, the Advisory Opinion of 1996 is the second major contribution made by the International Court of Justice to identifying the principles of *jus ad bellum* and *jus in bello* in relation to the threat and use of force, after the judgment of ten years ago in the case concerning *Military and paramilitary activities in and against Nicaragua*, not to mention the good old *Corfu Channel* case of nearly half a century ago. Virally's contention that matters relating to the use of force are not in the "operational field" of international justice is beginning to be strongly disputed, especially in connection with other pending cases that are now before the Court, such as those of *Iran v. the United States*, and *Bosnia v. Serbia.*

From the point of view of *jus ad bellum* (or "New York law", as this author likes to call it) the Court's Opinion is remarkable for several reasons.

First because, observing that the principles and provisions of the United Nations Charter relating to the prohibition of the threat or use of force and the right of self-defence do not mention any particular weapon, the Court points out that they apply to any use of force, whatever the weapon used, and thus to nuclear weapons (para. 2C of the decision). This implies in particular that their use in self-defence is subject to the conditions of necessity and proportionality. In view of the Court's general conclusion (or non-conclusion), it is particularly important to establish this point, because of the severe restrictions that should therefore follow under *jus ad bellum* by reason of the gravity and exceptional extent of the "force" in question. In plain English, the conditions of necessity and proportionality require that the use of nuclear weapons in self-defence could be envisaged only to meet an attack of comparable gravity that could not be neutralized by any other means.

The Opinion is also remarkable because the Court correctly couples the threat of force with its use and points out that whenever the use of force is prohibited, a threat to use that same force it also prohibited

(paras. 46 and 48 of the Opinion). In other words, nuclear deterrence[11] could be legal only in scenarios in which the use of nuclear weapons for self-defence was not prohibited.

Finally and above all, the Opinion is remarkable because it gives the Court an opportunity to express its wish to see New York law coordinated with Geneva law to such an extent that, so to speak, the first incorporates the second. Thus in paragraphs 39 and 42 of the Opinion and paragraph 2D of the decision, the Court stresses that the conditions that render the use of force in self-defence compatible with international law are not only those explicitly or implicitly prescribed by the Charter. A weapon prohibited by the law of armed conflict, or a use of force inconsistent with the rules of international humanitarian law, would not become lawful because the Charter recognized the aim pursued as legitimate. For the first time, the key principle that international humanitarian law must be equally respected by all parties to a conflict, quite irrespective of the *causa belli* (that is, of whether the war was a *bellum justum* or *injustum* according to New York law), is given the unequivocal blessing of jurisprudence. But, most unfortunately, that blessing might seem to be contradicted to some extent in the concluding remarks of the Opinion, as is pointed out below.

4. Anyone interested in the law of armed conflict must nevertheless be glad to see that the Court and its individual judges devoted so much attention to this body of international law, which is so often eyed by jurists with arrogance or suspicion. Here too we shall digress from the main question discussed in the beginning to note some of the Court's most significant *dicta*. Pending a more detailed study which cannot be made in this article, there would appear to be four that deserve attention.

The first relates to the fact that the corpus of international humanitarian law contained in the major conventions essentially comprises general and customary international law. Thus, referring to "*a great many rules of humanitarian law*", the Court observes (in para. 79 of the Opinion) that these rules "are to be observed by all States whether or not they have ratified the conventions that contain them".[12] Later on (para. 82) the Court talks of "a corpus of treaty rules *the great majority of which* had already become customary"[13] by the time they were codified. This is a

[11] This should be understood as comprising both actual possession of nuclear weapons and the declared intention to use them in specified circumstances.

[12] Emphasis added.

[13] *Idem.*

viewpoint that has to be taken into account in the present highly topical debate on customary humanitarian law. The International Committee of the Red Cross in particular must find it very encouraging (the international community having requested it to review custom in this area) as showing the great similarities between codified law and general law, with reference also to Additional Protocol I of 1977 (see para. 84 of the Opinion).

Second, the Court describes the said fundamental rules of humanitarian law as "*intransgressible* principles of international customary law" (para. 79).[14] This novel term is not as clear as it might be, but it is unlikely that the Court merely meant (as a literal interpretation of the word in italics might suggest) that those principles must not be transgressed. That, indeed, is true of any rule of law that imposes any obligation at all! The solemn tone of the phrase, and its wording, show that the Court intended to declare something much more incisive and significant, doubtless in order to bring the fundamental rules so described closer to *jus cogens;* to bring them closer but not to make them part of it, for in paragraph 83 the Court says frankly that it does not feel it has to decide whether these are peremptory rules — a statement open to question for many reasons.[15] By "intransgressible", then, the Court does not mean "peremptory", but something not far from peremptory, as President Bedjaoui hints in paragraph 21 of his Declaration. Probably — at least as I understand it — the intention was to highlight the fundamental concept embodied in Article 1 common to the four Geneva Conventions of 1949 and repeated in Article 1, paragraph 1, of Protocol I of 1977, namely that no circumstance offered as justification can make behaviour contrary to the principles in question anything but unlawful.[16] In other words, the circumstances eliminating unlawfulness that apply in other sectors of the international legal order (such as the victim's consent, self-defence, counter-measures or a state of necessity) cannot be invoked in this particular case.

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[14] *Idem.*

[15] If these principles belong to *jus cogens,* no treaty can abrogate them. In that case the Court should not have given priority to discussion of the treaty rules on nuclear weapons (as it admits openly having done — see para. 74 of the Opinion). In any case it is surely obvious that one of the Court's main concerns should have been to decide whether or not the relevant rules of international humanitarian law were or were not peremptory rules.

[16] See L. Condorelli, L. Boisson de Chazournes, "Quelques remarques à propos de l'obligation des États de 'respecter et faire respecter' le droit international humanitaire 'en toutes circonstances'", in Swinarski (ed.), *Studies and essays on international humanitarian law and Red Cross principles, in honour of Jean Pictet,* ICRC/Martinus Nijhoff Publishers, Geneva/The Hague, 1984, p. 17 ff.

Thirdly, nuclear weapons are subject not only to *jus ad bellum*, but also to *jus in bello*, and to humanitarian law in particular (para. 2D of the decision). The Court sets great store by this principle (see paras. 85-89 of the Opinion), and duly stresses that no one, the nuclear powers included, made any contrary statement to the Court. But if humanitarian law applies to nuclear weapons, what does that imply, seeing that because of their unique characteristics "the use of such weapons in fact seems scarcely reconcilable with respect for such requirements"?[17] It was, of course, at just this point that the Court brought its ratiocination to a halt and confessed that it was unable to conclude definitively whether nuclear weapons were legal or illegal. The stalemate arises, according to the Court, not only because the facts are uncertain (can there really be a "clean" nuclear weapon with "limited" effects?) but also because the law is ambiguous and in a state of flux. Obviously, the Court is alluding here to those specific legal data which, as this author has pointed out, are quite incompatible with the fundamental rules of humanitarian law.

So according to the Court the principles of humanitarian law, in spite of their "intransgressible" content, which seems "scarcely reconcilable", are not sufficient to justify outlawing weapons, because of the existence of other specific legal data (which, for their part, are not sufficient to justify the opposite conclusion). All this, however, does not mean that

[17] While by no means going deeply into the subject, the Court admits this *de plano* in para. 95 of the Opinion and para. 2E, clause 1, of the decision. It was most certainly (and rightly!) convinced of the intrinsically catastrophic nature of nuclear weapons and of the impossibility of containing their devastating effects in either space or time (para. 35 of the Opinion). In the view of Judge Higgins, however, that intermediate conclusion deserves strong criticism, on the grounds that the Court should not have confined itself to generalities and approximations, but should have closely examined the specific provisions of humanitarian law. Judge Higgins draws special attention to those provisions which, provided that combatants and not the civilian population are attacked, describe the suffering inflicted on combatants as "superfluous" and collateral damage suffered by civilians as "excessive" — not in the absolute sense of their magnitude only, but in terms of the extent to which they are proportionate to the legitimate aims of the military operation (such as repelling an aggressor) and to the military advantage expected. Going by the opinion examined, a study of this kind would doubtless have led the Court to conclude that "in the present stage of weapon development, there may be very limited prospects of a State being able to comply with the requirements of humanitarian law" if nuclear weapons were used (Dissenting Opinion, para. 26). This possibility, however, cannot be ruled out categorically and *a priori*. Clearly, this was an attempt to "reconcile the irreconcilable" — to reconcile humanitarian law with nuclear weapons; a very clever attempt, but a completely hopeless one if nuclear weapons have the characteristics and effects described by the Court. In my opinion, and for the reasons I have given, it would be preferable to condemn the blatant contradiction on this subject that lies within the international legal order.

nuclear weapons confer an exemption, so to speak, from the obligation to take humanitarian imperatives into account. That is the fourth and last point that deserves to be emphasized. In fact the Court assigns to humanitarian imperatives the role of helping[18] to restrict situations in which the use of nuclear weapons *might* not be unlawful to those, and only those, that would place a State in an "extreme circumstance of self-defence, in which its very survival would be at stake" (para. 97 of the Opinion and para. 2E, clause 2, of the decision). The Court's reasoning hinges on what it calls "the fundamental right of every State to survival". That right has never been heard of before,[19] but much will undoubtedly be said of it in the future. Unfortunately the Court neither defines nor indicates the scope of that right in any way whatsoever.

5. An attempt really should be made to arrive at an exact definition of this "right to survival", to which the Court appears to attribute the unprecedented force of making the legalization of nuclear weapons *possible* (if not *probable*). This despite the fact that because of their apocalyptic effects the use of such weapons "would generally be contrary (...) to the principles and rules of humanitarian law" (point 2E, clause 1, of the decision). This approach gives rise to the greatest misgivings as to the devastating implications for humanitarian law that might result from a certain interpretation of the Court's opinion.

Of course the Court's intention was in itself praiseworthy. It wanted to be as restrictive as possible in identifying situations in which the use of nuclear weapons might not be prohibited. Not feeling able to declare that the prohibition was absolute, the Court intimated that perhaps it did not apply exclusively to an absolutely extreme situation. But precisely as regards such a situation, the Opinion irresistibly prompts some highly sensitive questions. If, for example, the "right to survival" can justify the use of the most terrible and inhumane weapon in existence, why should it not also, and on even stronger grounds, justify less serious breaches of humanitarian law, in particular by a State whose survival hangs in the balance but which does not possess nuclear weapons? All things considered, should it be conceded that in a case of "extreme self-defence" *jus ad bellum* grants at least a partial exemption from the obligation to respect *jus in bello,* and by so doing flagrantly contradicts the fundamental rule

[18] Together with the principles of *jus ad bellum* relating to self-defence, whose restrictive effect, arising mainly from the condition of proportionality, has already been pointed out.

[19] As Judge Ranjeva stresses on p. 6 of his Separate Opinion.

of humanitarian law that *jus in bello* must be respected in all circumstances, whatever the *causa belli*? Is any and every criminal State to be offered the possibility of whitewashing its violations of humanitarian law by brandishing the argument of its "right to survival"?

From this viewpoint the Advisory Opinion (especially para. 2E, clause 2, of the decision) seems extraordinarily incomplete, defective and disquieting. Instead of making the "right to survival" the key factor in its attempt to justify its inability to decide whether nuclear weapons were lawful or unlawful, the Court would have done better to indicate that its argument was based mainly if not wholly on specific rules relating expressly to nuclear weapons, and leading, should the case arise, to a regime of exception. There can be no shadow of doubt that it is less pernicious to entertain the possibility of a *lex specialis* pertaining only to nuclear weapons than to endow States with a right to survival regardless of the principles of humanitarian law.

Happily (small consolation though this is) the text of the Opinion, especially paragraph 96, is open to an interpretation quite different from the one the decision alone appears to demand. According to this alternative interpretation the "right to survival" would be a sort of *ratio*, or reason justifying the waiver imposed on humanitarian law in relation to nuclear weapons, and not its true legal source. That would be established on the basis of specific normative data such as the Court mentions in the second clause of the aforesaid paragraph, namely, on the one hand, the "practice referred to as 'the policy of deterrence', to which an appreciable section of the international community adhered for many years", and, on the other, treaty practice in regard to nuclear weapons. The warning given in paragraph 104 of the Opinion[20] significantly attenuates the adverse impact of the Court's unfortunate failure to mention these matters in paragraph 2E of the decision.

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[20] Paragraph 104 states that the Court's reply to the question put to it by the General Assembly "rests on the totality of the legal grounds set forth (...) above (paragraphs 20 to 103)", and goes on to stress: "Some of these grounds are not such as to form the object of formal conclusions in the final paragraph of the Opinion; they nevertheless retain, in the view of the Court, all their importance".