The Opinion of the International Court of Justice on the legality of the use of nuclear weapons

by Eric David[1]

1. Of the 51 opinions handed down by the Court of the Hague (28 by the Permanent Court of International Justice and 23 by the International Court of Justice), there is little doubt that the two delivered on 8 July 1996 in response to requests submitted by the WHO World Health Assembly and the United Nations General Assembly will become landmarks in the history of the Court, if not in history itself.

Never before had the Court been asked to address a legal problem that had lain so close to the heart of international relations over the preceding 50 years, one which in the words of Vice-President Schwebel represented "a titanic tension between State practice and legal principle".[2] Its task was both sensitive and thankless because, in considering the particular problem of the legality of the threat or use of nuclear weapons, the Court had

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[1] The author of this commentary served as an adviser to the government of the Solomon Islands in connection with the two requests for an opinion; the views expressed here are purely personal and do not necessarily reflect the views of the government of the Solomon Islands.

[2] International Court of Justice, *Legality of the threat or use of nuclear weapons*, Opinion of 8 July 1996 (hereinafter referred to as "Opinion"), Dissenting Opinion of Schwebel, p. 1. Since the Opinion has not been published in the Court's *Reports* at the time of writing, the references relate to either paragraph numbers in the Opinion or page numbers in the statements and separate or dissenting opinions of the judges in the mimeographed edition.

to pronounce on the validity of conduct which, although it had remained hypothetical ever since Hiroshima and Nagasaki, was nonetheless the cornerstone of the defence policy of the world's major powers.

The Court therefore handed down two opinions — or rather one opinion and a refusal to express an opinion — which were supposed to reconcile everybody but surely satisfied no-one, least of all the judges themselves![3]

2. It will be recalled that the World Health Assembly submitted the following question to the Court on 14 May 1993:

> "In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law, including the WHO Constitution?"[4]

One year later it was the turn of the United Nations General Assembly to ask the Court for an advisory opinion on the question:

> "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"[5]

3. Arguments for and against the legality of using or threatening to use nuclear weapons were expounded at length during the written and oral phases of the proceedings.[6] The States supporting legality — notably the United States of America, the United Kingdom and France[7] — began by disputing the Court's competence to respond to either of the two requests for an opinion, citing on the one hand what they held to be WHO's incompetence to submit such a request and, on the other, the vague and abstract nature of the UN General Assembly's request and its potentially adverse effect on disarmament negotiations. As to the substance, the same States pointed *inter alia* to:

— the lack of any express prohibition on the use of such weapons;

— the impossibility of inferring an *opinio juris* from General Assembly resolutions condemning the use of such weapons since, far from being voted unanimously, they had always been adopted in the teeth of stiff

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[3] Separate Opinion of Guillaume, para. 1.

[4] Resolution WHA 46.40 of 14 May 1993.

[5] A/Res. 49/75K of 15 December 1994.

[6] In favour of legality: see *inter alia* the written and oral statements of the United States of America, France, the United Kingdom and the Russian Federation. Against legality: see *inter alia* those of Egypt, India, the Solomon Islands, Malaysia and Nauru.

[7] See the written and oral statements by those States and the Court's reply, Opinion, paras. 10-19.

opposition from a significant section of the international community, chiefly the Western group of States;

— the practice of deterrence accepted by the international community as a whole, which presupposed implicit recognition of the legality of resorting to nuclear weapons;

— the declaration made by certain nuclear powers when acceding to the Treaties of Tlatelolco and Rarotonga, whereby they reserved the right — without objection from the other States Parties — to resort to nuclear weapons in the event of aggression;

— the right of a State under attack to use nuclear weapons in self-defence.

Those contesting the legality of the use of nuclear weapons maintained that the Court should respond to both requests for an opinion: WHO had been examining the issue of nuclear weapons since 1983, so the question posed was well within the scope of its activities; moreover, since both requests were legal questions within the meaning of Article 96 of the United Nations Charter, it was appropriate that the Court should answer them; as to the substance, the use of nuclear weapons for hostile purposes was clearly unlawful in view of the effects they produced:

— it was virtually impossible to use such weapons against military targets without simultaneously causing tremendous damage both among the civilian populations of the parties to the conflict and to countries outside the theatre of war; since radiation, electromagnetic bursts and radioactive dust knew no frontiers, nuclear arms could be regarded as weapons causing indiscriminate effects and infringing on both the territorial integrity of third States and the rules of neutrality;

— all trace of human life would inevitably disappear within a radius which, depending on the magnitude and site of the explosion and the local topographical and climatic conditions, might range from a few hundred metres to several dozen kilometres (in the case of certain megabombs) from the point of impact; moreover, depending on the extent of their exposure, survivors exposed to the explosion or to radiation therefrom might either die within a timespan ranging from a few minutes to several years or suffer after-effects and, in particular, undergo irreversible genetic changes; weapons which caused such effects could therefore be classified as weapons which rendered death inevitable and caused unnecessary suffering; in addition, some of their characteristics were such that they could be likened to poisoned weapons and gas and could result in actual genocide;

— existing relief services, if they were not annihilated, would be unable to discharge their duty to help victims because of the extent and specific nature of the damage they had sustained; in that respect, therefore, such weapons also threatened the inviolability of health services.[8]

4. Without going into the details of those arguments, suffice it to say that the Court refused to respond to WHO's request for an opinion on the grounds that the matter did not relate to a question which arose within the scope of the activities of that organization, as required by Article 96, para. 2, of the United Nations Charter.[9]

On the other hand, the Court agreed to take up the question submitted by the UN General Assembly, thus rejecting the pleas of incompetence and inadmissibility lodged by several nuclear powers. As to the substance, it concluded by seven votes to seven, the President's casting vote being decisive, that the threat or use of nuclear weapons violated in principle the law of armed conflict. It added, however, that it could not conclude whether such threat or use would be unlawful in circumstances of self-defence or if necessary for the survival of the State.

5. Both the refusal to respond to WHO's request for an advisory opinion and the opinion handed down to the General Assembly offer a wealth of legal material which could give rise to reams of commentary. For reasons of space, however, our observations will be confined to certain aspects of the opinion given on the substance, namely:

— the Court's rejection of certain arguments concerning the illegality of the use of nuclear weapons (I);

— the Court's claim that it could not conclude whether certain uses of nuclear weapons would be unlawful (II).

I. The Court's rejection of certain arguments concerning the illegality of the use of nuclear weapons

6. Among the arguments hostile to the legality of using nuclear weapons, the Court set aside those based on the prohibition on the use of chemical or poisoned weapons:[10] it found that the Convention of

[8] For references to these various arguments, see E. David, *Principes de droit des conflits armés*, Bruylant, Brussels, 1994, p. 295 ff.

[9] International Court of Justice, *Legality of the use by a State of nuclear weapons in armed conflict*, Opinion of 8 July 1996 (WHO), para. 20 ff.

[10] Opinion, paras. 54-57.

13 January 1993 banning chemical weapons had been negotiated and adopted "in its own context and for its own reasons".[11] It pointed out that the issue of nuclear weapons had never been raised during the negotiations leading to the adoption of that instrument, so it would be improper to look there for the source of ban on the threat or use of nuclear weapons.

That reasoning is correct because it reflects the facts. Conversely, there is more room for scepticism when the Court asserts that Article 23 (a) of the 1907 Hague Regulations (which prohibits the use of poisoned weapons) and the 1925 Geneva Protocol (which bans the use of chemical, bacteriological and similar weapons) do not apply to nuclear weapons. Neither of these texts defines what is meant by "poisoned weapons" or "analogous (...) materials or devices" (1925 Protocol); moreover, in the words of the Court, the practice of States demonstrates that "the terms have been understood (...) in their ordinary sense as covering weapons *whose prime, or even exclusive, effect* is to poison or asphyxiate",[12] and not as covering nuclear weapons.[13]

7. Both parts of that objection are perplexing. The claim that the "practice" of States excludes nuclear weapons from the field of application of the 1925 Geneva Protocol and of Article 23 (a) of the 1907 Hague Regulations is contradicted by UN General Assembly resolution 1653 (XVI) of 1961, which states — admittedly in very general terms (preamble, third paragraph) — that the use of nuclear weapons falls within the purview *inter alia* of the Hague Conventions of 1899 and 1907 and of the Geneva Protocol of 1925. The General Assembly has recalled resolution 1653 (XVI) in every subsequent resolution (in 1972 and many times since 1978) condemning the use of nuclear weapons,[14] so a "practice" affirming the applicability of those instruments to the use of nuclear weapons certainly does exist.

8. The claim that those texts prohibit only weapons whose "*prime, or even exclusive*, effect is to poison or asphyxiate" (our emphasis) cannot be based on any precise element. Quite the contrary: the preparatory work for the Geneva Protocol in no way confirms such a restrictive interpretation since it is silent on the matter;[15] then again, although the Hague

[11] *Ibid.*, para. 57.

[12] *Ibid.*, para. 55 (our emphasis).

[13] *Ibid.*

[14] A/Res. 2936 (XXVIII) of 29 November 1972; 33/71 B of 14 December 1978; 35/152 D of 12 December 1980, etc.; more recently, 50/71 E of 12 December 1995.

[15] League of Nations, *Records of the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War*, Geneva, 4 May-17 June 1925.

Declaration of 29 July 1899 did prohibit "the use of projectiles *the object of which* is the diffusion of asphyxiating or deleterious gases" (our emphasis), that wording is significantly absent from the text of the Geneva Protocol. When we recall that the latter text prohibits not only "asphyxiating, poisonous or *other* gases" but also "*all* analogous liquids, materials or devices" (our emphasis), we realize the extent to which its letter and spirit contradict the Court's narrow interpretation, i.e., that it refers only to weapons whose "*prime, or even exclusive,* effect is to poison or asphyxiate"[16] (again, our emphasis).

9. The Court is also inconsistent in its own findings: after correctly noting that "the phenomenon of radiation is said to be *peculiar* to nuclear weapons"[17] (our emphasis), how can it then ignore the fact that such radiation, which is *specific* to nuclear weapons alone,[18] affects only living matter, the very property that defines chemical weapons?[19]

Maintaining that nuclear weapons are not like chemical weapons because they also produce a blast and heat is tantamount to stating that if one merely adds explosives to a chemical weapon it is no longer chemical, or even that if one combines legal effects with the illegal effects of a weapon it is no longer illegal!

The Solomon Islands responded as follows to those States which upheld that thesis:

> "The logic of this approach is, to say the least, disconcerting: he who does more cannot do less; the greater the destruction the more likely the legality of the weapon. The absurdity of the conclusion is matched only by the absurdity of the reasoning."[20]

In his Dissenting Opinion, Judge Weeramantry virtually echoed those words by stating that the Court's reasoning amounted to saying that "if an act involves both legal and illegal consequences, the former justify or excuse the latter".[21]

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[16] Opinion, para. 55.

[17] *Ibid.*, para. 35.

[18] *Comprehensive study on nuclear weapons, Report of the Secretary-General*, UN doc. A/45/373 of 18 September 1990, para. 327.

[19] See *Chemical and bacteriological (biological) weapons and the effects of their use, Report of the Secretary-General*, UN, New York, 1969, pp. 5-6.

[20] Written observations on the written statements concerning the WHO's request for an opinion on the legality of the use by a State of nuclear weapons in armed conflict, written observations of the Solomon Islands, 20 June 1995, para. 4.21 (mimeographed).

[21] Opinion, p. 58.

10. The Court's reasoning is also debatable if measured by the yardstick of the ban on the use of "poisoned weapons" (Article 23 [a] of the Hague Regulations).

First, we do not know on what basis the Court claimed that Article 23 (a) is confined to weapons whose "prime or exclusive" effect is to poison: was the statement based on practice (para. 7 above)? But what practice? The Court is silent on that point.

Nowhere is it actually written that poisoned weapons are solely those which deliver poison without having any other harmful effect on the victim; and indeed it is hard to imagine a poisoned projectile which would not injure the victim but would nevertheless manage by some telekinetic process to inoculate him with poison. It is hardly likely that the authors of the Hague Regulations had in mind scenarios or procedures which in their day would have belonged to the realm of science fiction.

The effects of nuclear weapons resulting from initial and induced radioactivity are similar to those of poison, a fact which has been recognized in scientific circles[22] and indeed by States themselves when they defined nuclear weapons as:

> "any weapon which contains or is designed to contain or utilize nuclear fuel or radioactive isotopes and which, by explosion or other uncontrolled nuclear transformation of the nuclear fuel, or by radioactivity of the nuclear fuel or radioactive isotopes, is capable of mass destruction, mass injury or mass *poisoning*"[23] (our emphasis).

In other words, even if the primary effects of a nuclear weapon are brought about by blast and heat, it nonetheless produces subsequent effects of poisoning; it is therefore prohibited under Article 23 (a) of the Hague Regulations on the same footing as a poisoned arrow or bullet which, although its prime effect is to injure the victim's body, nonetheless delivers poison and is thus subject to the ban.

11. The Court also dismisses the condemnation of the use of nuclear weapons in General Assembly resolutions on the grounds that the latter

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[22] M. Lechat, M. Errera and A. Meessen, in "Dangers pour les populations civiles, de la pollution inhérente à l'emploi des armes nucléaires", *Actes de la réunion de l'Académie royale de médecine de Belgique*, 25 September 1982, cited by A. Andries in "Pour une prise en considération de la compétence des juridictions pénales nationales à l'égard des emplois d'armes nucléaires", *RDPC*, 1984, p. 43. See also: *Effects of nuclear war on health and health services*, WHO doc. A/36/12, 24 March 1983.

[23] Protocol III to the Paris Agreements of 23 October 1954 on Arms Control, Annex II.

were adopted "with substantial numbers of negative votes and abstentions"; thus, although they "are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons".[24]

That finding seems equally debatable. First, it disregards the special *agreement* that General Assembly resolutions represent for States which vote for them and which thus acknowledge an *opinio juris*, at least in so far as those States are concerned. Secondly, it appears to take for granted that the traditional rules of international humanitarian law set out in those resolutions do not prohibit the use of nuclear weapons because a number of States oppose such a ban: in other words, notwithstanding the majority of States which support a thesis, the Court deduces from the minority will that that thesis does not exist, owing *inter alia* to "the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other".[25]

Thus a minority opinion limiting the scope of earlier rules is given precedence over the majority opinion which endows those rules with the scope due to them by virtue of the texts themselves, and all in the name of the practice — questionable in itself — of deterrence.[26] This is particularly unconvincing when the Court goes on to contradict itself by asserting that international humanitarian law governs and ... prohibits the use of nuclear weapons (see section II below). Yet what is humanitarian law if not the very rules mentioned in the resolutions which the Court declares devoid of any effect?

12. To sum up, the Court's refusal to place nuclear weapons in the same category as chemical or poisoned weapons has no logical justification. The same applies to its refusal to take UN General Assembly resolutions into account, even as agreements limited to those States which accepted them.

II. The Court's claim that it could not conclude whether certain uses of nuclear weapons would be unlawful

13. The Court goes on to conclude, however, that the use of nuclear weapons is in principle illegal after finding *inter alia* that:

[24] Opinion, para. 71.

[25] *Ibid.*, para. 73.

[26] *Ibid.*, Dissenting Opinion of Shahabuddeen, pp. 25-28.

— such weapons are "potentially catastrophic" because their "destructive power (...) cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet";[27]

— because of their radiation, such weapons produce effects that are harmful to the environment and future generations: "ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic effects and illness in future generations";[28]

— even supposing the existence of tactical nuclear weapons which are sufficiently precise to limit the risk of escalation,[29] no State has been able to demonstrate "whether such limited use would not tend to escalate into the all-out use of high yield nuclear weapons";[30]

— the newness of nuclear weapons is not an argument against the applicability of international humanitarian law to them, as has been recognized by the United Kingdom, the United States and the Russian Federation;[31]

— the Martens clause affirms that international humanitarian law applies to nuclear weapons;[32]

— neutrality is applicable "to all international armed conflict, whatever type of weapons might be used";[33]

— "methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited". Yet, "in view of the unique characteristics of nuclear weapons (...), the use of such weapons in fact seems scarcely reconcilable with respect for such requirements".[34]

14. Thus, while in paragraph 105 E of its opinion the Court reaches a conclusion consonant with the thesis that the use of nuclear weapons is illegal, it tempers that finding by observing that:

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[27] Opinion, para. 35.

[28] *Ibid.*

[29] *Ibid.*, para. 43.

[30] *Ibid.*, para. 94; cf. para. 43.

[31] *Ibid.*, para. 86.

[32] *Ibid.*, para. 87.

[33] *Ibid.*, para. 89.

[34] *Ibid.*, para. 95.

— it "cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter (...)";[35]

— "an appreciable section of the international community" has adhered to the "policy of deterrence";[36]

— when the Treaties of Tlatelolco and Rarotonga were adopted, the States in possession of nuclear weapons reserved the right to use them in the event of aggression committed by a State with the assistance of a nuclear Power;[37]

— those States entered similar reservations in connection with the extension of the Treaty on the Non-Proliferation of Nuclear Weapons.[38]

In view of that practice, the Court concluded:

> "However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."[39]

In other words, the threat or use of nuclear weapons is in principle incompatible with the law of armed conflict, but the Court does not know whether that would still be so in a case of self-defence when the survival of the State is at stake.

15. Having been passed by seven votes to seven by virtue of the casting vote of the President, that surprising conclusion in paragraph 105 E of the opinion has caused and will continue to cause much ink to flow.[40] However, we shall confine ourselves to the following remarks.

(1) The considerations on which the Court chiefly relied (para. 13 above) relate to the practice of the nuclear powers in regard to deterrence.

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[35] *Ibid.*, para. 96.

[36] *Ibid.*

[37] *Ibid.*

[38] *Ibid.*

[39] *Ibid.*, para. 105 E.

[40] With the exception of Judges Shi and Ferrari Bravo, all the judges commented on this provision in one way or another: Statements by Bedjaoui, p. 2, Herczegh, p. 1, Vereshchetin, p. 1; Separate Opinions of Guillaume, p. 3, Ranjeva, p. 3, Fleischhauer, p. 3; Dissenting Opinions of Schwebel, p. 8, Oda, p. 37, Shahabuddeen, p. 1, Weeramantry, p. 3, Koroma, p. 1 and Higgins, p. 1.

However, those considerations confuse two problems, that of the possession of nuclear weapons and that of their use or threatened use; while the international community appears to some extent resigned to accepting the practice of deterrence, that does not mean it has also accepted the use of such weapons. Similarly, although the nuclear Powers have publicly reserved the right to use nuclear weapons in certain circumstances, we cannot deduce therefrom that the said right has been accepted by most other States, since the latter are constantly affirming in UN General Assembly resolutions that any such use would be unlawful.[41] While the Court admittedly stopped short of deducing from those facts that the threat or use of nuclear weapons might be lawful, it is nonetheless regrettable that it invoked them to conclude that it did not know whether, in a case of self-defence where the survival of a State under attack was at stake, the use or threatened use of nuclear weapons would still be unlawful.

(2) That affirmation of ignorance is all the more regrettable in that it is based on recognition of the right of self-defence. In giving the impression that a case of self-defence, however extreme, might justify the use of nuclear weapons, the Court creates dangerous confusion between *jus ad bellum* and *jus in bello*; indeed, it suggests that respect for the latter might be subordinate to a rule of the former. In so doing the Court calls into question one of the basic principles of the law of armed conflict, namely that of the equality of belligerents before the law of war.[42] A finding so contrary to the essence of international humanitarian law carries within itself the seeds of its own invalidity.

(3) In the light of certain considerations, the second sub-section of paragraph 105 E is contradictory: indeed how, after finding that the use of nuclear weapons might bring about the annihilation of mankind,[43] can the Court go on to wonder whether the survival of a State under attack might not justify the use of a weapon which could lead to the destruction of its user? If resorting to nuclear weapons is likely to lead to the disappearance of all life from the planet, and if it is accepted that international

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[41] For more substantial developments, see the written observations of the Solomon Islands on the written statements submitted in connection with WHO's request for an advisory opinion, 20 June 1995, paras. 4.67-4.71 (mimeographed).

[42] *Yearbook of the Institute of International Law*, Vol. 50, Part II, 1963, p. 368; Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I), Preamble, para. 5, and Article 96, para. 3. See also: Opinion, Separate Opinion of Ranjeva, pp. 6-7, and Dissenting Opinion of Shahabuddeen, p. 30.

[43] Opinion, para. 35.

humanitarian law reflects the will of States, then it is hard to see how States could have accepted a rule which would lead to their own suicide, as well as that of the State trying to protect itself.[44] The absurdity of such a hypothesis implies a negative answer to the question put to the Court: not even an extreme case of self-defence can justify the use of nuclear weapons.

(4) Supposing that this is not exactly what the Court means, and that it is prepared to envisage, for purposes of self-defence, only a minimum use of nuclear weapons (in which case it should have said so), or a use which would not affect the survival of mankind as such, the fact remains that such a use of nuclear weapons, however limited, would not prevent nuclear radiation and fallout affecting the territory of many other States, as the Court itself acknowledges.[45] Here again, is it reasonable to suppose that most of the States in the international community would have agreed that, in order to ensure the survival of one of their number, their own territorial integrity, the health of their inhabitants and respect for their environment and neutrality could be jeopardized? An affirmative answer would mean that States have accepted a serious infringement of their sovereignty, and such a position would be known. No State has ever said that it was prepared to accept harmful affects resulting from the use of nuclear weapons by another State and, since limitations on sovereignty cannot be presumed,[46] it is fruitless to try to trace any acceptance of the use of nuclear weapons in the fact that States are more or less resigned to deterrence.[47]

(5) For the first time in its history, the Court claims not to know the content of the rule in a particular *de facto* hypothesis. As several judges observed, the result is a *non liquet*[48] or, to put it another way, a "non-opinion". As such, the decision should have no implications whatever: first, because it is based on considerations which have just been shown to be dubious (see [1] and [2] above) and, second, because the Court is in its own words a judicial organ and, in that capacity, "pro-

[44] *Ibid.*, Dissenting Opinion of Shahabuddeen, p. 34.

[45] Opinion, paras. 35 and 89.

[46] Permanent Court of International Justice, *Lotus*, ruling of 7 September 1972, *PCIJ*, Series A, No. 9, p. 19.

[47] Opinion, paras. 73 and 96.

[48] *Ibid.*, Statement by Vereshchetin, p. 1; Dissenting Opinions of Schwebel, p. 8, Shahabuddeen, p. 10 and Higgins, p. 1.

nounces only on the basis of the law"[49] or, as it asserts here, "states the existing law (...) even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend".[50]

In other words, the Court is fulfilling its judicial function when it finds that a certain type of conduct is lawful or unlawful, but it is not fulfilling that function when it says that it does not know the state of the law in a given hypothesis. *In casu*, the Court starts by clearly affirming that the threat or use of nuclear weapons is unlawful (first sub-section of para. 105 E), then it adds that it does not know how matters stand in the particular hypothesis of self-defence on the part of a State whose survival is at stake (second sub-section of para. 105 E). Since the Court fails to specify the scope of the prohibitory rule in the hypothesis in question, despite its self-avowed power to state the law (see quotation above), we may logically conclude that the only safe rule is that the use and threatened use of nuclear weapons are generally unlawful. The Court "states the law" in the first sub-section but, in the second, claims ignorance of the law: the second sub-section is therefore devoid of implications.

16. The affirmation of illegality in principle is, moreover, not confined to the seven judges who voted for paragraph 105 E; it is also shared by three dissenting judges who hold that the use and threatened use of nuclear weapons are *always* unlawful.[51] Setting aside the Dissenting Opinion of Judge Oda, who pronounces neither for nor against (he simply feels that the Court should have refused to respond to the request for an opinion given, *inter alia*, the excessively political and general nature of the question asked),[52] we find that ten of the thirteen judges recognize the illegality in principle of using or threatening to use nuclear weapons. Such is the law! The claim made by seven judges that they did not know whether it was legal or illegal to use or threaten to use nuclear weapons in response to aggression which threatens the very survival of a State does not constitute a legal argument. Any student who admits to his examiners that he does not know the content of this or that rule acknowledges his own ignorance but, in so doing, he is not stating the law. The only law is that

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[49] International Court of Justice, *Namibia*, Advisory Opinion of 21 June 1971, *ICJ Reports 1971*, p. 23, para. 29.

[50] Opinion, para. 18.

[51] Opinion, Dissenting Opinions of Shahabuddeen, p. 1 ff., Weeramantry, p. 1 ff. and Koroma, p. 1 ff.

[52] *Ibid.*, Dissenting Opinion of Oda, especially paras. 25, 44 and 51.

which is affirmed to be such. Anything else is merely a state of mind, devoid of substance.

17. For all the foregoing reasons, we take the view that the second sub-section of paragraph 105 E of the Court's opinion neither adds to nor detracts from the general illegality affirmed in the first sub-section. It simply betrays the Court's misgivings — the *"drame de conscience"* in the words of President Bedjaoui[53] — as to the considerable political implications of a more decisive opinion. Its qualms recall Hamlet's existential doubts but, as in the case of Shakespeare's hero, those qualms have to do with philosophy, not with the law.

18. After a moment's initial disappointment, therefore, the specialist in international humanitarian law might easily come to accept the opinion, which contains a wealth of favourable elements relating to humanitarian law. For instance, while the Court did not pronounce on the *jus cogens* nature of humanitarian law because it was not asked to do so,[54] it did implicitly recognize that the fundamental rules of the Hague Regulations and the 1949 Geneva Conventions are endowed with that quality, in that it described them as "intransgressible principles of international customary law".[55]

That is just one of the positive points of the opinion, and those are the ones which will stand.

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[53] *Ibid.*, Declaration by Bedjaoui, para. 9.

[54] Opinion, para. 83.

[55] *Ibid.*, para. 79.