

DECLARATION OF PRESIDENT BEDJAOUI

[Translation]

1. I have never been much in favour of declarations and other separate or dissenting opinions. I have therefore very rarely had recourse to them. However, the adoption by the Court of operative paragraph 2 E of this Opinion by my casting vote as President, in accordance with Article 55 of the Statute, is in itself a sufficiently exceptional event to prompt me to abandon my usual reticence in this matter. Moreover, I regard my recourse to this declaration less as the exercise of a mere option than as the discharge of a real duty, both on account of the responsibility which I have thus been led to assume in the normal exercise of my functions as President and in the light of the implications of the aforementioned paragraph.

* * *

2. With nuclear weapons, humanity is living on a kind of suspended sentence. For half a century now these terrifying weapons of mass destruction have formed part of the *human condition*. Nuclear weapons have entered into all calculations, all scenarios, all plans. Since Hiroshima, on the morning of 6 August 1945, fear has gradually become man's first nature. His life on earth has taken on the aspect of what the Koran calls "a long nocturnal journey", like a nightmare whose end he can not yet foresee.

3. However the Atlantic Charter did promise to "deliver mankind from fear", and the San Francisco Charter to "save succeeding generations from the scourge of war". Much still remains to be done to exorcise this new terror hanging over man, reminiscent of the terror of his ancestors, who feared being struck by a thunderbolt from the leaden, storm-laden skies. But twentieth-century man's situation differs in many ways from that of his ancestors: he is armed with knowledge; he lays himself open to self-destruction by his own doing; and his fears are better founded. Although endowed with reason, man has never been so unreasonable; his destiny is uncertain; his conscience is confused; his vision is clouded and his ethical co-ordinates are being shed, like dead leaves from the tree of life.

4. However, it must be acknowledged that man has made some attempts to emerge from the darkness of his night. Mankind therefore seems, today at any rate, more at ease than in the 1980s, when it subjected itself to the threat of "star wars". In those years the mortal blast of a space war, a war which would be total, highly sophisticated and

would rend our planet asunder, was more likely than ever before to unfurl itself upon humanity. Missiles orbiting close to the Earth could point their infernal nuclear snouts at our globe, while military satellites — for reconnaissance, observation, surveillance or communication — proliferated. The *lethal system* was about to be established. The “universal government of death”, the “thanatocracy”, as the French historian and philosopher of science Michel Serres once called it, said it was ready to set up its batteries in the furthest reaches of the planet. But luckily détente, followed by the ending of the cold war, put a stop to these terrifying preparations.

5. Nevertheless, the proliferation of nuclear firepower has still not been brought under control, despite the existence of the Non-Proliferation Treaty. Fear and folly may still link hands at any moment to perform a final dance of death. Humanity is all the more vulnerable today for being capable of mass producing nuclear missiles.

* * *

6. Man is subjecting himself to a perverse and unremitting nuclear blackmail. The question is how to deliver him from it. The Court had a duty to play its part, however small, in this rescue operation for humanity; it did so in all conscience and all humility, bearing in mind the limits imposed upon it by both its Statute and the applicable international law.

7. Indeed, the Court has probably never subjected the most complex elements of a problem to such close scrutiny as it did when considering the problem of nuclear weapons. In the drafting of this Opinion the Court was guided by a sense of its own particular responsibilities and by its wish to state the law as it is, seeking neither to denigrate nor embellish it. It sought to avoid any temptation to create new law and it certainly did not overplay its role by urging States to legislate as quickly as possible to complete the work which they have done so far.

8. This very important question of nuclear weapons proved alas to be an area in which the Court had to acknowledge that there is no immediate and clear answer to the question put to it. It is to be hoped that the international community will give the Court credit for having carried out its mission — even if its reply may seem unsatisfactory — and will endeavour as quickly as possible to correct the imperfections of an international law which is ultimately no more than the creation of the States themselves. The Court will at least have had the merit of pointing out these imperfections and calling upon international society to correct them.

9. As its Advisory Opinion shows, at no time did the Court lose sight of the fact that nuclear weapons constitute a potential means of destruc-

tion of all mankind. Not for a moment did it fail to take into account this eminently crucial factor for the survival of mankind. The moral dilemma which confronted individual consciences finds many a reflection in this Opinion. But the Court could obviously not go beyond what the law says. It could not say what the law does not say.

10. Accordingly, at the end of its Opinion, the Court confined itself to stating the situation, finding itself unable to do any more than this. There are some who will inevitably interpret operative paragraph 2 E as contemplating the possibility of States using nuclear weapons in exceptional circumstances. For my part, and in the light of the foregoing, I feel obliged in all honesty to construe that paragraph differently, a fact which has enabled me to support the text. My reasons are set out below.

* * *

11. I cannot sufficiently emphasize that the Court's inability to go beyond this statement of the situation can in no way be interpreted to mean that it is leaving the door ajar to recognition of the legality of the threat or use of nuclear weapons.

12. The Court's decision in the "*Lotus*" case, which some people will inevitably resurrect, should be understood to be of very limited application in the particular context of the question which is the subject of this Advisory Opinion. It would be to exaggerate the importance of that decision of the Permanent Court and to distort its scope were it to be divorced from the particular context, both judicial and temporal, in which it was taken. No doubt this decision expressed *the spirit of the times*, the spirit of an international society which as yet had few institutions and was governed by an international law of strict co-existence, itself a reflection of the vigour of the principle of State sovereignty.

13. It scarcely needs to be said that the face of contemporary international society is markedly altered. Despite the still modest breakthrough of "supra-nationalism", the progress made in terms of the institutionalization, not to say integration and "globalization", of international society is undeniable. Witness the proliferation of international organizations, the gradual substitution of an international law of co-operation for the traditional international law of co-existence, the emergence of the concept of "international community" and its sometimes successful attempts at subjectivization. A token of all these developments is the place which international law now accords to concepts such as obligations *erga omnes*, rules of *jus cogens*, or the common heritage of mankind. The resolutely positivist, voluntarist approach of international law still current at the beginning of the century — and which the Permanent

Court did not fail to endorse in the aforementioned Judgment¹ — has been replaced by an objective conception of international law, a law more readily seeking to reflect a collective juridical conscience and respond to the social necessities of States organized as a community. Added to the evolution of international society itself is progress in the technological sphere, which now makes possible the total and virtually instantaneous eradication of the human race.

14. Furthermore, apart from the time and context factors, there is everything to distinguish the decision of the Permanent Court from the Advisory Opinion of the present Court: the nature of the problem posed, the implications of the Court's pronouncement, and the underlying philosophy of the submissions upheld. In 1927, the Permanent Court, when considering a much less important question, in fact concluded that behaviour not expressly prohibited by international law was authorized by that fact alone². In the present Opinion, on the contrary, the Court does not find the threat or use of nuclear weapons to be either legal or illegal; from the uncertainties surrounding the law and the facts it does not infer any freedom to take a position. Nor does it suggest that such licence could in any way whatever be deduced therefrom. Whereas the Permanent Court gave the green light of authorization, having found in international law no reason for giving the red light of prohibition, the present Court does not feel able to give a signal either way.

15. Thus the Court, in this Opinion, is far more circumspect than its predecessor in the "*Lotus*" case in asserting today that what is not expressly prohibited by international law is not therefore authorized.

¹ "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims." (*"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10, p. 18.*)

² "The Court therefore must, in any event, ascertain whether or not there exists a rule of international law limiting the freedom of States to extend the criminal jurisdiction of their courts to a situation uniting the circumstances of the present case" (*ibid.*, p. 21);

and the Court concluded:

"It must therefore be held that there is no principle of international law, within the meaning of Article 15 of the Convention of Lausanne of July 24th, 1923, which precludes the institution of the criminal proceedings under consideration. Consequently, Turkey, by instituting, in virtue of the discretion which international law leaves to every sovereign State, the criminal proceedings in question, has not, in the absence of such principles, acted in a manner contrary to the principles of international law within the meaning of the special agreement." (*Ibid.*, p. 31.)

16. While not finding either in favour of or against the legality of the threat or use of nuclear weapons, the Court takes note, in its Opinion, of the existence of a very advanced process of change in the relevant international law or, in other words, of a current trend towards the replacement of one rule of international law by another, where the first is already defunct and its successor does not yet exist. Once again, if the Court as a judicial body felt that it could do no more than register this fact, States should not, in my view, see in this any authorization whatever to act as they please.

17. The Court is obviously aware that, at first sight, its reply to the General Assembly is unsatisfactory. However, while the Court may leave some people with the impression that it has left the task assigned to it half completed, I am on the contrary persuaded that it has discharged its duty by going as far, in its reply to the question put to it, as the elements at its disposal would permit.

18. In the second sentence of operative paragraph 2 E of the Advisory Opinion, the Court indicates that it has reached a point in its reasoning beyond which it cannot proceed without running the risk of adopting a conclusion which would go beyond what seems to it to be legitimate. That is the position of the Court as a judicial body. Some of the Judges supported this position, though no doubt each with an approach and an interpretation of their own. It will certainly have been noted that the distribution of the votes, both for and against paragraph 2 E, was in no way consistent with any geographical split; this is a mark of the independence of the Members of the Court which I am happy to emphasize. Having thus explained the construction which I believe should be put on the Court's pronouncement, I would now like to revert briefly to the substantive reasons which prompted me to support it.

* * *

19. International humanitarian law is a particularly exacting corpus of rules, and these rules are meant to be applied in all circumstances. The Court has fully recognized this fact.

20. Nuclear weapons can be expected — in the present state of scientific development at least — to cause indiscriminate victims among combatants and non-combatants alike, as well as unnecessary suffering among both categories. *By its very nature the nuclear weapon, a blind weapon, therefore has a destabilizing effect on humanitarian law, the law of discrimination which regulates discernment in the use of weapons. Nuclear weapons, the ultimate evil, destabilize humanitarian law which is the law of the lesser evil. The existence of nuclear weapons is therefore a major challenge to the very existence of humanitarian law, not to mention their long-term harmful effects on the human environment, in respecting which the right to life may be exercised. Until scientists are able to develop a "clean" nuclear weapon which would distinguish between combatants and non-combatants, nuclear weapons will clearly have indiscriminate*

effects and constitute an absolute challenge to humanitarian law. *Atomic warfare and humanitarian law therefore appear to be mutually exclusive, the existence of the one automatically implying the non-existence of the other.*

21. I have no doubt that most of the principles and rules of humanitarian law and, in any event, the two principles, one of which prohibits the use of weapons with indiscriminate effects and the other the use of arms causing unnecessary suffering, form part of *jus cogens*. The Court raised this question in the present Opinion; but it nevertheless stated that it did not have to make a finding on the point since the question of the nature of the humanitarian law applicable to nuclear weapons did not fall within the framework of the request addressed to it by the General Assembly of the United Nations. Nonetheless, the Court expressly stated the view that these fundamental rules constitute “intransgressible principles of international customary law”³.

22. A State’s right to survival is also a fundamental law, similar in many respects to a “natural” law. However, self-defence — if exercised in extreme circumstances in which the very survival of a State is in question — cannot produce a situation in which a State would exonerate itself from compliance with the “intransgressible” norms of international humanitarian law. In certain circumstances, therefore, a relentless opposition can arise, a head-on collision of fundamental principles, neither one of which can be reduced to the other. The fact remains that the use of nuclear weapons by a State in circumstances in which its survival is at stake risks in its turn endangering the survival of all mankind, precisely because of the inextricable link between terror and escalation in the use of such weapons. It would thus be quite foolhardy unhesitatingly to set the survival of a State above all other considerations, in particular above the survival of mankind itself.

* * *

23. As the Court has acknowledged, the obligation to negotiate in good faith for nuclear disarmament concerns the 182 or so States parties to the Non-Proliferation Treaty. I think one can go beyond that conclusion and assert that there is in fact a twofold *general obligation*, oppos-

³ See paragraph 79 of the Advisory Opinion, which reads:

“It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and ‘elementary considerations of humanity’ as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case (*I.C.J. Reports 1949*, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because *they constitute intransgressible principles of international customary law.*” (Emphasis added.)

able *erga omnes*, to negotiate in good faith and to achieve the desired result. Indeed, it is not unreasonable to think that, considering the at least formal unanimity in this field, this twofold obligation to negotiate in good faith and achieve the desired result has now, 50 years on, acquired *a customary character*. For the rest, I fully share the Court's opinion as to the legal scope of this obligation. I would merely stress once again the great importance of the goal to be attained, particularly in view of the uncertainties which still persist. The Court patently had to say this. Owing to the, by the nature of things, very close link between this question and the question of the legality or illegality of the threat or use of nuclear weapons, the Court cannot be reproached for having reached a finding *ultra petita*, a notion which in any event is alien to the advisory procedure.

* * *

24. The solution arrived at in this Advisory Opinion frankly states the legal reality, while faithfully expressing and reflecting the hope, shared by all, peoples and States alike, that *nuclear disarmament will always remain the ultimate goal of all action in the field of nuclear weapons, that the goal is no longer utopian and that it is the duty of all to seek to attain it more actively than ever*. The destiny of man depends on the will to enter into this commitment, for as Albert Einstein wrote, "*The fate of the world will be such as the world deserves.*"⁴

(Signed) Mohammed BEDJAOUI.

⁴ Albert Einstein, *The World as I See It* (trans. by Alan Harris), abridged ed., 1949, Philosophical Library, New York, p. 63.