

DECLARATION OF JUDGE HERCZEGH

[Translation]

According to Article 9 of the Statute of the International Court of Justice, “the representation of the main forms of civilization and of the principal legal systems of the world should be assured” in the membership of the Court. It is inevitable therefore that differences of theoretical approach will arise between the Members concerning the characteristic features of the system of international law and of its branches, the presence or absence of gaps in this system, and the resolution of possible conflicts between its rules, as well as on relatively fundamental issues. The preparation of an advisory opinion on the highly complex question put by the General Assembly concerning the legality of the threat or use of nuclear weapons “in any circumstance” has highlighted the different conceptions of international law within the Court. The diversity of these conceptions prevented the Court from finding a more complete solution and therefore a more satisfactory result. The wording of the reasons and the conclusions of the Advisory Opinion reflects these divergences. It must nevertheless be noted that the Court pronounced unanimously on several very important points.

In my view, however, in the present state of international law it would have been possible to formulate in the Advisory Opinion a more specific reply to the General Assembly’s request, one less burdened with uncertainty and reticence. In the fields where certain acts are not totally and universally prohibited “as such”, the application of the general principles of law makes it possible to regulate the behaviour of subjects of the international legal order, obliging or authorizing them, as the case may be, to act or refrain from acting in one way or another. The fundamental principles of international humanitarian law, rightly emphasized in the reasons of the Advisory Opinion, categorically and unequivocally prohibit the use of weapons of mass destruction, including nuclear weapons. International humanitarian law does not recognize any exceptions to these principles.

I believe that the Court should have completely avoided dealing with the question of reprisals in time of armed conflict, for a detailed consideration, in my view, would have been beyond the scope of the request submitted by the General Assembly. As it happened, the Court saw fit to mention the question in its Opinion, but did so too briefly, thus perhaps encouraging hasty and unjustified interpretations.

The relationship between paragraphs 2 C and 2 E of paragraph 105 of the Advisory Opinion is not entirely clear, and their respective content does not seem wholly consistent. According to paragraph 2 C, the threat or use of force by means of nuclear weapons must satisfy “all the require-

ments” of Article 51 of the Charter of the United Nations, concerning natural law and self-defence, whereas the second sentence of paragraph 2 E states that

“However . . . 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.”

In my view, the wording of this sentence cannot easily be reconciled with the earlier reference to “all the requirements” of Article 51 of the Charter. Paragraphs 40 and 41 of the Opinion stated that the entitlement to resort to self-defence is subject to certain constraints and that there is “a specific rule . . . well established in customary international law” whereby “self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it”. I think that the Court could have made this statement the subject of formal conclusions in paragraph 105 of the Advisory Opinion, thus rendering it more specific.

One of the many tasks assigned to the General Assembly — under Article 13 of the Charter of the United Nations — is “the progressive development of international law and its codification”. The transformation, by means of codification, of the general principles of law and customary rules into rules of treaty law might remove some of the weaknesses inherent in customary law and could certainly help to put an end to the disputes which led up to the request for an opinion addressed to the Court by the General Assembly as to the legality or illegality of the threat or use of nuclear weapons, pending complete nuclear disarmament under strict and effective international control.

I voted in favour of paragraph 2 E of paragraph 105 of the Opinion, although I think that it could have summarized more accurately the current state of international law regarding the question of the threat or use of nuclear weapons “in any circumstance”. In fact, to have voted against this paragraph would have meant adopting a negative stance on certain essential conclusions — also set forth in this Opinion and alluded to in paragraph 2 E — which I fully endorse.

(Signed) Geza HERCZEGH.