

## DECLARATION OF JUDGE FERRARI BRAVO

[Translation]

I have voted in favour of the present Advisory Opinion on the legality of nuclear weapons because I think it is incumbent upon the International Court of Justice to spare no pains in answering, to the best of its ability, the questions put to it by such principal organs of the United Nations as are entitled to seise the Court, particularly when such an answer may increase the likelihood of resolving a deadlock which, in the present case, has been perpetuated for over 50 years, casting a sombre, threatening shadow over the whole of mankind.

The Court, functioning as the principal judicial organ of the United Nations (Article 92 of the Charter), was set up to do just that — among other things — and does not have to ask itself whether its reply, given to the best of its ability, can contribute to the development of the situation. Neither does it have to justify itself if that reply is less than exhaustive. I accordingly subscribe fully to the reasons given in support of the Court's decision to allow the question put by the General Assembly.

In that regard, it is however necessary to point out that the matter appears in a quite different light when the Court is seised by a specialized agency of the United Nations, whose competence to make application to the Court is, for reasons of principle, clearly defined. I accordingly also voted in favour of the Opinion, given this same day, whereby the Court decided not to answer the question put to it by the World Health Organization (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict, I.C.J. Reports 1996*, p. 87), and consider my conduct to have been consistent. The Court is the principal judicial organ of the United Nations, but it is not the judicial organ of other international bodies whose right to seise the Court needs to be carefully restricted if the intention is to maintain a correct division of powers — and hence of effectiveness — among the international organizations, in a bid to prevent those political functions that the logic of the system has entrusted *only* to the United Nations from being usurped by other organizations which, to say the least, have neither the power nor the structure to assume them.

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Having said this, I am however deeply dissatisfied with certain crucial passages of the decision as, to tell the truth, it strikes me as not very courageous and at times rather difficult to read.

More particularly, I regret that the Court should have arbitrarily divided into two categories the long succession of General Assembly resolutions which begins with resolution 1 (I) of 24 January 1946 and

which, at least down to resolution 808 (IX), takes the form of a series of unanimously adopted resolutions. In my view these resolutions are fundamental, particularly the first of them, whose wording had already been determined in Moscow before the United Nations was created (for the history of the resolution and for the steps taken in Moscow with a view to entrusting the United Nations with the supervision of atomic energy to which, at that time, only the United States had the key see *The United Nations in World Affairs, 1945-1947*, 1947, pp. 391 *et seq.*), and which could, at a pinch, be placed on the same footing as the provisions of the Charter. As a matter of fact that resolution establishes — and in my view clearly establishes — the existence of an *actual undertaking* of a solemn nature to eliminate all atomic weapons whose presence in military arsenals was considered illegal. The resolution was worded as follows:

“5. . . . In particular, the Commission [established by the resolution] shall make specific proposals:

. . . . .  
 (c) *for the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction.*”  
 (Emphasis added.)

These ideas were repeated on several occasions in other General Assembly resolutions immediately after the founding of the United Nations (see for example resolution 41 (I) or resolution 191 (III)).

I am very well aware that the cold war which broke out shortly afterwards (and it is not for me to say who was responsible, although I would stress that responsibility did not lie with just one side), prevented the *development* of that concept of illegality (which was subsequently abandoned by the United States which had been its promoter), while giving rise to a whole series of arguments focusing on the concept of nuclear deterrence which (and this is important, as we shall see) has *no legal force*.

However, in my view that illegality nevertheless already existed and any production of nuclear weapons had, as a consequence, to be *justified* in the light of that stigma of illegality which could not be effaced. It is, then, to be regretted that such a conclusion is not clear from the reasoning followed by the Court — a reasoning which, on the contrary, is often difficult to read, tortuous and ultimately rather inadequate.

This apart, it remains to be said that a number of conclusions reached by the Court are not reflected in the results set forth in the operative part. These are serious lacunae, but can be explained by the difficulty of obtaining consistent majorities with respect to certain components of the Advisory Opinion.

It is however important to acknowledge that there is still paragraph 104 of the Advisory Opinion, which introduces the operative part and whose importance is really crucial. It in fact suggests that the atten-

tive reader should evaluate the whole of the reasoning given by the Court, take account of those parts of the reasoning which are not reflected in the various paragraphs of the operative part and, what is more, take account of the inevitable gaps in that reasoning. May its readers — and not only academics — take heed of this advice while bearing in mind that an advisory opinion, in spite of the procedural similarities, is not a judgment of the Court. And this one above all.

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To be sure, there is no precise and specific rule that prohibits nuclear weapons and draws the fullest conclusions from that prohibition. The theory of deterrence, to which the Advisory Opinion makes no more than passing reference (para. 96), would have merited further consideration. I have already said that, in my view, the idea of nuclear deterrence has no legal validity and I would add that the theory of deterrence, while creating a practice of nuclear-weapon States and their allies, is not able to create a legal practice which could serve as the basis for the creation of an international custom. One might even say that it is *contrary to the law*, if one thinks of the effect it has had upon the Charter of the United Nations.

I will not go so far myself, but feel bound to note that it is thanks to the doctrine of deterrence that the revolutionary scope of Article 2, paragraph 4, of the Charter has been reduced, while at the same time the scope of Article 51, which was traditionally considered as its counterpoint, has been extended as a whole series of conventional constructions have taken shape around that norm, as can be seen from the two systems governing respectively the Atlantic Alliance on the one hand and on the other the Warsaw Pact, while it was in existence. These are systems which are doubtless governed by legal rules but which proceed from an idea derived *essentially* from the political — and hence not legal — conclusion that the Security Council cannot function in the face of a major conflict as would probably be the type which is the subject of the present Advisory Opinion.

It is in this way that the gulf separating Article 2, paragraph 4, from Article 51 has widened, as a result also of the great obstacle of deterrence which has been cast into it. To overcome this gulf a bridge has therefore had to be built over it, using the materials currently available to us to do so, namely, Article VI of the Nuclear Non-Proliferation Treaty.

I very much doubt whether these arguments are really endorsed by the Court, as the very condensed manner in which the Court has chosen to deal with deterrence does not enable one clearly to understand whether this is really its view. However, it does not allow the exclusion of that possibility either. In any case, the separate or dissenting opinions appended to the Advisory Opinion (and I do not see any great difference between them) will help to shed light upon this point (and upon others, of course).

In any case, this is in my view the fundamental reason why the Opinion of the Court is bound to include, in its final part, certain arguments based upon a clause of a treaty which should not logically be given a place there as it is not of a universal character. These arguments are, however, fully justified by the circumstances in which we now find ourselves, in which the Non-Proliferation Treaty would seem to be the only means of arriving rapidly at a solution capable of averting catastrophic consequences.

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In conclusion, I take the view that there is as yet no precise and specific rule prohibiting nuclear weapons and drawing the fullest consequences from that prohibition.

It is obvious that no such rule could have come into existence in the political situation that prevailed between 1945 and 1985. However, I would point out that all the rules produced over the last 50 years, particularly with regard to the humanitarian law of armed conflict, are irreconcilable with the technological development of the construction of nuclear weapons. Can one, for example, imagine that just as humanitarian law, an essential and increasingly significant part of the international law of warfare and (of late) of peace as well, is bringing into being a whole series of principles for the protection of the civilian population or the environment, that same international law should continue to accommodate the lawfulness of, for example, the use of the neutron bomb, which leaves the environment intact, albeit with the "slight" drawback that the people living in it are wiped out! If that is the case, it matters little whether a rule specific to the neutron bomb can be found, since it becomes *automatically* unlawful as being quite out of keeping with the majority of the rules of international law.

This phenomenon is not new, as at every period in its development, since the beginning of the modern era, international law which is essentially a customary law — *and hence has come into being spontaneously* — has encountered situations in which the force of certain rules prevented contrary rules from being established or maintained.

All these considerations are unfortunately obscured, in the Court's Advisory Opinion, by its fear of engaging in a courageous analysis of the development over time of the General Assembly resolutions which, only from a certain period (around the 1960s), occasioned certain clear-cut divisions between nuclear-weapon States (and their allies) and those States that were threatened by the bomb.

I would point out once again that the fact that a rule prohibiting nuclear weapons began to take shape right at the beginning of the life of the United Nations does not mean that the development of that tendency and, as a consequence, the development of its propulsive force, were not cut short at the time when the two principal Powers, both in possession of nuclear weapons, embarked on the cold war and developed a whole

body of instruments — even treaties and conventions — that were focused upon the idea of deterrence. However, this only prevented the *implementation* of the prohibition (that could only be achieved by means of negotiations), whereas the prohibition as such — the “naked” prohibition, if I may express myself thus — has remained the same and still operates, at least as regards the burden of proof, rendering it more difficult for the nuclear-weapon States to justify themselves by references to various applications of the theory of deterrence which, as I said before, *is not* a legal theory.

In other words, one must, by a legal instrument (the agreement) ward off the danger of an entity — the atomic weapon — which as such has nothing legal about it, without its being possible, in any given case, to verify whether the proposed solutions hold good or not. Such a verification would require the explosion of the bomb. But would that verification still be meaningful, in that event?

This element of normative imbalance between the reasons advanced by the nuclear-weapon States and those advanced by the non-nuclear-weapon States should and could have been placed on record by the Court carefully, rather than in the sometimes contradictory manner in which it is perceived in the Advisory Opinion.

(Signed) L. FERRARI BRAVO.