DECLARATION OF JUDGE SHI

I have voted in favour of the operative paragraphs of the Advisory Opinion of the Court, because I am generally in agreement with its reasoning and conclusions.

However, I have reservations with regard to the role which the Court assigns to the policy of deterrence in determining *lex lata* on the use of nuclear weapons.

Thus, for instance, paragraph 67 of the Opinion states

> "It [the Court] notes that it is a fact that a number of States adhered to that practice during the greater part of the Cold War and continue to adhere to it. Furthermore, the members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past 50 years constitutes the expression of an *opinio juris*. Under these circumstances the Court does not consider itself able to find that there is such an *opinio juris*."

Then in the crucial paragraph 96 it is stated

> "nor can it [the Court] ignore the practice referred to as 'policy of deterrence', to which an appreciable section of the international community adhered for many years".

In my view, "nuclear deterrence" is an instrument of policy which certain nuclear-weapon States use in their relations with other States and which is said to prevent the outbreak of a massive armed conflict or war, and to maintain peace and security among nations. Undoubtedly, this practice of certain nuclear-weapon States is within the realm of international politics, not that of law. It has no legal significance from the standpoint of the formation of a customary rule prohibiting the use of nuclear weapons as such. Rather, the policy of nuclear deterrence should be an object of regulation by law, not vice versa. The Court, when exercising its judicial function of determining a rule of existing law governing the use of nuclear weapons, simply cannot have regard to this policy practice of certain States as, if it were to do so, it would be making the law accord with the needs of the policy of deterrence. The Court would not only be confusing policy with law, but also taking a legal position with respect to the policy of nuclear deterrence, thus involving itself in international politics — which would be hardly compatible with its judicial function.

Also, leaving aside the nature of the policy of deterrence, this "appreciable section of the international community" adhering to the policy of

deterrence is composed of certain nuclear-weapon States and those States that accept the protection of the "nuclear umbrella". No doubt, these States are important and powerful members of the international community and play an important role on the stage of international politics. However, the Court, as the principal judicial organ of the United Nations, cannot view this "appreciable section of the international community" in terms of material power. The Court can only have regard to it from the standpoint of international law. Today the international community of States has a membership of over 185 States. The appreciable section of this community to which the Opinion refers by no means constitutes a large proportion of that membership, and the structure of the international community is built on the principle of sovereign equality. Therefore, any undue emphasis on the practice of this "appreciable section" would not only be contrary to the very principle of sovereign equality of States, but would also make it more difficult to give an accurate and proper view of the existence of a customary rule on the use of the weapon.

(Signed) SHI Jiuyong.