

**Letter dated 19 June 1995 from the Honorary Consul of
Solomon Islands in London, together with Written Comments
of the Government of Solomon Islands**



Government of Solomon Islands

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11 June 1995

His Excellency, Edwardo Valencia Ospina
Registrar, International Court of Justice
Peace Palace, The Hague, The Netherlands.

Sir,

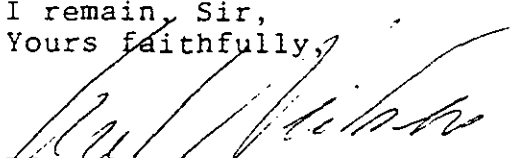
WORLD HEALTH ORGANISATION - ADVISORY OPINION

By the direction of the Minister for Foreign Affairs, Solomon Islands, I have pleasure in sending you herewith, on behalf of the Government of, Solomon Islands' Further Written Comments on Other Governments' Written Observations in respect of the request by the World Health Organisation for an Advisory Opinion from the International Court of Justice.

In view of the importance of the request made by the World Health Organisation, as evidenced by the large response in the form of the submission of Written Observations by 34 States, and the nature of the international legal questions arising thereunder, Solomon Islands considers that it would be appropriate for an oral hearing to be held on this matter.

I would be grateful if correspondence could continue to be addressed to me at the above address, with copies to the Minister of Foreign affairs at: P O Box G10, Honiara, Solomon Islands.

I remain, Sir,
Yours faithfully,


Edward Nielsen
Honorary Consul

**REQUEST BY THE WORLD HEALTH ORGANIZATION
FOR AN ADVISORY OPINION ON THE LEGALITY
OF THE USE OF NUCLEAR WEAPONS IN VIEW
OF THEIR EFFECTS ON
HUMAN HEALTH AND THE ENVIRONMENT**

**FURTHER WRITTEN OBSERVATIONS SUBMITTED
BY THE GOVERNMENT OF SOLOMON ISLANDS
TO THE INTERNATIONAL COURT OF JUSTICE**



Government of Solomon Islands

20 JUNE 1995

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INTRODUCTION

- 1.1 On 10 June 1994 Solomon Islands submitted Written Observations to the International Court of Justice pursuant to the request by the Assembly of the World Health Organization (WHO) for an Advisory Opinion on the use of nuclear weapons under international law, including the WHO Constitution. These Further Written Observations are now submitted by Solomon Islands in response to the Court's Order of 20 June 1994 fixing 20 June 1995 as the time-limit within which States and organisations having presented written statements may submit written comments on the other written statements.
- 1.2 The purpose of these Further Written Observations is to respond to points raised by other member countries of the WHO in their Written Observations to the Court. These address three issues:
- the competence of the WHO to make the request (Part I, paras. 2.1-2.45);
 - whether the Court should exercise its discretion in favour of answering the question (Part II, paras. 3.1-3.27); and
 - the substantive legal issues raised by the request, including human rights and environment (Part III paras. 4.1-4.96).
- 1.3 By way of introduction, Solomon Islands welcomes the fact that 34 Member countries of the WHO submitted Written Observations. This is apparently the largest number of States ever to participate in the written phase of a request for an Advisory Opinion, reflecting the importance of the question posed by WHO and related issues. For many of these States, including Solomon Islands, it is the first time that they have participated in proceedings before the Court. This is a noteworthy feature of these proceedings, in the *Decade of International Law*.
- 1.4 Before responding in detail to the written observations of those States which advocate that the Court should either decline to give an Advisory Opinion in the present case or give a negative reply to the question put by the WHO, Solomon Islands wishes to put on record some general observations. These relate to the scope of the question (A) and the issues concerning the application of the rule of law which are raised by the WHO's request (B).
- (A) **Scope of the question**
- 1.5 As will be recalled, the question put to the Court is the following:

"In view of the health and environment 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?"

The question thus relates only to the situation where an actual *use* of one or more nuclear weapons occurs. It does not encompass *mere possession* of a nuclear weapon by a State, or the *threat* of use of such weapons. This distinction is important, as some of the States submitting written observations suggest that possession would equate to or imply a right of use or that the question posed in reality seeks to address the legality of possession.

1.6 It is submitted that except where a treaty expressly recognises that the right of possession entails the right of use, such an inference is ill-founded. Thus the various conventions on nuclear test bans implicitly admit the possession of nuclear weapons by some States and the use but *only for test purposes*, provided that such use would not take place in geographic areas where nuclear tests are banned:

- Antarctic Treaty, 1 December 1959, (Article V);
- Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water, 5 August 1963, (Article 1);
- Treaty on the prohibition of the emplacement of nuclear weapons and other weapons of mass destruction on the seabed and the ocean floor and in the subsoil thereof, 11 February 1971, (Article 1);
- Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies, 27 January 1967, (Article IV);
- Agreement governing the activities of States on the moon and other celestial bodies, 5 December 1979, (Article 3, paras. 3 and 4).

On the other hand, other treaties prohibit non-nuclear weapon State Parties from even possessing nuclear weapons:

- Treaty on the non-proliferation of nuclear weapons, 1 July 1968, (Article II);
- Treaty of Tlatelolco establishing a nuclear weapon-free zone in Latin America, 14 February 1967, (Article 1), and Protocol II signed by the five nuclear weapon States; and
- Treaty of Rarotonga establishing a nuclear free zone in the South Pacific, 6 August 1985, (Articles 5, 6 and 7) and its Protocols II and III signed by the five nuclear weapon States.

1.7 No treaty states, however, that the nuclear weapon States have a right to use nuclear weapons for purposes of war or armed conflict. At best, reservation is made for the

peaceful use of nuclear energy (not weapons). Thus, Article IV, para 1 of the NPT provides:

"Nothing in this Treaty shall be interpreted as affecting the inalienable right of all Parties to the Treaty to develop research, production and *use of nuclear energy for peaceful purposes* without discrimination and in conformity with Articles I and II of this Treaty."

- 1.8 The distinction between use and possession is crucial to the present proceedings. First, with regard to the *jurisdiction* of the Court, WHO requests the Court to adjudicate only on the legality of the *use* and not on totally unrelated questions such as negotiations concerning the NPT or a comprehensive test ban treaty, or the strategic policies of certain nuclear weapon States. To suggest that the WHO is asking the Court to act as a legislator in these matters is wholly ill conceived. The Court is not being asked to advise on the type of actions the nuclear weapon States should or should not adopt in these (or other) negotiations, but only to record that the *use* of nuclear weapons in war or in other armed conflict would be a breach of their obligations under international law including the WHO Constitution. As the Court will appreciate, such a difference is crucial when deciding whether the request for an Advisory Opinion on the legality of such use falls within the competence of the WHO.
- 1.9 Second, the distinction between *use* and *possession* is also of the utmost importance in order to decide *whether it is proper for the ICJ to exercise its discretionary right* to give an Advisory Opinion in the present case. Contrary to what has been suggested in some written observations, the present request did not disrupt the negotiations for an extension of the NPT (see *infra*. 3.14-3.15) and will not adversely affect negotiations for the Comprehensive Test Ban Treaty. Nor would an Advisory Opinion reflect adversely on the current deterrence policies of some States. Indeed, the Court's Advisory Opinion is confined to the *use*, and need (and should) not address issues of possession. Such a difference is again decisive when finding whether the request for an Advisory Opinion is suitable for adjudication.
- 1.10 These observations are not intended to suggest that use and possession are totally unrelated. As stated in the Australian written observations:

"If the Court were to advise that nuclear weapons could be used in response to a conventional attack (...) the future of the Conference on Disarmament negotiations on strengthening Negative Security Assurances (...) could be jeopardised."

With this Solomon Islands is in full agreement. But it should be noted that what threatens to disrupt these negotiations is not the question posed to the Court, but the extravagant and dangerous assertion of some nuclear weapon States, whilst using every pressure on the non-nuclear weapon States to accept disarmament and non-proliferation obligations, that they reserve for themselves alone not only the right to possess nuclear weapons, but also the *right to use* these weapons in a conflict under certain circumstances. In other words, what is likely to affect the negotiations is the

fact that nuclear weapon States proclaim that they have privileged rights. Such a brutal affirmation of a right of discrimination is hardly calculated to enhance the negotiation process. This situation will be unaffected by the Court's Advisory Opinion.

- 1.11 In its written observations the Australian Government contemplates an alternative possibility in the following terms:

"Conversely, an opinion in which the Court concluded that all uses of nuclear weapons were *illegal* could create problems in the disarmament process, which will necessarily be negotiated carefully by the nuclear weapon states in the context of their own security perceptions ..."

- 1.12 This conclusion is not shared by Solomon Islands. It feels, on the contrary, that by giving to non-nuclear weapon States and nuclear weapon States alike legal assurances that any use of nuclear weapons in a state of war or armed conflict would be illegal, the Court would foster the negotiation process. It would ensure that the present status of inequality in the matter of possession would be characterised as a mere matter of fact which did not entail an inequality in terms of international legal rights. This would be fully consistent with the commitments of the signatories of the various disarmament treaties noted above: test ban treaties, nuclear-free zones treaties, and non-proliferation treaties. Indeed, it is recognised in the various preambles or articles of these treaties that nuclear war would be catastrophic and that the regime established by these treaties must be considered as transitory towards a complete disarmament to be negotiated *bona fide* in order to achieve equality among States.

- 1.13 Thus, the preamble to the 1963 Treaty Banning Nuclear Weapon Tests acknowledges the following:

"desiring to put an end to the contamination of man's environment by radioactive substances".

The language of the preamble to the 1968 Non-Proliferation Treaty is even stronger:

"Considering the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples (...)

Declaring their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament (...)

Desiring to further the easing of international tension and the strengthening of trust between States in order to facilitate the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a treaty on general and complete disarmament under strict and effective international control (...)

According to Article VI of the NPT

"Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control".

That aim had already been proclaimed as the principal aim of the nuclear weapon States in the Preamble of the 1963 Treaty Banning Nuclear Weapon Tests. Additional Protocols I and II to the 1967 Treaty of Tlatelolco establishing a nuclear weapon-free zone in Latin America, signed by the five nuclear weapon States, contain the following paragraph in their preambular part:

"Desiring to contribute, so far as lies in their power, towards ending the armaments race, especially in the field of nuclear weapons, and towards strengthening a world at peace, based on mutual respect and *sovereign equality of States*" (our emphasis)

- 1.14 And, perhaps most significantly, with the adoption of the May 1995 extension of the NPT, the nuclear weapons States committed themselves to ridding the world of nuclear weapons (see *infra* para. 3.15).
- 1.15 In the meantime, would the deterrence policy of some States be affected by an Advisory Opinion? Solomon Islands considers that a ruling by the Court that the use of nuclear weapons would be illegal would not affect *per se* such a policy, provided deterrence is construed as not being a threat of use. Deterrence is a policy by which possession of a sufficient but limited nuclear weapon arsenal must convince a possible aggressor that the risk he would take would be greater than the gain he could anticipate from such aggression (see definition given in the Written Observations of France, page 1). So defined, deterrence policy is not a threat to use force. It would have this effect only where it would be addressed specifically to another State in support of a particular demand, as an ultimatum. By itself, deterrence policy is not an ultimatum, it is a mere general warning. It is only where the nuclear power State would be the victim of an aggression that it reserves the right to retaliate with nuclear weapons.
- 1.16 As explained in these Further Observations, Solomon Islands take the view that the exercise of such a retaliation would be an illegal act (*infra* paras. 3.74 *et seq.*). However, Solomon Islands accepts that the mere warning that it *could* happen is not a threat, and is not illegal. Deterrence must be taken as a matter of fact, of a temporary and undoubtedly dangerous character, but not illegal as long as it has not been exercised, or used as a threat.
- 1.17 In consequence, Solomon Islands considers that a finding by the Court on the legality of the use of nuclear weapons would not affect this situation of fact. It does not involve the Court in a legislative or specifically political process. It only requests the Court to enlighten WHO on the legality of use. As explained in the earlier Written Observations (paras. 2.54-2.57 and below), a reply of the Court to that limited

question would help WHO in the exercise of its functions and the direction and nature of its future actions for the protection of health and environment in this regard.

(B) Application of the rule of law

1.18 Turning to the substance of the question, Solomon Islands submits that the Court has never before been so acutely in a position to make a major contribution to the affirmation of the rule of law in international relations, and to uphold the necessity of the principle of non-contradiction in the global system of international law. An Advisory Opinion would also affirm the relevance of international law to the activities of international organisations.

1.19 The essence of the nuclear weapon States' arguments is the following:

- 1) There is no international treaty prohibiting by name the use of nuclear weapons. This statement is true.
- 2) There is no general custom specifically prohibiting by name the use of nuclear weapons, at least a custom opposable to the nuclear weapon States. This is also true subject to what is said hereunder (para. 1.20). There is unquestionably a custom binding the great majority of States in this regard, but it is not opposable to the NATO and other States which have constantly opposed it.
- 3) The General Assembly resolutions which condemn as illegal the use of nuclear weapons were similarly opposed by the same States. The obligations embodied in these resolutions reflect the *opinio juris* for the States which voted in favour of these texts and whose behaviour was consistent with these texts, but cannot bind only by themselves the States which voted against them and constantly opposed these texts.

This does not mean, however, that no international law applies to the matter and that the general customary rules embodied in the General Assembly resolutions do not bind all States.

1.20 Rather, it is submitted that general principles of humanitarian law which have evolved since the nineteenth century and which are universally recognised today govern the matter (see in particular the Edinburgh resolution of the Institute of International Law of 13 September 1969, which makes a specific reference to nuclear weapons). Thus, as indicated in Solomon Islands Written Observations and those of most other States submitting Written Observations on the substance, the use of nuclear weapons would violate:

- the principle of necessity (their effect is generally greater than that required to achieve a legitimate military objective);

- the principle of discrimination (nuclear weapons have such indiscriminate effects that they necessarily affect civilians);
- the principle of non-toxicity (nuclear weapons are poisonous);
- the principle of humanity (nuclear weapons cause unnecessary or aggravated suffering);
- the principle of proportionality (nuclear weapons render death inevitable);
- the principle of protection of the environment (nuclear weapons cause significant and widespread damage to the environment);
- the principles of the Red Cross conventions concerning protection of medical facilities;
- the principle of neutrality; and
- the human rights to life and health which cannot be derogated.

1.21 It is accepted by the nuclear weapon States that these principles apply in all circumstances. Some of these principles have been reaffirmed in the 1977 Protocols to the Geneva Conventions. The diplomatic consensus to the effect that nuclear weapons would not be addressed by the Conference does not mean that accepted humanitarian principles do not govern the use of nuclear weapons. It would be illogical, juridically speaking, to maintain that all sorts of minor acts violating humanitarian law were prohibited *but* that a major crime against humanity would escape the applicability of that law. To accept such a contradiction would be to deny the rule of law. It would mean the end of a world order premised upon law and signal the acceptance as a legal norm the whimsical dictatorship of a small number of nuclear-weapon States entitled to violate those rules which are compulsory for all others.

1.22 The allegation by one nuclear weapon State that the matter is not regulated at all by international law, that there exists a sort of "lacuna" in the international legal system, does not withstand scrutiny and should be comprehensively rejected by the Court. Not only are there many treaties and other commitments in this field, but humanitarian law and that pertaining to human rights and the environment is applicable without exception in the matter. In the late twentieth century, in the Decade of International Law, the Court should use the opportunity presented by this request for an Advisory Opinion to reaffirm the relevance of international law and the rule of law in international relations.

1.23 Contrary to the view of that single State, if there is a place where doctrine recognises that there are rules of *jus cogens* which are not controversial, it is in respect of the

prohibition or the threat or use of force and in the prohibition against violation of the basic principles of humanitarian law of the commission of a crime against humanity (see *infra* paras. 4.94-4.96).

- 1.24 It has often been suggested that the use of "micro" nuclear weapons whose effect would be similar to conventional weapons might not be prohibited by international law. Though it is doubtful in the view of Solomon Islands that such weapons could ever be developed, it concedes that if the use of such weapons had no radioactive effect likely to endanger human health or third States, if this use would not be detrimental to the environment and, in general, would conform to the rules of humanitarian law mentioned hereabove and hereunder (*infra* paras. 3.1 *et seq*), the use of these weapons might be legal. That said, Solomon Islands is of the view that this is not the case today and it finds it difficult to conceive of any situation where the use of nuclear weapons could be lawful under international law, including by reference to the health prevention obligations set forth in the WHO Constitution.
- 1.25 It has also been suggested that the right of self-defence enshrined in the UN Charter entails the right to use nuclear weapons under certain circumstances. This position is not acceptable. The right of self-defence provided in Article 51 of the Charter applies "if an armed attack occurs". As such, it is an exception to the principles prohibiting the use of military force in international relations; it does not reflect any position with regard to the legality of the means (whatever the nature) used in resorting to the right of self-defence. In other words, self-defence refers to *jus ad bellum* and not to *jus in bello*. These are two different fields altogether (see *infra* paras. 3.74 *et seq*). It has never been alleged by anyone, for instance, that self-defence gives the right to kill prisoners of war.
- 1.26 The present request deals with the legality of the use of nuclear weapons by a State in war or other armed conflict. It does not address the situation arising where nuclear power would be used for peaceful uses. In such circumstances it is assumed that use would be made in conditions not detrimental to human health and the environment.

- 1.27 On 13th June 1995 France announced a unilateral decision to resume nuclear testing in the Pacific region, on Mururoa Atoll, far from its own metropolitan territory but close to that of Solomon Islands and more than a dozen other Pacific nations. Mururoa Atoll (French Polynesia) is within the nuclear-free zone area established by the South Pacific Nuclear Free Zone Treaty (Rarotonga, 6 August 1985). Solomon Islands has already indicated to France that it considers such tests would be unacceptable and would violate her substantive and procedural obligations under international law, including the obligation to cooperate and consult in decisions which are likely to affect shared natural resources within the Pacific region. Coming shortly after the Parties to the NPT agreed by consensus on a unanimous extension of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons, this unwelcome and

surprisingly ill-timed development provides the clearest possible evidence of the reasons for Solomon Islands' strong interest in the Advisory Opinion sought by the WHO. It also confirms the importance of the question, the reasons for Solomon Islands' concern, and the need for the Court to affirm the rule of law in international relations. Although this Advisory Opinion does not relate to the testing of nuclear weapons, it does have important implications for the conduct by nuclear-weapon States of nuclear activities very far from their own home territories and populations. The French action shows the casual and arrogant attitude of some nuclear-weapon States with respect to other States. If one State is able to act thus in time of peace, Solomon Islands feels all the more concerned about what could happen in time of war or armed conflict. Solomon Islands hopes that the tests announced last week will not take place either before or after the Court gives this Advisory Opinion.

PART I

COMPETENCE

- 2.1 The first issue raised by various Member countries concerns the WHO's competence to ask the Advisory Opinion requested of the Court. Solomon Islands notes that 181 Member countries (and twenty seven of the thirty five Member which have submitted Written Observations) have *not* objected to the WHO's competence to consider the legality of the use of nuclear weapons and request this Advisory Opinion. These include not only *all* developing countries submitting Written Observations, but also several important developed countries (Australia, Ireland, Japan, New Zealand, Norway, Sweden) and several former republics of the USSR (Lithuania, Kazakstan, Moldova and Ukraine). Only eight of the WHO's 189 Member countries (as at 19 May 1994) (Finland, France, Germany, Italy, Netherlands, Russia, United Kingdom and United States) have objected to the Court that the WHO does not have the competence to make the request. At least one nuclear-weapon State has not objected to the WHO's competence.
- 2.2 Whilst this is not of course determinative of the matter, the burden is very much on these countries to persuade the Court why they are correct in their analysis and the other 181 Member countries of WHO are wrong: the presumption must be that Resolution 46.40 was validly adopted. That is a presumption recognised by the Court, which has previously stated that

"[a] resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedures, and is declared by its President to have been so passed, must be presumed to have been validly adopted."¹

Absent a substantial and representative minority opposing an international organisation's expression of competence over a matter, the Court should exercise prudence in interfering with that expression. To do otherwise might risk introducing instability into the affairs of international organisations.

- 2.3 The arguments on competence raised by these eight countries generally fall into two categories:
- (A) whilst WHO has competence over the effect of nuclear weapons on human health and the environment, it does not have competence over the *legality* of their use, cannot itself use force or authorise others to do so, and has no

¹ Namibia Case, *ICJ Reports* 1971, p. 22. See also Certain Expenses of the United Nations: "[a]s anticipated in 1945 ... each organ must in the first place at least, determine its own jurisdiction" (*ICJ Reports* 1962, p. 168).

responsibility or authority in regard to the use of nuclear weapons, and has no competence in respect of rules of "jus ad bellum" and "jus in bello"; and

- (B) WHO has no *special* interest in the matter, and to recognise the WHO's competence would expand the scope of its activities, and to answer the question would require the Court to pronounce on a question concerning the mutual relationships of WHO and UN.

Additionally, a number of other issues have been raised by certain States in relation to discussions on competence. These are addressed at (C) below (see paras. 2.37-2.44).

- 2.4 Each of these matters raise valid points (both in relation to this request and more generally for the activities of international organisations) which the Court will no doubt consider carefully. However, for the reasons set out below Solomon Islands considers that none raises a real obstacle to the Court's concluding that WHO is competent, and that accordingly the Court should not rule the request inadmissible on the grounds of lack of competence.
- 2.5 Since some other States have chosen to do so, Solomon Islands considers it appropriate to comment briefly on the background to this issue and how it came to the International Court of Justice. The United Kingdom (Chapter I, paras. 7-9) and France (p. 16, para. 13) have highlighted the role played by non-governmental organisations in the adoption of WHA Resolution 46.40 in terms which might be taken to imply that those States supporting Resolution 46.40 did so under some form of "persuasion" from these organisations (see also *infra* para. 3.13 on the United Kingdom's view that the activities of such organisations supports the view that the proceedings have an avowedly political character). Solomon Islands considers such innuendo to be inappropriate. It also betrays a selective sense of history. As a small Pacific Island nation Solomon Islands has first hand experience of a major armed conflict between third parties being fought on its soil. It also has direct experience of increases in radiation being caused in the Pacific region as a result of nuclear test explosions caused by the two above-mentioned and other States in the 1950's and 1960's because these States were unwilling to subject the health and environment of their own populations to the risks attached to nuclear tests. Solomon Islands' interest in clarifying and confirming the rules of international law in relation to the use of nuclear weapons therefore has rather more to do with the past activities of these States than the more recent efforts of any non-governmental organisations. The efforts of responsible non-governmental organisations, including associations of professional physicians, in raising public awareness and contributing to the processes of international law are to be welcomed. This is especially the case where the matter at issue is of such direct relevance to the public.

(A) The WHO has competence over the effects of nuclear weapons on human health and the environment and over the legality of their use

2.6 A number of States deny that the WHO has competence under its Constitution over the legality of the use of nuclear weapons (see e.g. United Kingdom, Chapter III, para. 8; United States, p. 9; France, pp. 8-10, para. 7; Italy, p. 1). Variations of this theme claim that the WHO is not competent because it cannot itself use force or authorise others to do so and has no responsibility or authority in regard to the use of nuclear weapons (Netherlands, paras. 8-11), or because it has no competence in respect of rules of "*jus ad bellum*" or "*jus in bello*" (France, p. 9, para. 7). These arguments are based both on the specific provisions of the WHO Constitution and on general approaches to treaty interpretation.

(a) *The WHO has competence over the health and environmental effects of the use of nuclear weapons*

2.7 These claims are surprising in the sense that there is no dispute over the fact that the WHO is competent to address matters concerning the health and environmental effects of the use of nuclear weapons. Given the WHO's practice over the past two decades any other view would be unsustainable. Those countries which deny the WHO's competence to request the Advisory Opinion have recognised this aspect of the WHO's competence (see e.g. United Kingdom ("That the effects of nuclear weapons on human health has been the concern of WHO cannot be doubted", Chapter III, para. 18) and United States ("the WHO might concern itself with measures to protect human health from the effects of some hypothetical future use of nuclear weapons", p. 12)).

2.8 Solomon Islands has previously shown how the WHO in making the request is acting in accordance with its Constitution (Observations, paras. 2.8-2.15) and that it has competence over matters relating to the effects on human health and the environment of ionising radiation resulting from the use of nuclear weapons (*Ibid.*, paras. 2.16-2.34). A majority of other States, which support the WHO's request, clearly share this view, which does not amount to construing the WHO Constitution as prohibiting aggression by means of nuclear weapons, as one State claims (United Kingdom, pp. 38-9, para. 14). In fact, as indicated below, the WHO has previously addressed aggression and the use of force without that country denying its competence to do so (see *infra* para. 2.16 citing WHA resolution 42.24).

2.9 On the other hand, a minority of other States have taken a different approach to the WHO Constitution, interpreting it in such a way as to conclude that the organisation has no competence to make the request to the Court (see e.g. France, pp. 9-13, paras. 7-11; United Kingdom, pp. 35-39, paras. 10-18; United States, pp. 5-6).

2.10 To the extent that this difference of view reflects an ambiguity it is appropriate to consider the actual practice of the WHO in this area. As indicated in the 1922

Advisory Opinion of the Permanent Court of International Justice in the Competence of the International Labour Organisation with respect to Agricultural Labour (interpreting the Treaty establishing that organisation):

"If there were any ambiguity, the Court might, for the purpose of arriving at the true meaning, consider the action which had been taken under the Treaty."²

This approach has now been codified in the 1969 Vienna Convention on the Law of Treaties, which provides that there should be taken into account together with the context

"any subsequent practice between the parties regarding the interpretation of the treaty or the application of its provisions." (Art. 31(3)(b)).

(b) *WHO practice in relation to the legality of the use of weapons confirms its competence*

2.11 The subsequent practice of the WHO confirms its competence over the legality of the use of weapons which might affect human health and the environment. This is reflected in particular in resolutions adopted by WHO in relation to the legality of the use of other types of weapons, and in the WHO's participation in relevant international conferences, most notably the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, which adopted the 1977 Geneva Protocols.

2.12 Nauru has referred to various resolution of the World Health Assembly as far back as the late 1960's and early 1970's (Nauru, II, pp. 6-11, para. 2-3). In Resolution 20.54 the World Health Assembly "considered" resolution 2162 (XXI) of the UN General Assembly which noted, inter alia, that strict observance of the rules of international law on the conduct of warfare is in the interest of maintaining the accepted norms of civilization, referred to the WHO's "interest in the consolidation of peace as an inalienable prerequisite for preservation and improvement of the health of all nations",³ and called upon all WHO Member States to "implement" UN General Assembly resolution 2162 (XXI). Resolution 20.54 alone is sufficient to demonstrate WHO's competence to consider and act upon international legal issues relating to the conduct of warfare.

2.13 In fact, the WHO subsequently went even further. Two years later, in 1969, in Resolution 22.58 the Assembly called for the development of international law governing the use of certain types of weapons when it expressed *inter alia* its conviction of "the necessity of achieving a rapid international agreement for the

² Ser. B, Nos. 2 and 3, pp. 40,41.

³ Citing WHA Resolutions 11.31 and 15.51.

complete prohibition and disposal of all types of chemical and bacteriological (biological) weapons".

- 2.14 And the following year, in 1970, in Resolution 23.53 ("The Rapid Prohibition of Chemical and Bacteriological (Biological) Weapons") it *inter alia* appealed to governments to ratify the Geneva Protocol of 17 June 1925, emphasised the need to prohibit the development, production and stockpiling of chemical and bacteriological weapons "as a necessary measure in the fight for human health", and called upon medical associations and medical workers to "give every possible assistance to the international movement directed towards the complete prohibition of chemical and bacteriological (biological) means of waging war".
- 2.15 These three resolutions could only have been adopted if the WHO had competence over the legality of the use of chemical and bacteriological weapons. Since WHO clearly has competence over the legality of the use of those weapons, it is difficult to see why it should not have competence over the legality of the use of nuclear weapons. This is all the more so given the qualitatively and quantitatively greater threat to human health posed by nuclear weapons.
- 2.16 In addition to these three resolutions, in 1989 the World Health Assembly again addressed legal aspects of the use of force in international relations, appealing in its resolution WHA 42.24

"in the spirit of paragraph 4 of Article 2 of the United Nations Charter, to all Member States of the United Nations to abstain from aggression and the use of threats in their international relations, including threats against medical centres and medical production plants;"⁴

This resolution clearly confirms WHO's competence over the legality of the use of force by reference to its effects on human health, indicating the important role which the rules of international law can play in the context of "the principle contained in the WHO Constitution stating that the health of all peoples is *fundamental* to the attainment of peace and security".⁵

- 2.17 WHO's practice is also reflected in its long-standing and regular participation in conferences and other international efforts relating to the development of international humanitarian law in times of war and armed conflict. For example, in the 1970's the organisation participated in the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts,

⁴ WHA 42.24 (Effects on Health of Withholding Medical Supplies), May 1989, para.2.

⁵ *Ibid.*, preamble.

which adopted the 1977 Geneva Protocols.⁶ And in 1987 it participated in the Preparatory Committee for the International Conference on the Relationship between Disarmament and Development.⁷

(c) *The practice of other international organisations: analogous principles*

- 2.18 But even absent such practice by the WHO (which itself is sufficient to establish the organisation's competence over the legality of the use of nuclear weapons), its competence would be established by application of the principles and practice of other international organisations over the legality of the use of certain methods and means of warfare. Specifically in relation to the use of nuclear weapons, the Human Rights Committee in a 1984 General Comment (Right to Life and Nuclear Weapons) adopted *by consensus* commented that

"the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confronts mankind today"

and stated that *inter alia* the

"use of nuclear weapons should be prohibited and recognised as a crime against humanity".⁸

This example clearly reflects the fact that the legality of the use of nuclear weapons is not within the exclusive competence of the General Assembly or the Security Council. Other organisations and bodies also have competence over the subject insofar as it relates to their own activities.

- 2.19 In a similar vein, international organisations other than the United Nations General Assembly or Security Council have on occasion condemned the use of force by a State in terms which make it quite clear that those two bodies do not have a monopoly on the subject, as suggested by certain States. For example, in 1981 the General Conference of the International Atomic Energy Agency (another organisation whose constituent instrument makes no reference to methods or means of warfare)

⁶ Report of the UN Secretary General, UN Doc. A/32/144, 15 August 1977, p.8 (indicating the participation of WHO as an observer at that Conference).

⁷ A/CONF.130/PC/INP/22, p.15. See also A/CONF.130/PC/ING/2 (Background Information Provided by the WHO, attaching the 1987 Report on Effects of Nuclear War on Health and Health Services, 2nd ed.).

⁸ GenC 14/23, 2 November 1984, paras. 4 and 6, reproduced in M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1993), p. 861.

condemned the attack by Israel on an Iraqi nuclear research centre as "an act of aggression".⁹

2.20 Practice establishes that international organisations and bodies have competence over the legality of the use of certain weapons where there is a reasonable nexus with the general subject matter of the organisation's activities. Just as the Human Rights Committee has competence over the human rights aspects of the legality of the use of nuclear weapons, and the IAEA has competence over legal aspects of the use of force against nuclear installations, so it follows that WHO has competence over the legality of the use of force and methods and means of warfare insofar as it relates to the protection of human health and the WHO Constitution. That competence has in any event been expressed in the Assembly resolutions identified above.

(d) *The relevance of international law and the contribution its development can make to the fulfilment of an international organisation's purposes*

2.21 Finally, even if there were no relevant practice in the WHO or in other international organisations, which is not the case, the argument put forward by the United Kingdom, the United States and others is deeply flawed and minimises the important role that international law can play as an instrument of public policy. Coming from States which pride themselves on their commitment to the development of international law and the rule of law it is surprising. In effect they are saying that international law is irrelevant to the activities of the WHO, that it matters not in practice whether the use of nuclear weapons is lawful or unlawful, and that the WHO can (and should) carry on its activities of health prevention which relate to the effects of nuclear weapons without concerning itself with the legal niceties associated with such use.

2.22 For the United Kingdom it is "entirely false to argue that because an activity poses a threat to health, therefore the legality of that activity arises within the competence of WHO" (Chapter III, para. 8). No supporting explanation is given for this view, save that it is suggested that to conclude otherwise would make the WHO "the guardian of legality over a wide range of State activities, entitled to question the legality of those activities before the International Court simply on the basis that the activity involved a health risk" (*Ibid.*, para. 9).

2.23 Solomon Islands does not share this limited, perhaps overly cynical, view of the role of international law in contributing to the attainment of an international organisation's objectives. Assuming that an organisation has competence over a particular matter considered by the international community to be of importance (i.e. the health effects of the use of nuclear weapons), and assuming that it has an obligation under its Constitution to promote the protection of human health, then it does not require a

⁹ IAEA GC(XXV)/RES/381 (Military Attack on Iraqi Nuclear Research Centre and Its Implications for the Agency), 26 September 1981.

great leap of imagination to conclude that the development of international law (including through the process of clarification envisaged by the WHO's request) might provide one approach to achieving that objective. It is not, as France somewhat cynically suggests, simply about asking whether "Un hopital a-t-il besoin d'être éclairé sur la liceité de l'emploi des armes à feu pour prévoir les moyens permettant de soigner les victimes de leur usage?" (p. 9, para. 7). It is the use of international law as an instrument of public policy in contributing to important societal objectives which inspired the WHO in its activities related to chemical and bacteriological weapons, the Human Rights Committee in its General Comment, and the IAEA on its resolution condemning the use of force against a research reactor. In contributing to the development of the rule of law in international relations such an approach should be welcomed, not rejected.

- 2.24 Nor does Solomon Islands consider that its view would make the WHO the "guardian" of the legality of a host of a wide range of other activities. Certainly as an organisation it would be entitled to express an interest in some or even all of those activities, and it may also be entitled to question the legality of some or all of those activities, but its guardianship role would *prima facie* be limited only to its Constitution and those aspects of the activities which relate to human health. Since those activities necessarily impinge upon other societal objectives, it would share its "guardianship" role with other international organisations, the members of which would be free to decide on a case-by-case basis whether to act in respect of a particular issue, and if so how.
- 2.25 Similar considerations apply to the views expressed by the United States, in particular the conclusion that "[w]hile the WHO might concern itself with measures to protect human health from the effects of some hypothetical future use of nuclear weapons, this would not turn in any way on the Court's view of the legality of such use" (p. 12). Although this argument might have more to do with propriety than the question of WHO competence (on which see *infra* paras. 3.19-3.26) it is in effect saying that whatever the Court decides on the substance is irrelevant to the conduct by WHO of its activities, contributes nothing to its activities, and hence falls outside its competence. This is a limited view of the relevance of international law which Solomon Islands does not share. It has previously explained why the question is relevant and would provide practical assistance to WHO in the conduct of its activities (see *Solomon Islands*, paras. 2.54-2.57). Solomon Islands assumes that States fulfil their international obligations, and that a finding by the Court that the use of nuclear weapons was unlawful would lessen the likelihood of their use, and therefore allow WHO to channel its limited funds to other areas. It would also provide WHO with much needed clarification on the role it could play on future disarmament issues. If, on the other hand, the Court were to find that the use of nuclear weapons was in certain circumstances lawful, Solomon Islands would consider that the likelihood of their use might increase, and would act to ensure that WHO continued to contribute to the preparedness of small, developing countries such as Solomon Islands which do not have the medical or related resources to deal with the health and environmental

consequences of significant increases in radiation. Since the United States accepts that it is proper for the WHO to concern itself with measures to protect human health from effects of a hypothetical future use, presumably it would accept that the legality or otherwise might have at least some consequence for the measures which WHO ought to take.

(e) *Conclusion*

2.26 For all of these reasons Solomon Islands considers that the question of the legality of the use of nuclear weapons falls within WHO's competence. To find otherwise would limit the ability of WHO to contribute to the development of international law in fulfilling its constitutional objectives. It would also undermine the activities of other organisations in this field, such as the Human Rights Committee and the IAEA.

(B) WHO has a special interest in the legality of the use of nuclear weapons by reference to their effects on health and the environment, to so recognise would not expand the scope of its activities, and to answer the question would not require the Court to pronounce on a question concerning the mutual relationships of WHO and UN.

2.27 The second principal ground upon which certain States attack the WHO's competence is closely related to the first: this claims that the WHO has no special interest in the question posed (only a general interest in promoting human health and the environment), that most other specialised agencies could with equal right claim a special interest, and that answering the question would require the Court to pronounce on a question concerning the mutual relationships of the WHO and the UN (a matter upon which the WHO cannot ask a question) (see e.g. Netherlands, paras. 11, 13). Similarly, Germany considers that if the WHO Constitution were to be interpreted to give it competence to ask the question "it would cease to be a specialised organisation for health issues and become competent in all areas" and the Security Council's primary role, as well as that of the General Assembly, "would be impinged upon" (Germany, p. 1). Others take a similar view (see e.g. Finland, p. 3).

2.28 Solomon Islands has previously explained why the WHO's competence over this matter does not derogate from the principle of speciality (*ibid.*, paras. 2.35-2.41). Three points should be emphasised. First, the actual practice of the WHO shows that it does have a special interest in this matter. Second, as a general matter international law and the law of international institutions does not know of a strict and absolute delimitation between the competencies of various international organisations. Third, the rights of the Security Council and General Assembly (as well as other international organisations) have not been impinged upon by the WHO's request, as is now clear from the fact that the General Assembly has now asked the Court to consider a similar but materially different question.

(a) *WHO's special interest*

2.29 The various States submitting detailed written observations are in agreement that the WHO has a legitimate interest in the health and environmental effects of the use of nuclear weapons (see *supra* para. 2.7). This is expressed in the organisation's practice. That alone gives the WHO a sufficient special interest to raise the question asked of the Court, as explained above (see paras. 2.11-2.17). In fact, apart from the UN no other specialised agency has addressed the subject of the effects of nuclear weapons as comprehensively and regularly as the WHO. Taken together the WHO Reports of 1983, 1987, 1991 and 1993¹⁰ and the UN Reports of 1980 and 1990¹¹ provide some basic reference documents on the subject of the effects of nuclear weapons, and no other organisations (with the exception, perhaps, of the IAEA) are in a better position to consider their legality from a global perspective.

(b) *Delimitation of competencies between various international organisations*

2.30 Solomon Islands has explained, by reference to the Court's previous jurisprudence, that the application of the principle of speciality does not mean that relations between the specialised agencies and the United Nations should be interpreted in a formalistic or rigid manner (Solomon Islands, para. 2.38). In the context of the interdependence of different subject matters a flexible approach is needed to give organisations the necessary space to properly address those issues which fall fully within their competence. For the WHO it is those aspects of the use of nuclear weapons (including legality) which relate to the protection of human health. That subject does not attach *a priori* to the competence of another international organisation more than to the WHO. The United Nations has no exclusive powers in this domain (Nauru, p. 15). In a similar vein, the Human Rights Committee is entitled to address the human rights aspects of nuclear weapons use, and the IAEA is entitled to address the use of force against nuclear installations. The WHO's request does *not* trespass on the activities of any other international organisations.

2.31 This much is clear from the fact that the General Assembly has now asked its own question to the Court on international law and the use of nuclear weapons. Its question is different (see *infra* para. 2.34). It does not focus primarily on the health

¹⁰ *Effects of nuclear war on health and health services: Report of the International Community of experts in medical science and public health created by Resolution WHA 34.38*, WHO, Geneva, 1984; *Effects of nuclear war on health and health services, 2nd ed., Report from the WHO management group on the applicability of resolution WHA 36.28*, WHO, Geneva, 1987; *Effects of nuclear war on health and health services, Report from the WHO management group on the applicability of resolution WHA 36.28*, A44/INF.Doc/5, 25 April 1991; *The Effects of Nuclear Weapons on Health and the Environment: Report of the Director General*, A46/30, 26th April 1993.

¹¹ *Comprehensive Study on Nuclear Weapons: Report of the UN Secretary General*, UN Doc. A/35/392, 12 September 1980; *Comprehensive Study on Nuclear Weapons: Report of the UN Secretary General*, UN Doc. A/45/373, 18 September 1990.

and environmental aspects and it does not consider the WHO Constitution. It does, however, ask about the threat of use, a matter which is beyond the competence of the WHO since the mere threat does not have direct implications for human health and the environment, as is clear from the various WHO Reports on the subject.

- 2.32 The question of the legality of the use of nuclear weapons does not have a centre of gravity which makes it a disarmament issue any more than a health issue or a human rights issue. Indeed, it might be said that the subject matter's proper centre of gravity is human health and the environment, since disarmament is not an end in itself but merely a means to achieving the protection of human health and the environment. As Nauru has stated in its written observations:

"There are no exclusive powers of the United Nations in this field. Quite to the contrary, a tradition of cooperation of the United Nations with other bodies exists [...] Questions regarding peace and security and the laws of armed conflict have never been considered as a matter exclusively treated by the United Nations, but rather a common concern and function of the United Nations and of certain specialised agencies, in particular the WHO and UNESCO." (Nauru, Issues of Competence and Admissibility, pp. 15-16)

- 2.33 The question posed by the WHO to the Court essentially concerns the rules of international law *jus in bello*, rather than *jus ad bellum*. As such, the Security Council and General Assembly have no greater competence than the WHO. The UN Charter has nothing to say expressly about *jus in bello*, and the approach to constitutional interpretation applied by the United Kingdom, France and the United States to the UN Charter would logically yield the same conclusion as that they reached in relation to the WHO ie. that the UN also would not have competence.

(c) *Impingement upon the rights of other international organisations, including that of the Security Council and General Assembly*

- 2.34 The clearest evidence, if any is needed, that the WHO request does not impinge upon the rights of other international organisations may be found in General Assembly resolution 49/75K adopted on 15 December 1994 requesting the Court

"Urgently to render its advisory opinion on the following question: 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?'"

Coming more than one and a half years after the WHO's request, the General Assembly's request is broader than that posed by the WHO. It raises those issues considered by the General Assembly to be within its competence, namely including the threat of use of nuclear weapons, and it is not premised upon an approach which considers the use or threatened use of nuclear weapons by reference to environmental or health considerations. And it does not refer to the WHO Constitution.

- 2.35 If the General Assembly considered that its rights have been impinged upon one might have expected it to make clear that view, perhaps by addressing a communication

directly to the WHO or by indicating to the Court. There are good precedents for communications of this type.¹² Alternatively, the General Assembly might have indicated to the Court its displeasure with the WHO request. This it did not do. Or alternatively one might have expected States which considered the WHO request to trespass on the rights of the General Assembly to have registered this view upon adoption of General Assembly resolution 49/75K. Again, this did not happen.

- 2.36 For these reasons, Solomon Islands consider that the principle of specialisation would not be breached if the Court found that the WHO was competent to raise the question. The WHO's question does not impinge on the rights of any other international organisation, and the expression of its competence to act in making the request cannot be considered to be limited in this way. The WHO request does not, as Italy claims, limit the freedom of the General Assembly in a field of its specific competence (Italy, p. 2).

(C) Other claims regarding competence

- 2.37 Numerous other claims are made in support of the view that the WHO was not competent to ask the question of the Court. These may be disposed of briefly.
- 2.38 It is suggested that the WHO's lack of activity on the subject of the legality of the use of nuclear weapons between 1945 and 1993 reflects its lack of competence (United Kingdom, Chapter III, para. 12). This reasoning is clearly erroneous. Apart from the fact that the WHO has been active on the issue of the effects of nuclear weapons since the early 1980s (see Nauru, II, p.6, para.2) (see *supra* para. 2.7) and that it has addressed the legality of the use of chemical and biological weapons as early as 1967, this approach would suggest that the failure of an organisation to act in a certain way in respect of a particular issue would prejudice its right to act subsequently. This cannot possibly be right since the organisation would only act within the framework of its competence.
- 2.39 It is claimed that the answer to the question will have no effect on WHO's work (France, p. 15, para. 13). Since this has nothing to do with competence, but is rather about propriety, it is addressed below. In any event, it is untrue, as Solomon Islands indicated in its Written Observations.
- 2.40 It is suggested that the Court's advisory opinion would be "devoid of purpose" (Australia, paras. 16-21). This point also relates to propriety and is addressed below.

¹² See for example the communication addressed by the International Civil Aviation Organisation (ICAO) to the UN General Assembly concerning a resolution adopted by the latter urging members of the United Nations to refuse landing and transport facilities to Portuguese aircraft, the execution of which would be considered by ICAO to violate the ICAO Convention: 5 *ILM* 486 (1966).

- 2.41 It is claimed that the issue contributes nothing to the fulfilment by the WHO of its functions under its Constitution (United States, p. 12). This is quite wrong. Presumably the United States does not take the same approach to those resolutions of the WHA concerning the legality of the use of chemical and biological weapons.
- 2.42 Reference is made to the views of the WHO's Legal Counsel that legality is not within the competence of the WHO (United States, pp. 9-10; United Kingdom, p.12; France, p.13). Whilst of some interest the Legal Counsel's view is not in any way authoritative for the Court. In any event, the Legal Counsel stated unequivocally in the 46th World Health Assembly shortly before the adoption of resolution 46.40 that

"it is ultimately for the World Health Assembly to decide on the range of its competence, including its competence to refer. The Health Assembly, as a whole, has to take responsibility for its judgement and its interpretation of its competence under the Constitution of WHO. [...] [I]t is for you, the delegates of the World Health Assembly, to make the ultimate and final judgment on the range and competence of this World Health Assembly."¹³

Solomon Islands fully endorses this view.

- 2.43 It is said that the WHO has not participated in negotiations concerning nuclear disarmament issues (United Kingdom, Chapter II, para. 13). Quite why this should be relevant to WHO's competence is unclear. The question posed to the Court is not about disarmament but about international law applicable in armed conflicts. In fact, WHO has been a long-standing and regular participant in conferences and other international efforts relating to this issue.¹⁴
- 2.44 It is said that the question of the lawfulness under international law of the use of nuclear weapons in war or other armed conflict "cannot be determined simply by reference to their health effects" (Finland, p.3). The point is not whether health effects alone would provide the basis for addressing that question, but whether health effects provide a material and reasonably relevant basis for addressing that question. Presumably, Finland would agree that health effects are one of the factors that are reasonably relevant, and by that standard the WHO has a legitimate interest in the issue. As the WHA affirmed in its resolution 42.24, health is "fundamental to the attainment of peace and security", and therefore not an incidental or secondary factor.¹⁵

¹³ Provisional Verbatim Record of the 13th Plenary Meeting, 46th World Health assembly, 14 May 1993, A46/VR/13.

¹⁴ See e.g. Fourth session of the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Report of the UN Secretary General, UN Doc. A/32/144, 15 August 1977, p.8 (indicating the participation of WHO as an observer at that Conference).

¹⁵ *Supra* para. 2.16, note 4.

(D) Conclusion

- 2.45 WHO is competent to request an Advisory Opinion from the Court on this question of the legality of the use of nuclear weapons. The subject falls within an area in which WHO has a special interest and in respect of which it has an established practice going back many years. To find otherwise would threaten to undo WHO's important contribution to the development of international humanitarian law and to limit its role in future efforts in that field.

PART II

PROPRIETY

- 3.1 The second issue raised by certain States as a bar to the Court's giving the Advisory Opinion requested relates to propriety: it is said that the Court should, for the first time in its history, exercise its discretion so as not to give the Advisory Opinion requested.
- 3.2 As with competence, only a small number of States take this view. An overwhelming majority of the WHO's 189 member countries have either expressed a clear preference in favour of the Court's giving the opinion or have not opposed it on grounds of propriety or otherwise. These include not only *all* developing countries submitting Written Observations, but also several important developed countries (Ireland, Japan, New Zealand, Norway, Sweden) and several former republics of the USSR (Lithuania, Kazakstan, Moldova and Ukraine). At least one nuclear weapon State (China) has not objected to the propriety of the Court's giving an opinion on the substance. Just nine States (Australia, Finland, France, Germany, Italy, Netherlands, Russia, United Kingdom and United States) objected to the request on grounds of propriety. In this context the burden is very much on those States denying propriety to satisfy the Court as to the "compelling" reasons why an Advisory Opinion should not be given.
- 3.3 The arguments on propriety made by these countries are premised upon essentially three "compelling reasons" (A):-
- (B) the question is essentially political in character and answering it would take the Court into a legislative or policy-making role;
 - (C) the Court's intervention could be detrimental to efforts to achieve nuclear disarmament; and
 - (D) the Advisory Opinion would be of no practical utility for the WHO and is too abstract or general.
- 3.4 Each of these arguments has already been addressed by Solomon Islands (Written Observation, paras. 2.42-2.57). This is a legal question which does not relate to a dispute in which one of the Parties is a total stranger to the Court, requiring the Court to act within its judicial function, and which has a practical significance. Solomon Islands reiterates the important need for the WHO to be advised by the Court on the legal status of the use of nuclear weapons, notably by taking account of the consequences which would flow from the use of such weapons on human health and the environment. The WHO is entitled to request an Advisory Opinion from the Court. The Court, in accordance with its long standing and well-established practice, should give an Advisory Opinion on the question posed.

(A) No "compelling reasons" have been shown which require the Court not to give an Advisory Opinion

3.5 In conformity with Article 65 of its Statute, the Court is not required to answer the request and this has been recalled by some States (see e.g. Germany, p. 2; France, p. 16). The Court has always construed this provision liberally, insisting on the fact that only "compelling reasons" would lead it to decline to give an Advisory Opinion.¹⁶ Since 1946 it has never refused to give an Advisory Opinion. Its predecessor, the Permanent Court of International Justice, refused to answer a request only on one occasion and that was very clearly for "peremptory reasons". Thus, the United States of America is correct in stating that the Court has "indicated that in principle it should not refuse to provide an opinion when requested by another organ of the United Nations or a specialised agency" (Written Observations, p.13). That principle requires States opposing the request on the grounds of propriety to show "compelling" reasons.

3.6 They have not done so. The Opinion requested is of genuine importance for the WHO in the conduct of its activities related to the effects of the use of nuclear materials and weapons on human health and the environment. A significant majority of the WHO Members have decided that it would be helpful for the organisation's work to have the request for an Advisory Opinion answered, and in that context it is difficult to see why the Court should interfere with that determination. The WHO's request seeks to clarify the international legal context in which its activities are conducted, and to provide a proper legal basis for the conduct of its future activities. The request is motivated by humanitarian concerns, and these should be taken into account by the Court in weighing up the factors in deciding how to exercise its discretion (Costa Rica, p. 2).

3.7 Contrary to the views of certain States (Australia, para. 7; Germany, p. 2; Finland, p. 5), there is absolutely no reason for the exercise of judicial restraint. The Advisory Opinion requested from the Court relates to a legal question¹⁷ and the answer of the Court will, in concrete terms, enlighten the WHO in the conduct of its activities.¹⁸ The requested Opinion does not relate to a dispute within the meaning of *Eastern Carelia* case.¹⁹ There is therefore no compelling reasons as envisaged by the Permanent Court in that case and the Court should not decline to answer the request for an Opinion presented by the WHO.

¹⁶ *Judgment of the Administrative Tribunal of the ILO upon Complaints made against UNESCO*, Adv.Op., 23 October 1956, *ICJ Rep.* 1956, p.86; *Certain Expenses of The United Nations*, Adv.Op., 20 July 1962, *ICJ Rep.* 1962, p.155.

¹⁷ *Certain Expenses of the UN*, Adv. OP., 20 July 1962, *ICJ Rep.* 1962, p.155.

¹⁸ *Western Sahara*, Adv. OP., 16 October 1975, *ICJ Rep.* 1975, p.37.

¹⁹ PCIJ, opinion of 23 July 1928, *Series B No5*, pp.27-28.

- 3.8 The United Kingdom has sought to identify categories of cases in which an Opinion should or should not be given (pp. 43-61, paras. 4-36). Whilst helpful, the effort appears somewhat arbitrary and formalistic. In relation to the first category (cases for which as a matter of propriety an opinion ought to be given) the effort actually consists of a categorization of *past* cases on a rather descriptive basis. It is not a reasoned assessment of the applicable principles upon which the Court should base its *future* practice. The United Kingdom seems at pains to point out why this case is different from all others and hence ought not to be decided. This approach leaves little, if any, room for the Court to exercise its discretionary power in what is certainly a different type of request from those previously made. Its novelty alone is presumably not a bar to its propriety.
- 3.9 The Court has the power to decide if a request for an Opinion fulfils the conditions of Article 96(2) of the United Nations Charter.²⁰ The only concern of the Court while accomplishing its tasks as the principal judicial organ of the United Nations is to enlighten that Organisation and its Specialised Agencies on the proper conduct of their activities. The assertion that the present case falls within the second set of cases is, in Solomon Islands view, wrong.
- 3.10 There are no further criteria which should prevent the Court from giving an Opinion in a matter relating to a question which satisfies the conditions set forth by the UN Charter. It very clearly appears that the Government of the United Kingdom has misunderstood or even misinterpreted the practice of the Court. The Opinion requested by the WHO clearly relates to a question arising within the scope of its activities, a question on which the Court has competence to give an Opinion.
- (B) *Any political character which the question might have does not prevent the Court from giving an Opinion*
- 3.11 The question put to the Court relates to the compatibility of the use of nuclear weapons with international law, including the Constitution of the WHO. The WHO is therefore inviting the Court to address a legal question and carry out a task clearly within its judicial function. In this context, contrary to the assertions of some States (see e.g. Russia, p. 2; France, p. 20), the fact that the question has political implications is not in itself an obstacle to the competence of the Court. In giving the Opinion the Court would not go beyond its judicial function and embark upon a legislative or policy-making course, as some States have suggested (France, p. 20, para. 17; Finland, pp. 3-4, para. 2.2; Australia, paras. 7-9). When the Court has been asked to characterize a particular form of conduct with respect to international

²⁰ This principle of cardinal importance was recalled by Judge Bedjaoui in a very thoughtful analysis of the advisory function of the Court, *Les ressources offertes par la fonction consultative de la Cour Internationale de Justice. Bilan et perspectives*, United Nations Congress on Public International Law, 13-17 March 1995, p.32

law, the Court is performing a task which is essentially legal.²¹ Solomon Islands shares the view expressed by Ireland, which does not see the approach of requesting an Advisory Opinion from the Court "as in any way incompatible with ... efforts in the political field to secure the abolition of such weapons" (Ireland, p. 3, para. 11). In any event it is difficult to see why a confirmation of the illegality of the use of nuclear weapons would complicate disarmament negotiations. The logic behind this reasoning is difficult to comprehend. On the contrary: a clear statement by the Court about the illegality of the use of nuclear weapons would *encourage* nuclear weapon States to rid themselves of weapons the use of which would violate international law. In any case, it would be delicate for the Court to refuse to give an Advisory Opinion because of the political consequences which would result without also leaving its judicial character.²²

3.12 The Court has constantly reaffirmed that the political character of a legal question is not a bar to giving an Opinion.²³ As Nauru rightly emphasizes, the political implications of the question do not exclude the legal character of the question (Written Observations, II, pp.18-19).²⁴

3.13 The fact that certain non-governmental organisations have supported the WHO's request is wholly irrelevant to the Court's determination, for the reasons indicated above (see para.2.5). And it is similarly irrelevant whether the legal question raised is incidental to a political campaign, as one State suggests (United Kingdom, p. 55, para. 22). Moreover, it is not for the Court to second-guess the Assembly and decide that the question it is really asking is about the possession of nuclear weapons, as France suggests (p. 20, para. 17).

(C) *The Court's intervention would not be detrimental to efforts to achieve nuclear disarmament*

3.14 Some States maintain that an Advisory Opinion on the question *could* be detrimental to efforts to achieve nuclear disarmament, in particular by undermining the 1968 Treaty on Non-Proliferation of the Nuclear Weapons (NPT), or influence the course of the negotiations for its extension (Australia, paras. 12-14; Finland, p. 5; France, pp. 20-21; Netherlands, p.7). This unsubstantiated and entirely theoretical claim has been shown by events subsequent to the filing of Written Observations as wrong.

²¹ *Certain Expenses of the UN*, Adv.Op., 20 July 1962, *ICJ Rep.*1962, p.155.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility, Judgement*, *ICJ Rep.*, 1984, p.437.

- 3.15 In May 1995 the Review and Extension Conference of the Parties to the NPT adopted an indefinite extension of the NPT, in accordance with Article X(2) of its provisions.²⁵ That extension was supported by Solomon Islands, a position which it believes is entirely consistent with the views it has set forth in these and its prior Written Observations. The argument that a WHO request might be detrimental to the NPT negotiations has been shown to be entirely without foundation. Similar considerations apply to future negotiations.
- 3.16 If anything, the WHO's request for an Advisory Opinion contributed to that body of international opinion emphasizing the need to address by various avenues of international law all aspects of the regulation of nuclear weapons, and helped develop the momentum necessary to ensure an indefinite extension. In adopting the indefinite extension the Parties to the NPT also underscored their desire to use other legal means to reduce the threat posed by nuclear weapons, including a commitment to commence immediately and conclude early negotiations on a convention banning the production of fissile material for nuclear weapons and the "determined pursuit by nuclear-weapon States of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goal of eliminating those weapons."²⁶ In the context of these commitments it is difficult to see how the WHO request could even threaten to be detrimental.
- 3.17 In any event, the issues of legality of use and disarmament are related but clearly distinguishable. The WHO request does not address disarmament. It only addresses the legality of the use of nuclear weapons by reference to their effects on health and the environment. The ascertainment of the legal status of the use of nuclear weapons would allow the WHO to ensure that its activities are carried out properly in a manner which takes fully into account the priority needs of the international community.
- 3.18 Placing limits on the possession of nuclear weapons does not preclude other efforts to address the core issue of the legality of the use of nuclear weapons, particularly in view of their effects on human health and the environment. These are two different topics dealt with in different arenas. One is justiciable and of clear importance for the WHO to carry on its activities effectively. The other is a disarmament issue dealt with by the convening of a United Nations conference whose task was to consider extension of an international treaty. There is no concurrence between them and therefore no cause to fear an impediment on the renewal of a treaty of great importance for the international community, or of other relevant treaties.
- (D) *The Advisory Opinion will be of practical utility for the WHO and is not too abstract or general*

²⁵ NPT/CONF.1995/L.6, 9 May 1995 (adopted without a vote).

²⁶ NPT/CONF.1995/L.5, 9 May 1995, para. 4(b) and (c) (adopted without a vote).

- 3.19 Several States claim that the Court's response would be unlikely to provide any constructive assistance to the WHO, would provide no practical benefit, and would be incapable of implementation (UK, p. 42, para. 2, p. 60, para. 33; United States, p. 14; Australia, paras. 16-21). The United Kingdom considers that "the legal question, as it affects the WHO, is quite spurious" and raises questions of law entirely extraneous to the WHO Constitution (p. 55, para. 22).
- 3.20 Solomon Islands has previously explained why it considers that the Court's answer to the WHO's request can provide real and practical assistance to the organisation (Written Observations, paras. 2.54-2.57). It is indispensable for the conduct of its activities regarding health and environmental problems which would result from the use of nuclear weapons that the WHO should be enlightened and informed on the legal status of the use of nuclear weapons.
- 3.21 Australia considers that the Advisory Opinion will not have any practical consequences for WHO (para. 19). The United States of America (p. 14), Finland (p. 4) and France (p. 18, para. 16) consider that the question is too abstract and general (United States, p. 14). These arguments are misleading as regards to the function of the Court and as to the presumed absence of practical effects of the question raised by the WHO.
- 3.22 Solomon Islands can do no better than quote from the Court's Advisory Opinion in the *Western Sahara* case. This provides a clear indication of the type of questions that can be addressed to the Court and the nature and purpose of the advisory function:
- "It has undoubtedly been the usual situation for an advisory opinion of the Court to pronounce on existing rights and obligations, or on their coming into existence, modification or termination, or on the powers of international organs. However, the Court may also be requested to give its opinion on questions of law which do not fall for any pronouncement of that kind, though they may have their place within a wider problem the solution of which could involve such matters. This does not signify that the Court is any the less competent to entertain the request if it is satisfied that the questions are in fact legal ones, and to give an opinion once it is satisfied that there is no compelling reason for declining to do so."*
- 3.23 The Australian, US and Finnish claims are also misleading because they deny the practical effects that the Advisory Opinion will have for the conduct of the activities of the WHO. There is a clear link between the request of the WHO and its actions. The choices made and the acts taken by the WHO will depend directly on its knowing whether the use of nuclear weapons is legal or illegal. As Malaysia has indicated, clarification by the Court "will help WHO and the international community to promote the changes which must be brought about to effect primary prevention of health and environmental hazards arising out of the use of nuclear weapons" (p. 2). And as Nauru states, the request will clarify the meaning of WHO Constitution (p. 12), and contribute to the development of medical ethics.

- 3.24 Assuming that the Court was of the opinion that under certain conditions the use of nuclear weapons could be compatible with international law, the WHO would then be entitled to take specific preventative and curative measures to attend to the needs of the victims of such use. For countries with a limited territory and financial resources the active role of the WHO, in both a preventative and curative capacity, would be indispensable to their survival.
- 3.25 If, on the other hand, the Court decides that the use of nuclear weapons would be illegal under international law, then the WHO would be entitled under its Constitution to adapt its policies, aimed not only to prevent the effects of a nuclear war but also the very use of nuclear weapons. The identification of the legal status of nuclear weapons is essential for the selection of the measures to be conducted and among others, of additional preventative measures and efforts, which are very much related to the legal status of actions at the origin of health and environmental prejudicial effects.
- 3.26 Whatever the legal regime applicable to the use of nuclear weapons, the Opinion of the Court will determine the direction which the WHO will take in its action in the coming years.

(E) Conclusion

- 3.27 For the reasons set out above and in the Written Statement submitted by Solomon Islands to the Court on 10 June 1994, the Court should give an Opinion on the basis that the WHO is competent to request an Advisory Opinion from the Court, and that the Court is competent to give, and should give, an Advisory Opinion on the question submitted. No "compelling reasons" have been shown to suggest that the Court should decline to answer the question. The Court has been asked a legal question the answer to which would not be detrimental to on-going disarmament efforts and would, in the view of the great majority of WHO Members, be of practical utility to the organisation.

PART III

SUBSTANTIVE LEGAL ISSUES

- 4.1 By way of introduction Solomon Islands notes that of the thirty-four States submitting Written Observations only four (the Netherlands, United Kingdom, France, and the United States) have been prepared to express the view that the use of nuclear weapons could *in any circumstances* be lawful. Whilst a small number of States have been silent on the substantive aspects of the question posed by WHO, the overwhelming majority have expressed the view that any use of nuclear weapons would be contrary to international law because of the effects on health and the environment.
- 4.2 Some of the States challenging the admissibility of the WHO's request for an Advisory Opinion have, presumably as a matter of precaution, taken a position on the substance of the question. These States consider that the use of nuclear weapons by a State during an armed conflict might not, in certain circumstances, violate its international obligations, including those set forth in the WHO Constitution. In arriving at this conclusion, these States put forward arguments which can be grouped into four general categories:
- (A) it is impossible to give a general and abstract answer to the question requested (paras.4.3-4.24);
 - (B) international law does not prohibit the use of nuclear weapons (paras.4.25-4.54);
 - (C) various international instruments imply the existence of a rule authorising the use of nuclear weapons (paras.4.55-4.71); and
 - (D) the use of nuclear weapons is compatible with international humanitarian law (paras.4.72-4.81).

Solomon Islands has addressed these issues in its earlier Written Observations. In addition, and for the reasons set out below, Solomon Islands does not consider that any of these categories provides a basis for allowing the Court to conclude that the use of nuclear weapons is anything other than subject to international law and, *prima facie* incompatible with that law. Solomon Islands also considers the rules of international law relating to human rights and the environment (D) and the relevance to the WHO request of *jus cogens* (E).

(A) The question is not too abstract or general

- 4.3 Several States consider the question to have been posed in too general and abstract way (see e.g. Netherlands, p. 6, paras. 22-23; United States, pp. 26-27, 33; Finland, p. 4; United Kingdom, p. 6, para. 4). Although this argument concerns the

admissibility of the Advisory Opinion, it also touches upon the substance of the matter. It suggests that the use of nuclear weapons would not be illegal *per se*. This argument ignores the particular and inevitable nature of the effects and consequences of the use of nuclear weapons on human health and the environment. Solomon Islands has previously demonstrated (pp. 43-62, paras. 3.34-3.70), how the importance of the destruction necessarily resulting from the use of nuclear weapons and the means and methods of use of these weapons implicitly recognise that, *prima facie*, any such use is illegal *per se*. This applies even where such weapons are directed only against military targets.

(1) **The use of nuclear weapons is illegal by reason of the significance of the destruction they would cause**

4.4 The use of nuclear weapons is illegal because

- (a) they render death inevitable;
- (b) they cause superfluous injury;
- (c) their effects are indiscriminate; and
- (d) they can lead to a general nuclear war.

(a) *Nuclear weapons render death inevitable*

4.5 Combatants who find themselves within a certain radius of a nuclear weapon "explosion" have absolutely no chance of surviving. The use of such weapons therefore violates the prohibition against using weapons which render death inevitable (Solomon Islands, pp.47-49, para. 3.42-3.43 and references). The "only legitimate aim" of war is "to weaken the enemy forces" (St. Petersburg Declaration, 11 December 1868, 2nd preambular paragraph). It is not their complete annihilation. It may indeed be argued that every type of explosive causes lethal effects to anyone within a certain range of the explosion, and that it would therefore be prohibited under the St. Petersburg rule. This is really not the case. Should it, then, be inferred that the prohibition is out of date? There is no reason to think so: first of all the rule has never been repealed. Moreover, by contrast a conventional explosion is not a weapon which renders death inevitable at all times and in all circumstances. With appropriate protection (e.g. by a shelter) a person standing in a space where, without such protection, would surely be killed, can survive a conventional explosion. The power of a nuclear explosion, on the other hand, is so great that, within a certain range — depending upon the power of the weapon — *nothing* can provide the victims with appropriate protection. Death is an *absolute* certainty.

The inevitable lethal effects of all nuclear weapons implies the *per se* illegality of their use as provided for in the St. Petersburg prohibition.

(b) *Nuclear weapons cause superfluous injury*

- 4.6 The use of nuclear weapons necessarily causes "superfluous injury" to its victims. To that end their use violates various instruments which express a rule derived from the law of armed conflicts: the "law of the lesser harm"²⁷ (Solomon Islands, p.49, para. 3.44; see also Sri Lanka, p. 2). Proponents of the legality of the use of nuclear weapons challenge the idea that it is possible to compare in an abstract and general manner nuclear weapons with other weapons which cause superfluous injury. They suggest that there is no unnecessary suffering where there exists a reasonable link between the military advantage gained and the damage caused to the enemy. (See e.g., United Kingdom, p. 87, para. 37; Netherlands pp. 9-10, para. 26-29; United States p. 30). In other words, suffering caused efficiently would not be suffering caused unnecessarily. The utility of the suffering inflicted upon the victims would depend only on the efficiency of the military operation! This approach disregards fundamental principles of humanitarian law. It subordinates the characteristic of excessive suffering caused by the use of nuclear weapons to the whim of the military strategy employed, in other words to the subjective opinion of those in charge of military activities. The concept of "unnecessary suffering" does not depend on what a particular army judges to be good or bad in terms of military advantage, but on an objective determination of the victims' injury. It is their suffering which is at issue, not the interest of obtaining military advantage.
- 4.7 The rule prohibiting the use of weapons causing unnecessary suffering or their means and methods of use is deduced directly from international humanitarian law which aims to guarantee the protection of victims. The title to the 1977 Additional Protocols refers to "the protection of the victims of international and non-international armed conflicts". And in the third preambular paragraph the State parties emphasise the need "to reaffirm and develop the provisions protecting the victims of armed conflicts" (A.P. 1), as well as "to ensure a better protection for the victims of those armed conflicts" (A.P. 2). The concepts of "unnecessary suffering" and "superfluous injury" ensure that the interest of the victim is given paramountcy, rather than the interests of any particular military strategy. The conventional law of armed conflicts confirms this view when it says that war can only aim at putting the enemy out of combat, nothing more (see the St. Petersburg Declaration); the enemy's death, mutilation, subsequent aggravation of injuries, or an attack on descendants caused by genetic change cannot be considered legitimate goals of war; such effects *may* derive from a military operation, but they do not have to be a *necessary* consequence of it. However, these consequences necessarily derive from the use of nuclear weapons.

²⁷ David E., *Principes de droit des conflits armés*, Brussels, Bruylant, 1994, pp. 206-207, 279, 332 and 336.

Furthermore, this use will also lead to "unnecessary suffering" or "superfluous injury" because of its inevitable lethal effects (*supra* para. 4.5): a weapon which kills all those within a certain zone goes beyond that which is permissible in armed conflict. Even if no other rule prohibits the use of such a weapon — *quod non* — by this one consequence alone, its use constitutes an abuse of law. Moreover, the nature of the damage and injury which nuclear weapons cause to survivors also render them unlawful (see Solomon Islands pp. 56-61, para. 3.59-3.61, 3.66-3.67).

(c) *Nuclear weapons have indiscriminate effects*

- 4.8 The use of nuclear weapons necessarily has indiscriminate effects prohibited by international law (Solomon Islands, pp. 50-54, para. 3.48-3.54). Proponents of the legality of the use of nuclear weapons recognise that indiscriminate attacks are illegal, but consider that some nuclear weapons could be used in a precise and discriminate manner. Thus:

"It is unlawful to conduct any indiscriminate attack, including those employing weapons that are not or cannot be directed at a military objective (see Add. Prot. I, Art. 51 Para. 4). (Of course, this does not mean that attacks are prohibited simply because they may cause collateral civilian damage or injury — as is often the case in armed conflict.) Nuclear weapons can be directed at a military target and thus can be used in a discriminate manner (United States, p. 27).

Similarly:

"Modern nuclear weapons are capable of precise targeting and many are designed for use against military objectives of quite small size." (United Kingdom, p. 88, para. 39; see also paras. 38 and 40)

- 4.9 These assertions are noteworthy: they imply that the only nuclear weapons whose use would be legal are those whose effects could be limited in a discriminate manner to military targets. Since military targets rarely extend beyond a base or army corps, this implies that the area affected by the use of a nuclear weapon should be confined to a maximum area of a few square kilometres. Considering that a nuclear weapon of 13 KT (Hiroshima style) will produce lethal effects in a radius ranging from 1400 metres²⁸ to 2 kilometres²⁹ from the explosion (corresponding to an area of 6 to 12 square kilometres), it follows that the force of a 13 KT weapon is largely sufficient to destroy any military unit. Any weapon of greater strength would necessarily have greater effects of an "indiscriminate" character. Accordingly, by the logic of their own argument, the United States and the United Kingdom are implicitly recognizing the illegality of the use of all nuclear weapons having greater force than 13 KT.

²⁸ Comprehensive study on nuclear weapons: UN Report by the Secretary-General, *UN Doc. A/45/373*, 18 September 1990, p. 81, para. 297 ("1990 UN Report").

²⁹ Levi, B. and von Hippel, F., "Attaques limitées contre les E.U. et l'Union soviétique", *Effets de la guerre nucléaire sur la santé et les services de santé*, O.M.S., Geneva, 2nd ed., 1987, p. 106.

4.10 However, even as regards a nuclear weapon with a power of less than 13 KT, their effects would be indiscriminate, since:

- the radioactive fallout could never be confined to the military targets but would affect, depending on factors such as wind, location and the force of the weapon, a great number of innocent non-military people;³⁰
- the use of a single nuclear weapon, against an army in the desert or against a war fleet in the middle of the ocean would have indiscriminate effects because they affect indistinctly combatants and health services of the target forces.

Accordingly, Solomon Islands considers that any use of nuclear weapons would be likely to have indiscriminate effects and would accordingly be unlawful. This view is supported by many States (see e.g. India, p. 1; Mexico, p. 5, para. 14; Sri Lanka, p. 2).

(d) The use of nuclear weapons could lead to a general nuclear war

4.11 Finally, there is the real risk that the use of a single nuclear weapon might lead to a general nuclear conflict, violating the general obligation of all States to avoid any action that would encourage the violation of the laws of armed conflicts (Solomon Islands, pp. 49-50, paras. 3.45-3.47).

*

4.12 The lethal effects of nuclear weapons, the unnecessary suffering which they cause, their indiscriminate effects and the risks of a general nuclear conflict are *inherent* characteristics of these weapons. The illegality of their use according to international humanitarian law is therefore *independent* of the particular circumstances.

(2) The effects of use of nuclear weapons renders them illegal

4.13 Nuclear weapons are similar to chemical weapons and poison weapons because of the radioactivity they necessarily emit following the fission of uranium or plutonium atoms. This characteristic is inherent in every type of nuclear weapon irrespective of

³⁰ See the graphs on radioactive fallout as a result of nuclear attacks directed against strategic American and Soviet military units in February, *ibid.*, pp. 121-122. It has been estimated that the number of victims immediately following a massive nuclear attack directed against strategic American and Soviet nuclear forces amounted to between 12 and 27 million deaths and 7 to 14 million injured on the American side and 15 to 32 million deaths and 7 to 25 million injured on the Soviet side..., *ibid.*, pp. 115 and 117.

its size. This is recognised by the scientific community and by States, including members of NATO who have so defined atomic weapons in Annex II of Protocol 3 of the Paris Accords of 23 October 1954 on the control of weapons (see Solomon Islands, p. 59, para. 3.62).

- 4.14 Consequently, it follows that nuclear weapons are illegal in so far as they are considered equal or analogous to chemical and poison weapons. Any use would violate the prohibition on using chemical weapons found in various instruments,³¹ including the Paris Declaration of 11 January 1989 on the prohibition of chemical weapons,³² and the Paris Convention of 13 January 1993 on the prohibition of the development, production, stockpiling and use of chemical weapons and their destruction,³³ as well as various military manuals;³⁴ and the prohibition on the use of poison weapons.³⁵
- 4.15 Proponents of the legality of the use of nuclear weapons challenge the notion that these prohibitions are applicable to nuclear weapons. They consider that this prohibition is limited to weapons whose *principal* effects is to poison the human body and does not cover any secondary consequences. Thus:

"The prohibition in both Art. 23 (a) and the 1925 Protocol, however, were intended to apply only to weapons whose principal effect was poisonous and not to those where poison was a secondary effect. As one leading commentator says of the 1925 Protocol, its drafting history makes clear that 'the scope *ratione materiae* of the Protocol is restricted to weapons the primary effect of which is to asphyxiate or poison the adversary (Kalshoven, 'Arms, Armaments and International Law' 191 *Rec. de Cours (collected courses)*, 1985-II, p. 284; see also Mc Dougal and Feliciano, *Law and Minimum World Public Order*, 1961, p. 663). In the case of almost all nuclear weapons, the primary effects are blast and heat." (United Kingdom, p. 85, para. 34)

Similarly:

³¹ Hague Declaration (IV,2), of 29 July 1899 concerning gas asphyxiation; Treaty of Versailles of 28 June 1919 between Germany and the Allies, Art. 171; Treaty of Saint Germain of 10 September 1919 between Austria and the Allies, Art. 135; Treaty of Neuilly of 27 November 1919 between Bulgaria and the Allies, Art. 82; Treaty of Trianon of 4 June 1920 between Hungary and the Allies, Art. 119; Geneva Protocol of 17 June 1925; and A/Res. 2603 A (XXIV), 16 December 1969 (80-3-36).

³² *R.G.D.I.P.*, 1989, p. 251.

³³ See text in *Report of the Conference on Disarmament, UN Doc A/47/27*, 23 September 1992, pp. 115 ss; *R.G.D.I.P.*, 1993, pp. 456-499.

³⁴ *International law rules relating to the prohibition or the restriction of the use of certain weapons*, study established by the UN Secretary-General, *UN Doc. A/9215*, vol. 1, p. 142.

³⁵ See e.g. Art. 23 (a), Hague Regulations 1899 and 1907; Peace Treaties of Versailles, Saint Germain, Neuilly, Trianon, other arrangements cited below; and various military manuals.

"The 1907 Hague Convention includes a prohibition on the use of poison weapons [Art.23 (a)]. This prohibition was established with particular reference to projectiles that carry poison into the body of the victim. It was not intended to apply, and has not been applied, to weapons that are designed to injure or cause destruction by other means, even though they also may create toxic byproducts. For example, the prohibition on poison weapons does not prohibit conventional explosives or incendiaries, even though they may produce dangerous fumes. By the same token, it does not prohibit nuclear weapons, which are designed to injure or cause destruction by means other than poisoning of the victim, even though nuclear weapons may also create toxic radioactive byproducts." (United States, p. 27).

The United States expresses the same reasoning with respect to the Geneva Protocol (Written Observations, p. 28; similarly see Netherlands, p. 9, para. 25).

- 4.16 These arguments call for certain observations. First, by declaring that "[i]n the case of *almost* all nuclear weapons, the primary effects are blast and heat" (emphasis added), the United Kingdom implicitly recognises that there are some nuclear weapons whose principal effects are not blast and heat. Presumably they have in mind the neutron bomb. Neutron bombs produce:

"much higher levels of initial neutron radiation than an ordinary fission weapon of equal yield, while at the same time suppressing the level of blast and heat, thus considerably reducing the expected damage to the surroundings"³⁶

To the extent that the principal effect of the neutron bomb is the emission of radiations which react with living matter, analogously chemical or poison weapons (Solomon Islands, pp. 58-59 para. 3.62), proponents of the legality of the use of nuclear weapons seem to be admitting that such weapons are analogous to chemical or poison weapons. This is recognised by both the United States and the United Kingdom. In the sentence that follows that cited in the United Kingdom's written observations (*supra* para. 4.15), Professor Kalshoven writes:

"If a nuclear device were used the primary effect of which would precisely be radiation (as the so-called neutron grenade, or 'enhanced radiation reduced blast' nuclear weapon, was reportedly designed to have), the use of this particular device might then probably be regarded as a contravention of the Protocol [the 1925 Geneva Protocol]."³⁷

Those who deny the association of nuclear weapons to chemical or poison weapons thus accept that such an association is appropriate for neutron bombs. The same conclusion must apply to all nuclear weapons by reference to their effects. It is quite wrong to advocate the opposite view.

³⁶ 1990 UN Report, p. 29, para. 113; see also Solomon Islands, p. 44, para. 3.35.

³⁷ Kalshoven, F., "Arms, Armaments and International Law", *R.C.A.D.I.*, 1985, vol. 191-II, p. 284.

- 4.17 Second, the United Kingdom, the United States and the Netherlands affirm that nuclear weapons cannot fall under the rules which prohibit the use of chemical and poison weapons since these prohibitions only apply to weapons whose *primary* effect is to asphyxiate or poison the adversary. This simple but unconvincing view is supported by reference to doctrines whose limitations have been demonstrated and which could just as easily be used in support of the opposite view. The use of nuclear weapons does not produce only "an initial nuclear radiation", but also residual radioactivity resulting from the radioactive fallout (Solomon Islands, pp. 56-61, paras. 3.59-3.68). Since such radiation is one of the *essential and typical* consequences of any nuclear reaction in which radioactive fissile matters are used, use do not extend the meaning by saying that such a consequence confers on nuclear weapons the characteristics of a 'chemical weapon'. The 1990 UN Report states that "the most specific medical effects related to a nuclear explosion are the radiation injuries".³⁸

In calculating the number of victims following a massive nuclear attack on exclusively military targets in the United States and the Soviet Union, it was concluded that "the number of victims as a result of the blast and the heat is *comparable to the number of victims as a result of radioactive fallout*".³⁹

These are only estimates. Under certain scenarios (e.g. climatic and topographic conditions etc.), the number of victims as a result of radioactive fallout can be double the number of victims from the blast and the heat.⁴⁰

- 4.18 To claim that radioactivity is not one of the principal effects of a nuclear reaction evidences a refusal to acknowledge reality. Even if the chemical and poisonous effects are not those intended by the user of a nuclear weapon, they are nevertheless the actual effects. They are neither secondary nor incidental. They are as important as the effects of blast and heat in terms of the injury to human health and possibly more so in the case of the environment. To compare, as the United States does (*supra* para. 4.15), the radiation from a nuclear explosion which can extend over thousands of kilometres with the "dangerous fumes" emitted from the use of fire arms is a wholly unrealistic comparison. In this context, it is significant that the 1925 Geneva Protocol refers to "asphyxiating, poisonous or *other* gases, and [...] all *analogous liquids, materials* or devices" (emphasis added). This indicates that there was no desire to limit the prohibition to a restricted category of weapons. In fact, the United States which would have wanted to use radiological weapons against Japan in 1942,

³⁸ 1990 UN Report, p. 90, para. 327.

³⁹ Levi, B. and von Hippel, F., *loc. cit.*, p. 109 (emphasis added, author's translation).

⁴⁰ *Ibid.*

conceded that "atomic poisons appear to fall directly under the Geneva Convention on gas used during war"⁴¹ (author's translation).

4.19 International humanitarian law cannot be restrictively interpreted when it concerns the life or the physical integrity of the victims it is intended to protect.⁴² The protection of the victim, as already mentioned, is the standard against which humanitarian law is to be interpreted.⁴³ The terms of the Martens Clause⁴⁴ reiterates this approach: it is difficult to see how "humanitarian laws" and "the requirements of public consciousness" could permit the use of nuclear weapons whilst prohibiting the use of chemical weapons on the basis that the emission of radiation is not the only effect of the use of nuclear weapons.

4.20 Third, it is somewhat surprising to suggest, as certain States have, that an action which is prohibited because of its effects becomes permissible where and because it also has other effects. Is it reasonable to conclude that the expected effects (blast and heat) justify the unwanted consequences (radiation)? It is difficult to see how the effects of blast and heat generated by a nuclear explosion could justify the poisonous effects of the radiation produced by this explosion. To say that the use of nuclear weapons does not violate the prohibition on chemical weapons on the basis that the radiation they produce is not their primary effect (apart from being incorrect) amounts to saying that the speed limit imposed by the road traffic laws do not apply to racing cars because their primary purpose is not to be driven on a road! The example of the neutron bomb illustrates the absurdity of an approach which claims that the use of nuclear weapons does not violate the prohibition against using chemical weapons because the radiation caused is not a principal effect. According to the study by the UN Secretary-General on nuclear weapons, the development of the neutron bomb is the result of research to improve the flexibility and variety of methods of using nuclear weapons.

¹¹². One way of pursuing versatility through diversification of the nuclear inventory, is the "tailoring" of warheads to enhance or suppress various effects of the explosion. This is done by selecting different fission-to-fusion ratios to produce the desired total yield, combined with different designs of the casing and other structural components of the warhead.

⁴¹ Goldschmidt, B., *L'aventure atomique. Ses aspects politiques et techniques*, Paris, 1962, p. 55 cited by Meyrowitz, H., "Le projet américano-soviétique de traité sur l'interdiction des armes radiologiques", *A.F.D.I.*, 1979, p. 97.

⁴² E. David, "Examen de certaines justifications..." théoriques à l'emploi de l'arme nucléaire" in *Les conséquences juridiques de l'installation éventuelle des missiles Cruise et Pershing en Europe*, Bruxelles, Bruylant, 1984, p.21.

⁴³ *Id.*, *Principes ...*, *op. cit.*, pp. 101, 158, 191, 209,225.

⁴⁴ Preamble of the 1899 2nd Hague Convention; 4th Hague Convention 1907, 8th preambular paragraph; 1949 G.C., common art. 63/62/142/158; A.P. 1, art. 1 para. 2; A.P. 2, 4th preambular paragraph; United Nations Convention of 10 October 1980, 5th preambular paragraph.

113. The best-known example of "tailoring" is the "enhanced radiation" weapon or the so-called "neutron bomb", a weak fusion device with a special design.⁴⁵

- 4.21 Some proponents of the legality of the use of nuclear weapons appear to accept that neutron weapons are similar to chemical weapons (*supra* 4.16), and that therefore their use would be illegal. Their approach leads to the following result: as long as a nuclear weapon produces much blast and heat and a great deal of destruction, its use is legal so long as the radiation emitted is insignificant. Its destructive force precludes it from being categorised as a chemical weapon. But where its effects from the blast and heat are limited and the weapon produces significant radiation, it causes less destruction and becomes illegal! 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.
- 4.22 In fact, nuclear weapons are subject to the same rules of technical progress as any other product: however attractive that new product, it cannot be used if it produces harmful effects which are not permitted in earlier products. It might appear strange to evaluate the legality of the use of nuclear weapons according to one of the most elementary rules of consumer protection, but these rules are also found in the laws of armed conflict. Thus Article 36 of 1977 Geneva Protocol I Additional to the 1949 Geneva Convention, provides that:

"In the study, development, acquisition or adoption of a new weapon, means or methods of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party."

*

- 4.23 In conclusion, the fact that the developers of nuclear weapons had not intended to produce a chemical or poisonous weapon, does not mean that nuclear weapons should be considered to be different (see Malaysia, p. 12; Nauru, p. 4). Nuclear weapons have many of the same characteristics as chemical or poison weapons in their effects. These effects are far from being secondary or incidental. We need only remind ourselves of the tens of thousands of people who survived Hiroshima and Nagasaki bombings only to die subsequently from the radiation to which they had been subject can no doubt testify.

⁴⁵ 1990 UN Report, p. 28-29, paras. 112-113.

4.24 To summarise, taking into account their individual and collective qualities, nuclear weapons and their use are *prima facie* illegal *per se* notwithstanding the circumstances in which they may be used. In the event that their use would or might:

- annihilate any person located within a certain distance from point "zero" with no hope of survival, or
- cause unspeakable and difficult, if not impossible, to cure, suffering for all those outside the lethal range but that have nonetheless been affected by the explosion or radiation, or
- destroy or affect people after hostilities have ceased, or affect people who have nothing to do with the conflict, or
- cause the outbreak of a general nuclear war, or
- have on human beings the same effect as chemical and poison weapons have on human being,

then they would violate the international rules prohibiting, *inter alia*, the use of weapons which:

- render death inevitable;
- cause "superfluous" and "unnecessary" harm;
- have indiscriminate effects;
- have chemical and poisonous characteristics; and
- contribute to the escalation of a general nuclear war.

Such violations of the rules of international law would arise independently of the context in which they have been committed and the manner in which the nuclear weapon has been used. They apply to any use of such a weapon in an armed conflict or otherwise. This confirms that the Court cannot respond to the question in spite of its relative generality since the rules of *jus in bello* are clear and unambiguous.

(B) International law prohibits the use of nuclear weapons

4.25 Proponents of the legality of nuclear weapons affirm that international law does not expressly or specifically prohibit their use (1), and that certain instruments invoked to justify the illegality of their use of nuclear weapons, are inapplicable to nuclear weapons (2).

(1) The claim that no actual rule of international law prohibits the use of nuclear weapons

4.26 Proponents of the legality of the use of nuclear weapons express in this regard a number of arguments:

- (a) no treaty specifically prohibiting the use of nuclear weapons has ever been adopted;
- (b) any prohibition on the use of a weapon necessarily implies an express prohibition;
- (c) any negotiations on a treaty prohibiting the use of nuclear weapons have never been successful;
- (d) UN General Assembly resolutions prohibiting the use of nuclear weapons do not represent the *opinio juris* of the international community.

Solomon Islands turns to consider each of these arguments.

(a) The claim that no treaty specifically prohibiting the use of nuclear weapons has ever been adopted

4.27 Many of those States proposing the legality of nuclear weapons use have noted that no treaty specifically prohibits their use (see *United Kingdom*, p. 62, para. 2; *Germany*, pp. 3-4; *France*, pp. 2 ss., paras 20-22; *Russia*, p. 2; *United States*, pp. 16-17). These States seem to be concluding that in the absence of an express prohibition, they are not prohibited from using nuclear weapons in the context of their legitimate right to self-defence.

4.28 Solomon Islands has previously made its position clear on this argument: first, the absence of a specific rule does not imply that one does not exist, and second, the general law of armed conflicts applies to nuclear weapons along with all other weapons (pp. 25-29, para. 3.3-3.10; see also *Iran* p. 1). This has been recognised by the proponents of the legality of nuclear weapons. The absence of an express and

specific prohibition does not imply *a contrario* the right to use these weapons in an armed conflict.

- 4.29 The use of nuclear weapons is subject to the *generic* prohibitions recognised by international law as referred to above (*supra* paras. 4.3-4.24). To suggest that the absence of a "nominal" prohibition implies the existence of a correlative right is as erroneous as suggesting that it is permissible to torture prisoners or to inflict electric shocks on them under the pretext that the pain from the torture or the use of electric shocks are not specifically prohibited by any particular international rule. Clearly such behaviour is illegal by reason of the generic prohibition against torture or bad treatment.

(b) *The claim that a prohibition on the use of a weapon necessarily implies the existence of an express prohibition*

- 4.30 A similar argument claims that a general prohibition on the use of nuclear weapons, if it existed, would give rise to a specific prohibitive norm, and that such practice would have become customary law. According to France:

"La pratique générale, et on peut même parler là d'une coutume, dans le domaine de l'interdiction ou de la réglementation des armements est du reste de procéder par voie conventionnelle. L'interdiction partielle ou totale d'emploi d'armes déterminées suppose des règles précises qui sont établies par des conventions spéciales [suit la liste des conventions conclues en 1925, 1977, 1980 et 1993 pour interdire certains types d'armes]. L'exigence de ces conventions spécifiques confirme bien qu'on ne saurait déduire une restriction précise de l'emploi d'armes déterminées de principes généraux qui, par nature, s'applique à tous les armements sans discrimination, et à aucun d'entre eux en particulier. [...]. Il paraît donc impossible de formuler sur la base de règles générales en vigueur un principe d'interdiction d'emploi des armes nucléaires qui en serait déduit, ou y serait implicitement contenu. Une telle interdiction ne saurait résulter que d'une règle spéciale, liant les Etats qui l'acceptent." (France, pp. 33-34 para. 27; see also United States, p. 18)

- 4.31 Behaviour, even if frequent, becomes practice but not customary law in the absence of *opinio juris*. It is hard to see how the fact of having concluded various treaties prohibiting the use of certain types of weapons would imply "a belief that this practice is rendered obligatory by the existence of a rule of law requiring it".⁴⁶ Such treaties do not suggest that specifically designated weapons are the only types of weapons which are prohibited, or that the generic rules only apply to particular weapons. A more appropriate conclusion is that these rules apply to the use of all weapons which cause a certain type of effect.
- 4.32 Practice shows that generic rules have their own existence and concrete legal effect. For example, the prohibition against the use of weapons which cause superfluous injury was expressed in the 1868 St. Petersburg Declaration, and in the 1907 Hague

⁴⁶ *North Sea Continental Shelf case*, judgment, ICJ Rep. 1969, p. 44, para. 77

Regulations. By 1907, when the prohibition was being repeated, the use of certain weapons had already expressly been prohibited, such as projectiles of less than 400 grammes capable of exploding or charged with inflammable matter (St. Petersburg, 1868), and gas which causes asphyxiation, and "dum-dum" bullets (the Hague Regulation, 1899). If, as France and the United States suggest, these specific prohibitions are the only ones that matter, and generic prohibitions are without any legal effect, it is difficult to see why these and other States have nevertheless felt the need to repeat a prohibition with no effect.

- 4.33 Similar reasoning can be invoked in relation to the reappearance of the prohibition set forth in the 1977 Geneva Protocol 1 (Art. 35 (2)), in spite of its adoption in 1925. In fact, the history of the prohibition illustrates its autonomy and the will of States to maintain it *alongside* prohibitions on the use of specific weapons. In the 1868 St. Petersburg Declaration, the prohibition on the use of weapons which cause *superfluous injury* is stated in the fourth preambular paragraph. It appears as a justification of the rule prohibiting the use of projectiles with a weight of less than 400 grammes. There therefore appears to be a direct link between the paragraph and the prohibition:

"Considering that the progress of civilisation should have the effect of alleviating as much as possible the calamities of War;
That the only legitimate object which States should endeavour to accomplish during War is to weaken the Military Forces of the enemy;
That for this purpose it is sufficient to disable the greatest possible number of men;
That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;
That the employment of such arms would, therefore, be contrary to the laws of humanity;
The Contracting Parties engage mutually to renounce, in case of War among themselves, the employment by their Military or Naval Troops of any Projectiles of a weight below 400 grammes, which is either Explosive or charged with Fulminating or Inflammable Substances.

At the 1874 Brussels Conference which was to bring to a conclusion the project for a Declaration on the customary laws of war, the text deposited initially by Russia stipulated:

11. "Les lois de la guerre ne reconnaissent pas aux parties belligérantes un pouvoir illimité quant au choix des moyens de se nuire réciproquement.
12. D'après ce principe, sont interdits
[...]
e) L'emploi d'armes occasionnant des souffrances inutiles, comme: les projectiles remplis de verre pilé ou de matière propres à causer des maux superflus;
f) l'emploi de balles explosibles d'un poids inférieur à 400 gr et chargés de matières inflammables;
[...].⁴⁷

⁴⁷ Mechelynck, A., *La Convention de la Haye concernant les lois et coutumes de la guerre sur terre d'après les actes et documents des Conférences de Bruxelles de 1874 et de la Haye de 1899 et 1907*, Gand, 1915, p. 238.

The final text was simplified and reads:

Art. 12. "Les lois de la guerre ne reconnaissent pas aux belligérants un pouvoir illimité quant au choix des moyens de nuire à l'ennemi."

Art. 13. "D'après ce principe, sont *notamment* interdits

[...]

e. L'emploi d'armes, de projectiles ou de matière propres à causer des maux superflus, *ainsi que* l'usage de projectiles prohibés par la Déclaration de St. Pétersbourg de 1868 [...]"⁴⁸(emphasis added)

The existence of two distinct clauses in the first text and the conjunctive use of "ainsi que" in the second confirms the autonomous character of the generic prohibition of the use of explosive and incendiary bullets. As for the reference to the word "notamment", the Belgian delegate (Baron Lambermont) explained that "on pourrait croire, sans cela, que tout ce qui n'est pas compris dans l'énumération est licite".⁴⁹

- 4.34 At the 1899 Hague Conference, Articles 12-13 of the project on the Brussels Declaration became Articles 22-23 of the 2nd Convention on the Laws and Customs of Land War. Only the style of Article 12 (new Article 22) was amended whereas Article 13 (new Article 23) was modified to make its application more general. The report by Rolin states:

"L'art. 23 commence par ces mots: 'Outre les prohibitions établies par des conventions spéciales, il est notamment interdit:...'. Ces conventions spéciales sont d'abord la Déclaration de St. Pétersbourg de 1868, qui est toujours en vigueur, et puis toutes celles de même nature qui pourraient être conclues notamment à la suite de la Convention de La Haye. Il a paru à la Sous-Commission qu'une formulation générale était préférable à l'ancienne rédaction qui mentionnait seulement la Déclaration de St. Pétersbourg."⁵⁰

Articles 22-23 state:

Art. 22. "Les belligérants n'ont pas un droit illimité quant au choix des moyens de nuire à l'ennemi."

Art.23. "Outre les prohibitions établies par des conventions spéciales, il est notamment interdit [...]

e. d'employer des armes, des projectiles ou des matières propres à causer des maux superflus; [...] (emphasis added)

These clauses were to remain unchanged in the Regulations annexed to the 1907 Hague Convention IV.

⁴⁸ *Ibid.*, p. 246.

⁴⁹ *Ibid.*, p. 249.

⁵⁰ *Ibid.*, p. 249.

4.35 Two conclusions may be drawn from this review. First, as drafted these texts do not provide for an exhaustive prohibition; the use of the word "notamment" suggests that the weapons identified are only examples and are not intended to be exhaustive. It would be quite wrong to deduce from the lack of an express prohibition of a particular method or mean of war the conclusion that which is not prohibited is permitted. This is surely not the place to invoke the judgment in the *Lotus* case adopted by the tiniest of simple majorities (6 votes for, 6 votes against, the President's vote making the difference).⁵¹ Second, by referring to these conventions which prohibit the use of specific weapons and by generally stating the generic prohibition on the use of weapons which cause superfluous injury, the autonomous nature of the generic prohibition is emphasised. *A fortiori* this rule is also stated in Geneva Protocol 1 (Art. 35 (2)), together with another rule requiring States to verify the compatibility of all new weapons with their obligations arising under applicable international humanitarian laws (Art. 36). These rules would have little significance and be of limited use if they applied only to the use of weapons forming the basis of a nominal prohibition.

4.36 Accordingly, it is wrong to claim that the use of a particular weapon is only prohibited where there exists a specific prohibition on such use. Practice and precedent provide otherwise.

(c) *The claim that any negotiations on a treaty prohibiting the use of nuclear weapons have never been successful*

4.37 According to France:

"Les propositions faites au cours des dernières années en vue de la conclusion d'un traité sur l'interdiction des armes nucléaires — qui n'ont pas abouti — conduisent également à la constatation qu'une telle interdiction ne saurait être considérée comme juridiquement établie." (France, p. 33, para. 27; see also United Kingdom, pp. 62,74,76, paras 3,15,18).

There can be no doubt that disagreements exist between States on the issue of the legality of the use of nuclear weapons. The present request for an Advisory Opinion acknowledges this, as does the absence of a treaty expressly prohibiting such use. Such disagreement does not however suggest that there is no prohibition on the use of nuclear weapons. A vast majority of States (*supra* para. 4.1) take the view that positive international law prohibits any use of nuclear weapons independently of a specific treaty. A very small minority of States take an opposite view. The absence of a specific treaty, does not, however, mean that there is no prohibition under general international law. It is precisely for the Court to decide this issue.

⁵¹ *P.C.I.J.*, 7 September 1927, *Series A no. 10*, pp. 18-19, 32.

4.38 Certain States have commented that if the Court affirms the illegality of the use of nuclear weapons it would be acting as legislator (France, p. 38, para. 29), which would be incompatible with its judicial functions (Australia, para. 7). This is a particular and peculiar understanding of the advisory function of the Court. The Court, being the "principal judicial organ of the United Nations, an organ which, in that capacity, acts only on the basis of the law";⁵² by stating the law the Court is not creating new law. The Court's function here is declaratory, not constitutive. The Court would not be assuming the role of legislator by confirming the applicability of international humanitarian laws to the use of nuclear weapons.

(d) *The claim that U.N. General Assembly resolutions prohibiting the use of nuclear weapons do not represent the opinio juris of the international community*

4.39 Proponents of the legality of the use of nuclear weapons consider that UN General Assembly resolutions condemning the use of nuclear weapons are without authority in the absence of *opinio juris*. It is claimed that these resolutions were voted in by a small majority and subject to many abstentions. Moreover, it is said that the minority was made up of nuclear power States. However, many of these resolution demand the conclusion of a treaty prohibiting the use of nuclear weapons or prohibiting the first use of such weapons. According to the United Kingdom,

"17. These resolutions are not, of course, legally binding instruments. Moreover, there are several reasons for rejecting any suggestions that they are declaratory of a rule of customary international law forbidding all use of nuclear weapons. First, an analysis of the voting figures reveals that the resolutions were controversial. Resolution 1653 (XVI) was adopted by 55 votes to 20, with 26 abstentions. Of the nuclear powers, France, the United Kingdom and the United States voted against the resolution while the Soviet Union voted in favour. [...] The later resolutions also failed to command the general support which characterised those resolutions which have often been treated as declaratory of customary international law.

18. Secondly, it is evident that many of those States which voted for the resolutions concerned did not regard them as stating such a customary law principle. In the case of Resolution 1653, the link between the assertion of the illegality of nuclear weapons in paragraph 1 and the request that the Secretary-General consult States about the conclusion of a convention to prohibit the use of nuclear weapons raises the question whether those States which voted for the resolution regarded the use of nuclear weapons as lawful in the absence of such a convention. Statements by a number of States, including some of the sponsors of the resolution, suggest that they did not take such a position. The later resolutions also refer to the adoption of a convention prohibiting the use of nuclear weapons". (United Kingdom, pp. 75-76, paras. 17-18, see also pp. 76-77, paras. 19-20; Netherlands, p. 11, para. 32; France, p. 32, para. 27 and the United States, pp 25-26.)

4.40 To suggest that UN General Assembly resolutions condemning the use of nuclear weapons are not declaratory of the law because they were not supported by all States limits the quality of international law only to those instruments supported by States

⁵² *Namibia case, judgment, ICJ Rep.*, 1971, p. 23, para. 29.

unanimously. This is quite wrong: international law is relative and its rules bind those States which adhere to them. Considering the normative nature of these resolutions, they would still, even if they were to create new law — *quod non* — be declaratory of the law for those States which voted in their favour.

4.41 However, the significance of these resolutions does go further. Their application is not limited only to those States supporting them. States advocating the view that the use of nuclear weapons is legal but opposed to these resolutions nevertheless admit that humanitarian law is applicable to the use of nuclear weapons (*infra*). There is therefore agreement between proponents and opponents of the legality of the use of nuclear weapons on the applicability of international humanitarian law to their use. Where General Assembly resolutions affirm this applicability, they represent, at least on this point, the *opinio juris* of the international community and to that end all States agree on this issue.

4.42 The point of disagreement is on the legality of the use of nuclear weapons under these rules. Solomon Islands is one of the many States which considers that any use of nuclear weapons *prima facie* violates international humanitarian law. It is for the Court to affirm or reject this view: if the Court confirms this view, the above mentioned resolutions would indeed reflect the *opinio juris* of the international community. If, on the other hand, the Court rejects this view, their legal effect would be limited to States who voted in their favour.

(2) Certain international humanitarian law instruments do not apply to the use of nuclear weapons

4.43 States which affirm the legality of nuclear weapons reject the idea that the legality can be challenged on the basis of

- (a) 1977 Geneva Protocol 1;
- (b) the 1948 Convention for the Prevention and Punishment of the Crime of Genocide; and
- (c) the law of neutrality.

(a) *The applicability of the 1977 Geneva Protocol 1 to the use of nuclear weapons*

4.44 Proponents of the legality of the use of nuclear weapons challenge the applicability of the 1977 Geneva Protocol 1 to the use of nuclear weapons (Netherlands, p. 10, paras. 30-31; United Kingdom, pp. 64 and 82, paras 4 and 29; France, pp. 26-27; United States, pp. 24, 28-29). Solomon Islands has already explained why the silence on this issue of the 1977 Geneva Protocol 1 and the consensus on "setting aside the

issue of nuclear weapons" does not imply that the Protocol does not apply to their use (Solomon Islands, pp. 29-36, 72 paras. 3.11-3.24, 3.90). There is no need to repeat what has already been stated on this issue.

(b) *The claim that the Convention for the Prevention and Punishment of the Crime of Genocide applies to nuclear weapons*

- 4.45 Proponents of the legality of nuclear weapons challenge the idea that the use of such weapons could amount to genocide because there is no element of intent. According to the Netherlands:

"[...] the use of nuclear weapons need not — as is sometimes alleged — necessarily amount to genocide in terms of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (45 AJIL 1951 Suppl. p. 7). Indeed, as long as the use of nuclear weapons, or for that matter any weapons, remains directed at the combatants of the other belligerent and is not directed at the population (which may be considered as a national group) as such with the intent to destroy that population in whole or in part as such, i.e. whether having status of combatant or not, there can be no question of genocide within the meaning of the 1948 Genocide Convention." (Netherlands, p. 12, para. 13; see also United Kingdom, p. 89, para. 41).

- 4.46 If all uses of nuclear weapons necessarily violate the international humanitarian laws identified above (paras. 4.5 *et seq.*), such use does not necessarily amount to genocide. This qualification will depend, on the particular circumstances in which nuclear weapons are used. If they are directed only at combatants, and if they affect the civilian population only marginally, it may be that such use might not amount to genocide even if it amounts to the violation of other international humanitarian laws (*supra* paras. 4.5 *et seq.*).

- 4.47 If on the other hand a large scale use of nuclear weapons leads to the destruction of a significant number of civilians forming part of group having a common national, racial, ethnic or religious identity, could the absence of genocide be implied merely because those responsible for the use of nuclear weapons had not specifically *intended* there to be a genocide? Article II of the Convention on the Prevention and Punishment of the Crime of Genocide states:

"In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- [...]

The express reference to "intent" makes it a fundamental element of the crime of genocide. The question is how to determine the intention of those responsible for the destruction of a national, ethnical, racial or religious group as such. Do those responsible have to publicly express their "intent" to annihilate a specific group of

people because of their nationality? Or, are they permitted to destroy that group without committing genocide simply by saying that it was not their intention to kill people because of their nationality? Is it reasonable to claim that an objective genocide depends only on the subjective motive of those responsible?

- 4.48 A positive answer to these questions would seriously undermine the effectiveness of the Convention. The Convention should be applied, to ensure its effectiveness is maximized, objectively rather than be dependent on a particular subjective interpretation attributed to it by the perpetrators of an act. If the outcome of certain actions resemble a genocide, it is meaningless for the perpetrator to claim not to have had the intention of committing the genocide: where there is voluntary killing of a population identified on the basis of a common nationality, ethnicity, race, or religion, genocidal intent can be presumed. Equally the use of nuclear weapons on a sufficiently large scale in full knowledge of their horrendously destructive effect, leads to a presumption of genocidal intent. Those responsible for such use cannot subsequently say "I knew not what I was doing" or "It was not my intention to cause the results which inevitably occurred".

(c) *The claim that the law of neutrality does not apply to the use of nuclear weapons*

- 4.49 It has also been suggested that the use of nuclear weapons causing radioactive fallout on the territory of neutral States does not violate the law of neutrality so long as there are no incursions by belligerent forces into neutral territories or the deliberate bombardment of targets in such territory. This is a claim which Solomon Islands finds particularly unattractive, in large part because some of those European States making the argument are the very same ones that have in the past carried out atmospheric nuclear tests in the Pacific region. The United Kingdom claimed that "[...] Hague Convention No. V was designed to protect the territory of neutral States against incursions by belligerent forces or the deliberate bombardment of targets located in that territory, not to guarantee such States against the incidental effects of hostilities" (p. 92, para. 44)
- 4.50 The violation of the law of neutrality by the use of nuclear weapons will obviously depend on the circumstances in which they are used. The law of neutrality is violated only where the use of nuclear weapons has effects on the territory of neutral States. For Solomon Islands any such effect is contrary to international law (see also Malaysia, p. 10). Similar considerations apply to electro-magnetic impulses which reach the territories of neutral States (Solomon Islands, pp. 55-56 paras. 3.57-3.58). To claim that certain effects do not violate the neutrality of third States in the absence of a belligerent incursion is extraordinary and at odds with the applicable law. Article I of the 1907 Hague Convention No. V on Respecting the Rights and Duties of Neutral Powers and Persons in case of War on Land, states in simple terms that "the territory of neutral Powers is inviolable". The Convention does not define inviol-

ability. It does not say that incursions by belligerents into the territory of neutral States or its bombardment violate the neutrality of the State. It is, however, indisputable that such effects amount to the violation of the neutrality of the victim State. In other words, the Convention's silence does not imply that the effects of the use of nuclear weapons which reach the territory of a neutral State do not violate its neutrality. Any use of a nuclear weapon which materially affect the territory of a neutral State violates the neutrality of that State.

- 4.51 In this regard, it matters little whether the violation is intentional or not. In the extract cited above (para. 4.49), the United Kingdom, addressing "deliberate bombardment", suggested that the violation of the neutrality of a State is limited to the intentional violation of its territory and that any accidental effects of the use of nuclear weapons which might reach the territory of neutral States would not amount to a violation because of the lack of intent. This conclusion is incorrect. Intention is not a constituent of international law except where expressly stipulated (see *supra* para. 4.47, also see Article 85 (3) and (4) of Geneva Protocol 1).
- 4.52 In its draft articles on international responsibility, the International Law Commission stated that only the existence of an action or omission attributable to the State is a constitutive element of international responsibility (Art. 3 of the draft articles)⁵³. According to one commentator:

*"L'exigence d'une condition supplémentaire, la faute ou un de ses avatars l'intention, n'est plus revendiquée aujourd'hui par aucun courant significatif, étatique ou doctrinal. A partir du moment où le fait illicite est un manquement au droit, l'intention délictuelle n'est pas requise en sus. Un fait est illicite dès que l'obligation est objectivement violée, quelles qu'aient pu être les intentions de l'auteur de la violation. C'est en quelque sorte un point de vue behaviouriste."*⁵⁴ (emphasis added)

By stating that the territory of neutral States are "inviolable", only the actual physical outcome is of relevance. According to the same commentator "lorsque l'obligation [violée] s'analyse en une obligation de résultat [...] peu importent les intentions, c'est le résultat qui compte."⁵⁵

On 6 June 1982, in justifying its invasion into Lebanon, Israel declared that:

*"qu'il n'avait aucune ambition territoriale au Liban et qu'il respectait et honorait l'indépendance et l'intégrité libanaise"*⁵⁶

⁵³ *Ybk. of I.L.C.*, 1973, vol. I, p. 28.

⁵⁴ Salmon, J.J.A., "L'intention en matière de responsabilité internationale", in *Mélanges Michel Virally*, Paris, Pedone, p. 414.

⁵⁵ *Ibid.*, p. 419.

⁵⁶ Security Council, off. doc. 2375th Session, 6 June 1982, p. 5, para. 43 (French).

The Security Council reaffirmed:

"la nécessité de respecter strictement l'intégrité territoriale, la souveraineté et l'indépendance politique du Liban à l'intérieur de ses frontières internationalement reconnues"

and

"1. *Exige* qu'Israël retire immédiatement et inconditionnellement toutes ses forces militaires jusqu'aux frontières internationalement reconnues du Liban;
[...] (S/Res. 509 of 6 June 1982).

The issue of intent was clearly irrelevant for the Security Council. What mattered was the actual violation of Lebanon's sovereignty and territorial integrity.

- 4.53 The same applies to radioactive and electro-magnetic effects caused by the use of nuclear weapons. Where these consequences affect the territory of a neutral State its neutrality has been violated and its territorial integrity infringed. Such violation or infringement may also amount to an aggression as defined in Art. 2 and 3(b), of the definition of aggression — which unless it were to be altered by a decision of the Security Council — presumes the existence of an aggression irrespective of the intention of the State which is the first to use force against another State.

* * *

- 4.54 By way of summary, in response to the proponents of the legality of the use of nuclear weapons, the lack of a treaty specifically prohibiting the use of nuclear weapons does not imply the absence of rules prohibiting such use:
- there exist generic prohibitions which apply to any use of nuclear weapons (paras. 4.32-4.35);
 - the suggestion that the prohibition on the use of a weapon requires the adoption of specific treaties cannot be reconciled with the fact that States continue to affirm general prohibitions applicable to various categories of weapons which are not otherwise designated (para. 4.32);
 - the lack of a consensus on the illegality of the use of nuclear weapons does not imply their legality, rather it implies the existence of a disagreement between States on the application to nuclear weapons of the generic rules of international humanitarian law (para. 4.37);
 - there is no decisive argument which restricts the application to the use of nuclear weapons of the 1977 Geneva Protocol 1, the 1948 Genocide Convention and the rules on neutrality and the territorial integrity of States (paras. 4.43-4.53).

(C) The claim that various international instruments imply the existence of a rule authorising the use of nuclear weapons

4.55 Proponents of the legality of the use of nuclear weapons consider that treaties which limit the possession and testing of nuclear weapons (1) or which "denuclearise" certain parts of the world (2) imply *ipso facto* the right to use nuclear weapons in an armed conflict; the same applies to the reservations and declarations made by certain States in relation to treaties which limit the possession or deployment of nuclear weapons (3).

(1) The claim that treaties which limit the possession of nuclear weapons imply the right to use nuclear weapons during an armed conflict

4.56 According to the United States,

"A number of international arms control agreements prohibit or regulate the manufacture, testing or possession of nuclear weapons or systems for their delivery. These include the 1963 Limited Test Ban Treaty, the 1967 Outer Space Treaty, the 1968 Non-Proliferation Treaty, the 1971 Seabed Arms Control Treaty, the 1972 Anti-Ballistic Missile (ABM) Treaty, the 1974 Threshold Test Ban Treaty, the 1987 Intermediate-Range Nuclear Forces (INF) Treaty and the 1991 Treaty on the Reduction and Limitation of Strategic Offensive Arms (START). These treaties would be unnecessary if there were already a generally-accepted prohibition on the use of nuclear weapons.

Further, the terms of these treaties implicitly acknowledge in many ways that the continued possession and use of such weapons (within the confines of treaty limitations) are not prohibited. For example, the Limited Test Ban Treaty (to which there are well over one hundred parties) permits underground nuclear weapons testing, while prohibiting testing elsewhere. This is a clear acknowledgement that the possession of such weapons by the nuclear-weapon States is lawful and implies that use in at least some circumstances would also be lawful, since possession and testing of such weapons would otherwise be purposeless. Likewise, the Non-Proliferation Treaty accepts the lawfulness of the development and possession of nuclear weapons by the nuclear-weapon States designated in the Treaty, which would make no sense if all uses of such weapons were unlawful. (United States, pp. 19-20; see also Netherlands p. 13, para. 35; United Kingdom, pp. 62 and 73, paras. 1 and 14; France, pp. 26 and 36, paras. 23 and 28).

Solomon Islands has considered these arguments in its written observations (p. 70, para. 3.84). This issue has been considered again by Solomon Islands in its introduction of these observations (*supra*). They are further developed below.

4.57 For proponents of the legality of nuclear weapons, regulating the possession, deployment or testing of nuclear weapons makes no sense if their use were prohibited. It would, for example, not make sense to allow underground nuclear weapons testing unless the purpose of such testing was the possible use of the weapons in an armed conflict. This argument is inaccurate for at least three reasons:

- (a) at its simplest the arguments reflects what might be called pseudo-logic;
- (b) any logic which it might have is based on a one-dimensional perception and inaccurate interpretation of the applicable law;
- (c) the argument reflects a blurred sense of reality.

(a) *A pseudo-logical argument*

4.58 Proponents of the legality of nuclear weapons claim that, the regulation of the possession, deployment or testing of nuclear weapons necessarily implies that their use is permissible in an armed conflict. In simple terms, this argument suggests that the legality of X behaviour implies the legality of Y behaviour, despite the very different nature of the latter behaviour, and that it takes place after X. In such circumstances the inference that "X implies Y" has no basis as the transitional link necessary to justify Y by X is absent. In deontic logic,⁵⁷ it would seem that Y is the conclusion of a syllogism for which no major premise can be found. The illogicality of this argument is also reflected in the development of rules concerning manufacture and use of chemical and biological weapons in which WHO played an important part. Whilst since 1899 the use of such weapons was prohibited, it is only recently in 1993 that their manufacture and their possession have been prohibited (*supra* para. 3.14). Accordingly, the international community has a long experience of living with one rule for production and another for use.

(b) *A unilateral and inaccurate interpretation of the applicable law*

4.59 The reasoning of proponents of the legality of the use of nuclear weapons is based on a unilateral and inaccurate perception of the applicable law. It presupposes that their interpretation is the only correct one: a half dozen States manufacture, possess and test nuclear weapons and merely because the international community is powerless to change this fact, it is presumed to be accepting the legality of the use of nuclear weapons. This reasoning is incompatible with the fact that even if States have admitted or tolerated the manufacture, possession and under certain conditions the testing of nuclear weapons, they have also challenged the legality of their use in an armed conflict, as is reflected by resolutions of the UN General Assembly (*supra* para. 4.39-4.41, and Solomon Islands, pp. 36-39, para. 3.25-3.26).

4.60 That these resolutions had been voted in by a simple majority is of little importance. They show that it is not possible to affirm, as certain States have done, that the manufacture, possession and testing of nuclear weapons implies the recognition by the international community of the legality of the use of nuclear weapons in an armed

⁵⁷ Cf Kalinowski, G, *Etudes de logique déontique* 1 (1952 1969), Paris LGDJ, 1972, 267p.

conflict. It is a unilateral and mistaken presumption because it disregards these resolutions and pretends to form an *opinio juris* which these resolutions refute.

(c) *A blurred vision of reality*

- 4.61 To claim that it does not make sense to tolerate the manufacture, possession and testing of nuclear weapons if they cannot be used in an armed conflict is based on a misconceived sense of reality. Historically, nuclear weapons have been developed and manufactured without any questioning on the matter of the legality of their use. This is particularly so for the early years of their development. This question was posed by the international community for the first time at the 16th Session of the UN General Assembly (in 1961), where the vast majority of States concluded in Res. 1653 (XVI) that the use of nuclear weapons was illegal under existing international law. In fact, the UN has abstained from declaring an analogous condemnation on the manufacture, possession and testing of nuclear weapons. These different aspects of nuclear weaponry have only led to conventional law making.
- 4.62 Is there an inherent logic to proclaiming the prohibition on the use of nuclear weapons in an armed conflict, whilst regulating their manufacture, possession and testing? The last 35 years have shown *a posteriori* that the political beliefs of the international community with regard to nuclear weapons — accepting their limited possession but refusing to validate their use — is not illogical. The international community has, in fact, proven its ability to make possible the coexistence of a law on nuclear dissuasion with a law on the legality of the use of nuclear weapons. This legal contradiction reflects a political reality which is more complex than might first appear.
- 4.63 To a certain extent, States have, in effect, accepted the dissuasion argument, even though many rightly deplore the huge investments which have been made with respect to the nuclear arms race and which could have been put to better use elsewhere. In any event, supporters of the nuclear arms race have reason to believe that dissuasion has permitted the preservation of peace between the nuclear Powers and that this alone justifies the legality of dissuasion. On the other hand, a vast majority of States consider that, if the maintenance of the peace justifies dissuasion, nothing in international law can justify the use of nuclear weapons, that is to say the applicable international humanitarian law. In other words, the international community might be ready to pay a price for one but not the other. These are two different political values which international law has integrated, and history shows their coexistence is not inherently illogical.
- 4.64 In fact, dissuasion makes sense only where its failure would definitely lead to the use of nuclear weapons. It would be incomprehensible to imagine that States had wanted to create a system of rules based on "dissuasion or use" which in some cases would definitely lead to the violation of the rules prohibiting use. Therefore the only way

to avoid this legal incompatibility would be to say that dissuasion implies the legality of use. This objection is not conclusive: in reality, the use of nuclear weapons is not as absolute as one might be tempted to believe. It will depend on the failure of dissuasion and the outbreak of an armed conflict which would undoubtedly have to be on a large scale involving a nuclear power State against one or more other nuclear or non-nuclear power States. Even in this hypothetical situation, recourse to nuclear weapons is far from certain and would depend on various factors. In other words, the failure of dissuasion is a risk, and the outcome of this risk leads merely to another risk. There is no guarantee of one or the other. Consequently, there is nothing illogical in elaborating a law based on certain eventualities. There is nothing illogical in noting that the international community is ready to assume the risk of a violation of law — the failure of dissuasion and the recourse to nuclear weapons — without accepting to legalise the occurrence of the final risk. This sort of hiatus between the permitted rule — the right of dissuasion — and the prohibitive rule — the prohibition on the use of nuclear weapons — is not exceptional in State practice. As one commentator has stated:

"La doctrine juridique a tendance à accepter la fiction que les normes d'un système juridique sont établies par un 'législateur rationnel' et que 'selon la volonté du législateur' il faut éliminer la possibilité d'une contradiction quelconque entre les normes du système. On accepte donc les règles d'interprétation des dispositions légales qui obligent à refuser toute interprétation qui admettrait des normes contradictoires dans le système. Mais malgré cela, il est parfois tout à fait clair que les législateurs réels établissent des dispositions qui contiennent des normes évidemment contradictoires ou des normes dont les conséquences, conformément à des théorèmes indubitables de la logique des normes ou de la logique déontique, sont contradictoires."⁵⁸

For nuclear weapons the international community thus prefers to tolerate rather than prohibit the manufacture of weapons which are not in actual fact legally permitted to be used.

- (2) **The claim that treaties which call for "denuclearised zones" in some parts of the world imply the right to use nuclear weapons in an armed conflict**

4.65 According to France:

"[...] le traité susvisé de 1967 sur l'espace extra-atmosphérique [...] de même que le traité sur la dénucléarisation du fond des mers et des océans, qui interdisent le placement d'armes nucléaires dans certains espaces déterminés, et ceci pour empêcher l'utilisation de ces armes dans les espaces en cause, établissent *a contrario* l'éventualité de présence et d'emploi de ces armes en d'autres lieux." (France, p. 36 para. 28) (emphasis added).

⁵⁸ Ziembinski, Z., "Conditions préliminaires de l'application de la logique déontique dans les raisonnements juridiques", in *Etudes de logique juridiques*, vol. IV, publ. by Ch. Perelman, Brussels, Bruylant, 1970, p. 120.

In other words, if the deployment of nuclear weapons is prohibited in certain areas, they can therefore be deployed elsewhere, and where they can be deployed they can be used.

4.66 This reasoning is analogous to that considered above (*supra* paras. 4.56-4.64): it is limited by

- the absence of logic: there is no link between the rule prohibiting the deployment of nuclear weapons in certain zones and the suggestion that there is a rule permitting the use of these weapons in the locality where their deployment is authorised (*supra* para. 4.58);
- the unilateral and mistaken interpretation of the applicable law: simply because nuclear weapon States accept not to deploy them in certain areas, the international community is assumed to have accepted that these weapons could legally be used elsewhere although there is a clear opposition to this by a majority of States as reflected in UN General Assembly resolutions (*supra* paras. 4.59-4.60);
- a blurred and simplistic vision of reality: the prohibition on the deployment of nuclear weapons in certain areas does not imply that they can be used elsewhere; the aim was to limit the risks of violating the prohibition on their use; where their deployment is not prohibited, the position is one of coexistence between the right to possess and deploy nuclear weapons with a law on the prohibition of their use, a system which reflects the complexity of international relations in this field (*supra* para. 4.61-4.64).

4.67 In other words, as with the manufacture, possession and testing of nuclear weapons, their deployment does not imply a right to use them in areas where such deployment is not prohibited.

(3) The claim that the unilateral declaration by States on treaties limiting the possession or deployment of nuclear weapons by which they reserve the right to use nuclear weapons in the event of an armed conflict implies their right to be used

4.68 In their written observations, the United States recalls the declarations made by them (pp. 22-23), the United Kingdom and France in 1978, by China in 1982 and by Russia in 1993, in which these States affirm that they would not use nuclear weapons unless they or their allies were attacked. The United States submission makes the following conclusion:

"Although these statements differ in some respects, they have certain important common features. First, none acknowledges any general prohibition on the use of nuclear weapons; on the contrary each clearly reserves the right to use nuclear weapons in some circumstances. Second, limits on

.the use of nuclear weapons are stated as a matter of national policy, not legal obligation. Third, limits are offered only with respect to States that have accepted the obligations of the Non-Proliferation Treaty (or similar obligations), thus indicating that there are no comparable constraints on the use of nuclear weapons against States generally.

Likewise, at the time of its ratification of Additional Protocols I and II to the Tlatelolco Treaty, the United States made a formal statement of understandings and declarations, including a statement that effectively reserved its right to use nuclear weapons against one of the Contracting Parties in the event of 'an armed attack by a Contracting Party, in which it was assisted by a nuclear-weapon State ...' Similar statements were made by the United Kingdom and the Soviet Union. France stated that nothing in the Protocol could present an obstacle to 'the full exercise of the right of self-defence confirmed by Art. 51 of the UN Charter'." (United States, pp. 23-24, see also United Kingdom, pp. 68-72, paras 10-13).

4.69 As before (*supra* paras. 4.61-4.64), such reasoning is based on a misconceived perception of the applicable law. These States are concluding from their *own* declarations or reservations the existence of a law which binds the entire international community. They are suggesting that the international community would have remained silent, would not have protested and would have confirmed the right of these States to use nuclear weapons in self-defence. This sort of reasoning is unilateral and mistaken as it disregards the position of the majority of States which have condemned the use of nuclear weapons.

4.70 The United States also stated that:

"[...] the Permanent Members of the Security Council [...] would not have borne the expense and effort of acquiring these [nuclear] weapons if they believed that the use of nuclear weapons was generally prohibited.

[...] The variety and disparity of views expressed by States demonstrates that there is no generally-accepted prohibition on the use of nuclear weapons ." (United States, pp. 21-22).

These forms of reasoning prove nothing as they are easily reversible; contrary theories could apply with the same apparent logic. On the one hand, if the majority of States do not possess nuclear weapons it is because they consider their use illegal; on the other hand the variety and diversity of opinions expressed by States suggests that there is no agreed general authorization on the use of nuclear weapons.

4.71 Just as a reminder, the fact that certain States recognise the right to use nuclear weapons in self-defence does not mean that they are able to modify the law of armed conflicts in their mutual relations alone giving themselves the right to annihilate each other or third States. Solomon Islands refers to its earlier observations (pp 71-74, paras 3.85-3.91) with respect to what has been said on the right of two or more States to modify *inter se* the rules applicable to the entire international community.

(4) **The claim that the use of nuclear weapons is compatible with international humanitarian law**

4.72 States which support the legality of nuclear weapons recognise that the international humanitarian law of armed conflicts applies to the use of nuclear weapons. The United States submission states:

"The United States has long taken the position that fundamental principles of the international humanitarian law of armed conflict would apply to the use of nuclear weapons as well as other means and methods of warfare." (see also Netherlands, pp. 13-14, para. 39, Germany, p. 3; United Kingdom, p. 81 para. 38).

It has been shown that the purpose of the law of armed conflicts was to prohibit any use of nuclear weapons which affects human beings. States which support the legality of the use of nuclear weapons seek to justify their position by, on the one hand, invoking the issue of self-defence (a), and on the other hand, by attempting to limit in various ways the application of the law of armed conflicts to nuclear weapons (b).

(a) *The claim that self-defence justifies the use of nuclear weapons during an armed conflict*

4.73 According to the United Kingdom,

"The use of nuclear weapons by one State against another would amount to a violation of the prohibition on the use of force in Art. 2(4) of the U.N. Charter unless that State could justify its reaction by reference to the right of self-defence [...]. It has, however, been argued that the use of nuclear weapons could not comply with the requirement that measures taken in self-defence must be necessary and proportionate to the danger they are designed to meet. This view is based upon the thesis that the effects of any use of nuclear weapons would be so serious that it could not constitute a necessary and proportionate measure [...].

It has never been denied that recourse to nuclear weapons would be a step of the utmost gravity and only one to be taken in a case of the greatest necessity. [...]. Yet it is not difficult to envisage circumstances in which a State which is the victim of aggression can protect itself only by resorting to the use, or threatened use, of nuclear weapons. That would particularly be the case where the aggressor itself employed nuclear weapons to further its attack, since even a State with a considerable superiority in conventional forces would be likely to be overwhelmed in such circumstances. It could also be the case, however, where a State sustains a massive conventional attack which it has no prospect of successfully resisting unless it resorts to nuclear weapons. To deny the victim of aggression the right to use the only weapons which might save it would be to make a mockery of the inherent right of self-defence." (United Kingdom, pp. 77-80, paras 22-24; see also Netherlands, p. 13, para. 38; Germany, p.4; France, pp. 23-24, para. 21 and United States, p. 25).

This type of argument attempts to use self-defence as a justification for the use of any sort of weapon or method of war; the terms "nuclear weapons" could just as easily be replaced by "chemical" or "biological" weapons without prejudicing this reasoning. It has never been suggested that chemical weapons could be used in self-defence. Why different reasoning should be applied to nuclear weapons is not explained. Solomon Islands will not expand this argument which has already been referred to in

its Written Observations (p. 64, para. 3.73) and which confuses the *jus ad* or *contra bellum* with *jus in bello* (see Nauru, p. 29).

- 4.74 This legality of the use of nuclear weapons is examined by the United Kingdom and others in terms of the UN Charter. Solomon Islands would ask: what use is there in justifying behaviour by reference to one category of rules where that behaviour would violate another category of rules? Such a distinction has no purpose as, whether in the case of aggression or self-defence, the law of armed conflicts will apply. The law of armed conflicts does not differentiate between the legitimacy of the objectives pursued: what is at issue is the principle of the equality of belligerents during war which is unanimously recognised in doctrine,⁵⁹ explicitly reaffirmed in Geneva Protocol 1 (5th preambular paragraph and Art. 96 para. 3,(c)) and implicitly supported by the 1949 Geneva Conventions (common Art. 1) and Additional Protocol 1 (Art. 1 (1)) where these instruments envisage the respect of their obligations "in all circumstances".⁶⁰ Self-defence authorises a State to use force against an aggressor State, but there are limits as to how this right can be exercised: such use of force is subject to and must remain within the relevant laws. Where that recourse to the use of nuclear weapons violates laws applicable to armed conflicts, the use of force would be illegal, even in the case of self-defence, and even against a State which has itself used nuclear weapons. Two illegalities do not make a right.
- 4.75 One variant on the argument based on self-defence puts forward the view that the WHO Constitution does not seek to limit self-defence. According to the Netherlands:

"[...] the implied general obligation of WHO Member States to contribute to the achievement of the principal objective of the WHO and to co-operate to that effect cannot encroach upon the right of the individual or collective self-defence to which States are entitled under Art. 51 of the Charter of the U.N." (Netherlands, p. 15, para. 43; see also, United Kingdom., p. 39, Para. 16; United States, p. 32).

- 4.76 Whilst it is clear that the WHO Constitution is not incompatible with the inherent right of self-defence, it is also clear that the use of nuclear weapons is incompatible with the WHO Constitution as has already been shown by the Solomon Islands (pp. 41-43, paras. 3.32-3.33).

(b) *The claim that certain rules of the law of armed conflicts would not prohibit the use of nuclear weapons*

⁵⁹ On this principle see Meyrowitz, H., *Le principe de l'égalité des belligérants devant le droit de la guerre*, Paris, Pédone, 1970, p. 418; Institut de Droit International, Brussels session, 1963, *Ann. I.D.I.*, 1963, vol. 50, T. II, p. 368; Gasser, H.-P., "Le droit international humanitaire", in Haug, H., *Humanité pour tous*, Berne, Haupt-Inst. H. Dunant, 1993, p. 512; for an example of case law, see Nur., U.S Military Tribunal, 19 February 1948, *List et al (Hostages Trial)*, A.D., 1948, 637.

⁶⁰ *Commentaire des Protocoles additionnels du 8 juin 1977 aux Conventions de Genève du 12 août 1949*, ed. by Y. Sandoz, Chr. Swinarski and B. Zimmerman, Geneva, I.C.R.C -Nijhoff, 1986, p. 37.

- 4.77 It has been argued that neither the limitations on the methods and means of warfare nor the Martens Clause are obstacles to the use of nuclear weapons because they are not autonomous and they do not relate to a specific prohibition. According to the United Kingdom, the principle of the limitation on the methods and means of warfare

"cannot stand alone as a prohibition of a particular category of weapons. It is necessary to look outside the principle in order to determine what limitations are imposed by customary or conventional law upon the choice of methods and means of warfare.[...]

The terms of the Martens Clause themselves make it necessary to point to a rule of customary international law which might outlaw the use of nuclear weapons." (United Kingdom, pp. 83-84, paras 31-32)

- 4.78 Even if the limits on the methods and means of warfare make sense only by reference to specific rules or limitations, it is not correct to state that no such rules or limitations do exist. In particular they arise from the prohibition on the use of certain weapons which apply by reason of their effects (*supra* paras. 4.8-4.10). The Martens Clause does not refer to a specific rule of international law because its purpose is precisely to fill gaps in the law of armed conflicts. Consequently, to determine whether there is no rule prohibiting the use of nuclear weapons (*quod non*), the question which needs to be asked is whether in any particular case their use is or is not compatible with "humanitarian laws and the dictates of the public conscience". *In casu*, the question has already been answered, since there are rules prohibiting the use of nuclear weapons and the Martens Clause acts as a standard for interpreting and applying these rules (*cf.* Solomon Islands, p. 60, para. 3.64).

- 4.79 It has also been suggested that the prohibition on reprisals does not apply in respect of nuclear weapons. The United Kingdom notes that if the 1977 Geneva Protocol 1 prohibits reprisals against the civilian population, civilian property, cultural heritage, etc. then

"these provisions are widely regarded as innovative and thus as inapplicable to the use of nuclear weapons (KALSHOVEN, 'Arms, Armaments and International Law', 191 Rec. des Cours (1985-II), p. 283). (United Kingdom, p. 94, para. 47; see also United States, p. 31).

In other words, it is being suggested that in relation to nuclear weapons reprisals which are directed against civilians and their property are legal despite the prohibition in the Geneva Protocol 1 on all forms of reprisals.

- 4.80 Solomon Islands has previously addressed this argument (p. 65, para. 3.75; see also Sweden, p. 3; Malaysia, p. 8). It sees no need to further elaborate on the illegality of reprisals directed at the civilian population and other targets in any circumstances: the essence of humanitarian law condemns such actions. As the *Commentary to the Additional Protocols* makes clear with regards to Art. 1 (1) of the 1977 Geneva Protocol 1,

"The prohibition against invoking reciprocity in order to shirk the obligations of humanitarian law is absolute. This applies irrespective of the violation allegedly committed by the adversary. It does

not allow the suspension of the application of the law either in part or as a whole, even if this is aimed at obtaining reparations from the adversary or a return to a respect for the law from him.⁶¹

Even if the prohibition on reprisals against the civilian population is a new rule of international law — *quod non*, as is stated in the above mentioned *Commentary*, then

"the Martens Clause prevents the assumption that anything which is not explicitly prohibited by the relevant treaties is therefore permitted."⁶²

4.81 Finally, if hard evidence is needed in support of the view that reprisals against the civilian population or their property are prohibited, reference should be made to the Security Council resolutions condemning Iraq and Iran during their conflict, where each belligerent bombarded the enemy's cities in a chain of reprisal and counter-reprisal. According to Security Council resolution 540 of 31 October 1983,

"*Condemns* all violations of international humanitarian law, in particular, the provisions of the Geneva Conventions of 1949 in all their aspects, and calls for the immediate cessation of all military operations *against civilian targets*, including city and residential areas"⁶³ (emphasis added).

This example is even more significant if account is taken of the fact that Iraq and Iran both invoked the doctrine of reprisals to justify their actions, and that neither is a party to Geneva Protocol 1. They were both nevertheless roundly condemned by the Security Council. If the reprisals directed against the civilians had been legal, the Security Council could not have adopted the position it did. In any event, the I.C.R.C. was of the opinion that these actions, even under guise of reprisals, were without a doubt illegal. In their statement to the two belligerent States on 7 May 1983, the I.C.R.C. stated:

"Les forces armées irakiennes ont bombardé de façon indiscriminée et systématique des agglomérations — villes et villages — entraînant par là des pertes au sein de la population civile et des destructions considérables de biens civils. Ces actes sont d'autant plus inadmissibles, qu'ils furent parfois annoncés comme *représailles* avant d'être perpétrés.
Des villes irakiennes ont également été la cible de tirs indiscriminés des forces armées iraniennes. De tels actes sont *contraires à l'essence même du droit international humanitaire* applicable dans les conflits armés, qui repose sur la distinction entre civils et militaires."⁶⁴ (emphasis added)

⁶¹ *Ibid.*, p. 38.

⁶² *Ibid.*, p. 39.

⁶³ See also, S/Res. 582 of 24 February 1986, para. 2; S/Res. 598 of 20 July 1987, 4th preambular paragraph.

⁶⁴ Cited by Sandoz, Y., "Appel du C.I.C.R. dans le cadre du conflit entre l'Irak et l'Iran", *A.F.D.I.*, 1983, p. 173.

It is therefore difficult to reconcile the above examples with the idea that nuclear weapons are legal when used in the context of reprisals against a civilian population.

4.82 In summary, none of the arguments invoked by the proponents of the legality of nuclear weapons justifies their position. Further to Solomon Islands original Written Observations:

- the use of nuclear weapons would *prima facie* be illegal by reason of:
- their inevitable lethal effects (para. 4.5);
- the unnecessary suffering they cause (paras. 4.6-4.7);
- their indiscriminate effects (paras. 4.8-4.10);
- their resemblance to chemical and poison weapons (paras. 4.13-4.23);
- their ability to provoke the outbreak of a general nuclear war (para. 4.11);
- the absence of a conventional rule specifically prohibiting the use of nuclear weapons does not imply the absence of a generic prohibition (paras. 4.25-4.53);
- international law does not require the prohibition on the use of a particular weapon to be the subject of a specific rule (paras. 4.27-4.36);
- the lack of agreement between States on the issue of whether the conventional law of armed conflicts prohibits the use of nuclear weapons does not imply the absence of such a prohibition (para. 4.37);
- it has not been shown that the 1977 Geneva Protocol 1 does not cover the use of nuclear weapons (para. 4.44);
- the use of nuclear weapons amounts to genocide where the result of their use is the destruction of a population characterised by a national, racial, ethnic or religious identity (paras. 4.45-4.48);
- the use of nuclear weapons can violate the neutrality and territorial integrity of neutral States where any of the effects of the weapons reach the territory of the neutral State (paras. 4.49-4.53);

- the right to possess, deploy and test nuclear weapons by certain States does not imply a right to use them in an armed conflict bearing in mind the prohibitions which exist (paras. 4.56-4.64)
- the fact that certain areas of the world have been "denuclearised" does not imply that nuclear weapons can be used in other areas (paras. 4.65-4.67);
- the fact that certain States have made statements reserving their right to use nuclear weapons in some situations does not imply that they have such a right bearing in mind the opposite opinion expressed by the majority of the international community (paras. 4.68-4.71); and
- self-defence and the doctrine of reprisals do not justify violations of the law of armed conflicts and therefore do not justify the use of nuclear weapons (paras. 4.72-4.81).

(D) Human Rights and the Environment

4.83 In its Written Observations Solomon Islands considered the legality of the use of nuclear weapons by reference to those rules of international law which protect human health (pp. 85-6, para. 4.23), fundamental human rights (pp. 86-7, para. 4.24) and the environment (pp. 87-91, paras. 4.25-4.31). This was felt to be particularly appropriate because of the question posed by the WHO, which refers expressly to human health and the environment, and because Solomon Islands considers these rules to be relevant to the question posed by the WHO.

4.84 It is noteworthy that very few of the proponents of the legality of the use of nuclear weapons have bothered to address the broader international law of human health, human rights and environmental protection. Those that do so apparently consider them to be irrelevant for one reason or another in respect of the use of nuclear weapons, which is perhaps surprising given their commitment to these subjects in other fora. Germany, France and Russia are silent about both human rights and environmental rules. The United Kingdom and the United States are silent about human rights instruments, dismissive of the applicability of environmental obligations forming part of *jus in bello*, and silent about all environmental obligations arising under general international law. Only the Netherlands amongst proponents of legality consider the human rights instruments, and then only to dismiss their applicability. By contrast, many of the proponents of the illegality of the use of nuclear weapons devote attention to these rules.

(a) Human rights and human health

4.85 Solomon Islands views on the relevance and applicability of human rights instruments are shared by many other States. In particular, support is found for the applicability

of the right to life, as reflected in Article 6 of the International Covenant on Civil and Political Rights and other instruments (see Costa Rica, para. 5; Mexico, pp. 8-9, paras 30-1; Malaysia, pp. 12-13; and Nauru, pp. 48-51).

- 4.86 The United Kingdom is silent about human rights, and considers that "the only documents which do treat nuclear weapons as if they were unlawful per se are a number of resolutions of the United Nations General Assembly" (p. 73, para. 15). In fact, as other States have indicated, and as implicitly recognised by the Netherlands (see *infra*) this is not the case: in 1984 the Human Rights Committee adopted a consensus text on the applicability of Article 6 of the ICCPR (Right to Life) to nuclear weapons, stating *inter alia* that the

use of nuclear weapons should be prohibited and recognised as a crime against humanity.⁶⁵

Solomon Islands fully endorses this view, which is directly relevant to the WHO request (on issues of competence, propriety and substance). It is particularly noteworthy that the General Comment was adopted without dissent, and that eminent jurists who were members of the Committee in 1984 and supported the adoption included Roger Errera (France), Sir Vincent Evans (United Kingdom) and Anatoly Movchan (USSR).

- 4.87 Without directly mentioning the General Comment the Netherlands disagrees with its conclusions. It argues that the use of nuclear weapons cannot be considered in itself to be a violation of the right to life, as enshrined in *inter alia* Article 6 of the 1966 ICCPR, because Article 6 does not create "an absolute right to life". Referring to the ICCPR *travaux préparatoires*, Netherlands considers that death resulting from "the performance of lawful acts of war" would not be arbitrary and hence not unlawful (p. 12, para. 34). Two points need to be made. First, Netherlands implicitly accepts the relevance and applicability of human rights instruments to the use of nuclear weapons. Second, Netherlands appears to accept that death from an *unlawful* use of nuclear weapons would violate Article 6. Solomon Islands agrees with both these conclusions, and considers further that since it is inconceivable that any use of nuclear weapons would be lawful it follows that any use of nuclear weapons would also violate Article 6 and, in the words of the Human Rights Committee, constitute a "crime against humanity".

(b) *Environment*

- 4.88 Many States also share Solomon Islands views on the interpretation and applicability of the *jus in bello* rules concerning the environment, as well as the applicability of general international environmental law to the use of nuclear weapons.

⁶⁵ General Comment 14/23 of 2 November 1984 [Right to Life and Nuclear Weapons], reproduced in M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary, 1993, p. 861.

- 4.89 On the applicability of general international environmental law, Sweden, for example, considers that "there are impediments to the use of weapons which cause extensive, long term and serious damage to the environment", and cites the 1972 Stockholm Declaration (p. 5; see also Democratic People's Republic of Korea, p. 1; Nauru, p. 39; Mexico pp. 10-11). Other States cite to the 1992 Convention on Biological Diversity (Sri Lanka, p. 3; Democratic People's Republic of Korea, p. 1; Nauru, p. 44), the 1992 UN Framework Convention on Climate Change (Mexico, p.10, para. 38; Sri Lanka, p. 3; Nauru, p. 43) and the 1992 Rio Declaration on Environment and Development (Sri Lanka, p. 3; Nauru, p. 45). Samoa invokes the general obligation to prevent widespread, long term and severe damage to the environment (p. 3).
- 4.90 In sharp contrast proponents of the legality of the use of nuclear weapons are conspicuously silent on these and other international instruments. This silence is particularly surprising given that these same countries have recognised in the recently adopted Convention on Nuclear Safety the very real risks of damage which radiation poses for the environment.⁶⁶
- 4.91 There is also apparently a sharp difference of view on the applicability of the *jus in bello* rules relating to environmental protection. Various countries join Solomon Islands in expressing the view that the use of nuclear weapons would violate the ENMOD Convention and the relevant provisions of the 1977 Additional Geneva Protocol (Mexico, pp. 9-11, paras. 35-40; Malaysia, p. 10; Iran, p. 1; Nauru, p. 36).
- 4.92 On the other hand the United Kingdom (p. 91, para. 43) and the United States (pp. 30-1) consider that the ENMOD Convention is unlikely to be applicable to most cases in which nuclear weapons might be used, since the intent of the users will not be to achieve "deliberate manipulation" of natural processes within the meaning of Article II of that Convention. In fact, the ENMOD Convention approach has been superseded by general international law, which is reflected in recent state practice and customary law, and which establishes a stricter obligation not to cause environmental damage during warfare. This is confirmed by the recent dispute between Iraq and Kuwait and the practice of the Security Council in relation thereto. Thus, whilst there was no evidence that Iraq intended to carry out "deliberate manipulation" within the meaning of the ENMOD Convention in its interference with Kuwaiti oilfields, the Security Council was nevertheless quick to find Iraq "liable under international law for ... environmental damage" as a result of its unlawful invasion of Kuwait.⁶⁷ Since Iraq was not a party to the ENMOD Convention or the 1977 Geneva Additional Protocol I, the Security Council's finding can only have been based on general international law, as it has evolved following the adoption of the two 1977 conventions. And, as Solomon Islands indicated in its Written Observations, these rules of general

⁶⁶ 1994 Convention on Nuclear Safety, preamble.

⁶⁷ UN Security Council Resolution 687/1991, UN Doc. S/RES/687 (1991).

international law apply in times of war as in times of peace (Written Observations, paras. 4.34-4.45).

- 4.93 For these reasons Solomon Islands also disagrees with the United States' view that the rule in 1977 Additional Protocol I (which is broader than the ENMOD Convention) does not apply to nuclear weapons (pp. 30-1). As reflected in customary law that rule is applicable to nuclear weapons, as it is by operation of treaty law for parties to the Protocol (on the applicability of the 1977 Additional Protocol I, see Solomon Islands Written Observations, paras. 3.11 - 3.24).

(E) Jus cogens

- 4.94 "If there is a place where doctrine recognises that there are rules of *jus cogens* which are not controversial, it is in respect of the prohibition of the threat or use of force and in the prohibition against violation of the basic principles of humanitarian law, and against the commission of a crime against humanity." The normative and legal force of these prohibitions has been recognised in the concept of *jus cogens*. The apocalyptic impact of nuclear weapons on human life, the environment, and the public order justifies the conclusion that their use would *prima facie* violate *jus cogens*.
- 4.95 This Court has referred on a number of occasions to the existence of peremptory norms of international law that are of a higher normative value, and that as such are applicable to all States, and allow no derogation.⁶⁸ Although the Court has not yet had occasion to directly apply such a norm, or to provide precise guidance on the scope of *jus cogens* norms, it has acknowledged and relied upon their existence to reach its decisions. The Court has, in this context, referred to specific norms that have also been recognised as peremptory by treaty law in the practice of States,⁶⁹ resolutions of the United Nations General Assembly, in the work of the International Law Commission,⁷⁰ and in the writings of highly qualified publicists.⁷¹

⁶⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, 1986 ICJ 14; *Advisory Opinion in the Genocide case (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide)* 1951, ICJ 15; *Barcelona Traction and Light* (second phase), ICJ Reports 1970.

⁶⁹ See e.g., Restatement of Foreign Relations Law of the United States (Revised), Tent. Draft No.6, vol.2 1985, paragraph 702 comment 1.

⁷⁰ See e.g., 2 *Yearbook of the International Law Commission*, 1966, pp.247-48; ILC Report 1976 on the 28th Session, p.85.

⁷¹ See, e.g., Verdross, *Forbidden Treaties in International Law*, 1937; Jimenez de Arachaga, 159 *Rec. des Cours* 9, (1978-I); Brownlie, *Principles of Public International Law*, 512-515 (4th ed. 1990).

- 4.96 The 1969 Vienna Convention defines *jus cogens* as a peremptory norm of international law . . . *accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted . . .*⁷². In the context of the issue now before the Court, it is essential to clarify that this provision has been interpreted authoritatively to allow "no question of requiring a rule to be accepted and recognised as peremptory by all States.

It would be enough if a large majority did so; that would mean that if one State in isolation refused to accept the peremptory character of a rule, or if that State was supported by a very small number of States, the acceptance and recognition of the peremptory character of the rule by the international community as a whole would not be affected."⁷³

While the drafters of the 1969 Vienna Convention chose not to list specific examples of *jus cogens* prohibitions, the decisions of the Court⁷⁴, State practice, and the writings of highly qualified publicists have identified a number of norms that fall uncontroversially within the category of *jus cogens*. These norms, each of which would be violated by the use of nuclear weapons, include prohibitions against genocide⁷⁵ and violation of basic human rights.⁷⁶

⁷² 1969 Vienna Convention, Article 53.

⁷³ Statement of the Chairman of the Drafting Committee of the in Vienna Conference on the Law of Treaties, in *United Nations Conference on the Law of Treaties, 1968*, p.472 (emphasis added). In 1976, the International Law Commission in its report reflected on this term "as a whole" and said the following: "it certainly does not mean the requirement of the unanimous recognition by all members". ILC Report 1976, UN Doc. A/31/10, p.287.

⁷⁴ For example, the Court, in the *Barcelona Traction Case*, in the course of developing the doctrine concerning obligations *erga omnes*, recognised that states owe certain obligations to the international community as a whole, obligations which all States can be held to have a legal interest in their protection. To illustrate the types of obligations it had in mind, the Court set apart certain norms of a higher normative character:

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.

Barcelona Traction and Light (second phase), ICJ Reports 1970, at 32.

⁷⁵ The Advisory Opinion in the *Genocide Case*, the Court affirmed that genocide was "contrary to moral law and to the spirit and aims of the United Nations" and that the "principles underlying the Convention are provisions that are recognised by civilised nations as binding on States even without any conventional obligation." 151 ICJ 15, 28 May. Similarly, in the *Provisional Measures Case*, Judge Lauterpacht said in his separate opinion that "... the prohibition of genocide ... has generally been accepted as having the status not of an ordinary rule of international law, but of *jus cogens*." *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*

As has been demonstrated elsewhere in these observations, the use of nuclear weapons violates these norms. It would, furthermore, be appropriate, and entirely justified for the Court, in context of this request for an Advisory Opinion, to conclude that *prima facie* the use of nuclear weapons would be violative of *jus cogens*.

(Bosnia and Herzegovina v. Yugoslavia and Serbia and Montenegro), 13 September 1993, Further Requests for the Indication of Provisional Measures, paragraph 100, Separate Judgment by Judge Lauterpacht.

⁷⁶ See Barcelona Traction, note 45.

PART IV

SUBMISSIONS

- 5.1 In this context Solomon Islands submits again that the Court should give an Advisory Opinion which states:
- (A) that the World Health Organization is competent to request an Advisory Opinion from the International Court of Justice on this question, and that the Court is competent to and should give an Advisory Opinion on the question submitted;
 - (B) that any use of a nuclear weapon by a State would violate its obligations under international law as reflected in the rules of international law concerning methods and means of warfare (*jus in bello*) and neutrality, ALTERNATIVELY that the use of nuclear weapons must not violate applicable rules of international law concerning methods and means of warfare (*jus in bello*) and neutrality;
 - (C) that any use of a nuclear weapon by a State would violate its obligations under international law as reflected in the rules of international law for the protection of human health and the environment and fundamental human rights, ALTERNATIVELY that the use of nuclear weapons must not violate applicable rules of international law for the protection of human health and the environment and fundamental human rights;
 - (D) that any use of a nuclear weapon by a State would constitute a crime against humanity, ALTERNATIVELY that the use of nuclear weapons in violation of international law constitutes a crime against humanity; and
 - (E) that any use by a State of a nuclear weapon gives rise to its international responsibility, ALTERNATIVELY that the violation by a State of its obligations under international law relating to the use of nuclear weapons gives rise to its international responsibility.
- 5.2 Solomon Islands wishes to take this opportunity to thank the Court for consideration of its views, and to indicate its willingness to continue to assist the Court in addressing the challenging task posed by the WHO's request for this Advisory Opinion. In this regard, Solomon Islands considers that it would be useful for an oral hearing to be convened, during which time further views and clarifications of position might usefully be made available to the Court.