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Cour internationale
de Justice

LA HAYE

International Court
of Justice

THE HAGUE

ANNEE 1995

Audience publique

tenue le mardi 14 novembre 1995, à 10 heures, au Palais de la Paix,

sous la présidence de M. Bedjaoui, Président

sur la Licéité de l'utilisation des armes nucléaires
par un Etat dans un conflit armé
(Demande d'avis consultatif soumise par
l'Organisation mondiale de la Santé)

et

sur la Licéité de la menace ou de l'emploi d'armes nucléaires
(Demande d'avis consultatif soumise par
l'Assemblée générale des Nations Unies)

COMPTE RENDU

YEAR 1995

Public sitting

held on Tuesday 14 November 1995, at 10.35 a.m., at the Peace Palace,

President Bedjaoui presiding

in the case

in Legality of the Use by a State of Nuclear Weapons in Armed Conflict
(Request for Advisory Opinion Submitted by the World Health Organization)

and

in Legality of the Threat or Use of Nuclear Weapons
(Request for Advisory Opinion Submitted by
the General Assembly of the United Nations)

VERBATIM RECORD

Présents : M. Bedjaoui, Président
M. Schwebel, Vice-Président
MM. Oda
Guillaume
Shahabuddeen
Weeramantry
Ranjeva
Herczegh
Shi
Fleischhauer
Koroma
Vereshchetin
Ferrari Bravo
Mme Higgins, juges

M. Valencia-Ospina, Greffier

Present:	President	Bedjaoui
	Vice-President	Schwebel
	Judges	Oda
		Guillaume
		Shahabuddeen
		Weeramantry
		Ranjeva
		Herczegh
		Shi
		Fleischhauer
		Koroma
		Vereshchetin
		Ferrari Bravo
		Higgins
	Registrar	Valencia-Ospina

Licéité de l'utilisation des armes nucléaires par un Etat dans un conflit armé (Demande d'avis consultif soumise par l'Organisation mondiale de la Santé)

L'Organisation mondiale de la Santé est représentée par :

M. Claude-Henri Vignes, conseiller juridique;

M. Thomas Topping, conseiller juridique adjoint.

Licéité de l'utilisation des armes nucléaires par un Etat dans un conflit armé (Demande d'avis consultif soumise par l'Organisation mondiale de la Santé)

et/ou

Licéité de la menace ou de l'emploi d'armes nucléaires (Demande d'avis consultatif soumise par l'Assemblée générale des Nations Unies)

Le Gouvernement de l'Australie est représenté par :

M. Gavan Griffith, Q.C., Solicitor-General d'Australie, conseil;

L'Honorable Gareth Evans, Q.C., Sénateur, ministre des affaires étrangères, conseil;

S. Exc. M. Michael Tate, ambassadeur d'Australie aux Pays-Bas, conseil;

M. Christopher Staker, conseiller auprès du *Solicitor-General* d'Australie, conseil;

Mme Jan Linehan, conseiller juridique adjoint du département des affaires étrangères et du commerce extérieur, conseil;

Mme Cathy Raper, troisième secrétaire à l'ambassade d'Australie, La Haye, conseiller.

Le Gouvernement de la République fédérale d'Allemagne est représenté par :

M. Hartmut Hillgenberg, directeur général des affaires juridiques du ministère des affaires étrangères;

Mme Julia Monar, direction des affaires juridiques, ministère des affaires étrangères.

Le Gouvernement du Costa Rica est représenté par :

S. Exc. M. J. Francisco Oreamuno, ambassadeur de la République du Costa Rica aux Pays-Bas;

M. Carlos Vargas-Pizarro, conseiller juridique et envoyé spécial du Gouvernement du Costa Rica;

M. Rafael Carrillo-Zürcher, ministre-conseiller à ambassade du Costa Rica, La Haye.

Le Gouvernement de la République arabe d'Egypte est représenté par :

S. Exc. M. Ibrahim Ali Badawi El-Sheikh, ambassadeur d'Egypte aux Pays-Bas;

M. Georges Abi-Saab, professeur;

M. Ezzat Saad El-Sayed, ministre-conseiller à l'ambassade d'Egypte, La Haye.

Le Gouvernement des Etats-Unis d'Amérique est représenté par :

M. Conrad K. Harper, agent et conseiller juridique du département d'Etat;

M. Michael J. Matheson, conseiller juridique adjoint principal du département d'Etat;

M. John H. McNeill, conseil général adjoint principal au département de la défense;

M. John R. Crook, assistant du conseiller juridique pour les questions relatives à l'Organisation des Nations Unies, département d'Etat;

M. D. Stephen Mathias, conseiller pour les affaires juridiques à l'ambassade des Etats-Unis d'Amérique, La Haye;

M. Sean D. Murphy, attaché pour les questions juridiques à l'ambassade des Etats-Unis d'Amérique, La Haye;

M. Jack Chorowsky, assistant spécial du conseiller juridique, département d'Etat.

Le Gouvernement de la République française est représenté par :

M. Marc Perrin de Brichambaut, directeur des affaires juridiques au ministère des affaires étrangères;

M. Alain Pellet, professeur de droit international à l'Université de Paris X et à l'Institut d'études politiques de Paris;

Mme Marie-Reine d'Haussy, direction des affaires juridiques du ministère des affaires étrangères;

M. Jean-Michel Favre, direction des affaires juridiques du ministère des affaires étrangères.

Le Gouvernement de la Fédération de Russie est représenté par :

M. A. G. Khodakov, directeur du département juridique du ministère des affaires étrangères;

M. S. M. Pounjine, premier secrétaire à l'ambassade de la Fédération de Russie, La Haye;

M. S. V. Shatounovski, expert au département juridique du ministère des affaires étrangères.

Le Gouvernement des Iles Marshall est représenté par :

L'Honorable Theordore G. Kronmiller, conseiller juridique, ambassade des Iles Marshall aux Etats-Unis;

Mme. Lijon Eknilang, membre du conseil, gouvernement local de l'atoll de Rongelap.

Le Gouvernement des Iles Salomon est représenté par :

L'Honorable Victor Ngele, ministre de la police et de la sécurité nationale;

S. Exc. M. Rex Horoi, ambassadeur, représentant permanent des Iles Salomon auprès de l'Organisation des Nations Unies, New York;

S. Exc. M. Levi Laka, ambassadeur, représentant permanent des Iles Salomon auprès de l'Union européenne, Bruxelles;

M. Primo Afeau, *Solicitor-General* des Iles Salomon;

M. Edward Nielsen, consul honoraire des Iles Salomon à Londres;

M. Jean Salmon, professeur de droit à l'Université libre de Bruxelles;

M. James Crawford, professeur de droit international, titulaire de la chaire Whewell à l'Université de Cambridge;

M. Eric David, professeur de droit à l'Université libre de Bruxelles;

Mme Laurence Boisson de Chazournes, professeur adjoint à l'Institut universitaire de hautes études internationales, Genève;

M. Philippe Sands, chargé de cours à la *School of Oriental and African Studies*, Université de Londres, et directeur juridique de la *Foundation for International Environmental Law and Development*;

M. Joseph Rotblat, professeur émérite de physique à l'Université de Londres;

M. Roger Clark, professeur à la faculté de droit de l'Université Rutgers, Camden, New Jersey;

M. Jacob Werksman, directeur de programme à la *Foundation for International Environmental Law and Development*;

Mme Ruth Khalastchi, *Solicitor* de la *Supreme Court of England and Wales;*

Mme Louise Rands, assistante administrative à la *Foundation for International Environmental Law and Development*, Université de Londres.

Le Gouvernement de l'Indonésie est représenté par :

S. Exc. M. Johannes Berchmans Soedarmanto Kadarisman, ambassadeur d'Indonésie aux Pays-Bas;

M. Malikus Suamin, ministre et chef de mission adjoint à l'ambassade d'Indonésie, La Haye;

M. Mangasi Sihombing, ministre-conseiller à l'ambassade d'Indonésie, La Haye;

M. A. A. Gde Alit Santhika, premier secrétaire à l'ambassade d'Indonésie, La Haye;

M. Imron Cotan, premier secrétaire de la mission permanente d'Indonésie auprès de l'Organisation des Nations Unies, Genève;

M. Damos Dumoli Agusman, troisième secrétaire à l'ambassade d'Indonésie, La Haye.

Le Gouvernement de la République Islamique d'Iran est représenté par :

S. Exc. M. Mohammad J. Zarif, ministre adjoint aux affaires juridiques et internationales, ministère des affaires étrangères;

S. Exc. M. N. Kazemi Kamyab, ambassadeur de la République islamique d'Iran aux Pays-Bas;

M. Saeid Mirzaee, directeur, division des traités et du droit international public, ministère des affaires étrangères;

M. M. Jafar Ghaemieh, troisième secrétaire à l'ambassade de la République islamique d'Iran, La Haye;

M. Jamshid Momtaz, conseiller juridique, ministère des affaires étrangères.

Le Gouvernement italien est représenté par :

M. Umberto Leanza, professeur de droit international à la faculté de droit de l'Université de Rome «Tor Vergata», chef du service du contentieux diplomatique du ministère des affaires étrangères et agent du Gouvernement italien auprès des tribunaux internationaux, chef de délégation;

M. Luigi Sico, professeur de droit international à faculté de droit à l'Université de Naples «Frederico II»;

Mme Ida Caracciolo, chercheur auprès de l'Université de Rome «Tor Vergata».

Le Gouvernement japonais est représenté par :

S. Exc. M. Takekazu Kawamura, ambassadeur, directeur général au contrôle des armements et aux affaires scientifiques, ministère des affaires étrangères;

M. Koji Tsuruoka, directeur de la division des affaires juridiques, bureau des traités, ministère des affaires étrangères;

M. Ken Fujishita, premier secrétaire à l'ambassade du Japon, La Haye;
M. Masaru Aniya, division du contrôle des armements et du désarmement, ministère des affaires étrangères;

M. Takashi Hiraoka, maire d'Hiroshima;

M. Iccho Itoh, maire de Nagasaki.

Le Gouvernement de la Malaisie :

Dato' Mohtar Abdullah, *Attorney-General*, chef de délégation;

S. Exc. M. Tan Sri Razali Ismail, ambassadeur, représentant permanent de la Malaisie auprès de l'Organisation des Nations Unies, chef de délégation ajoint;

Dato' Heliliah Mohd. Yusof, *Solicitor-General*;

S. Exc. Dato' Sallehuddin Abdullah, ambassadeur de Malaisie aux Pays-Bas;

Dato' Abdul Gani Patail, jurisconsulte et chef de la division du droit international, cabinet de l'*Attorney-General*;

Dato' R. S. McCoy, Expert;

M. Peter Weiss, Expert.

Le Gouvernement du Mexique est représenté par :

S. Exc. M. Sergio González Gálvez, ambassadeur, ministre adjoint des affaires étrangères;

S. Exc. M. José Carreño Carlón, ambassadeur du Mexique aux Pays-Bas;

M. Arturo Hernández Basave, ministre à l'ambassade du Mexique, La Haye;

M. Javier Abud Osuna, premier secrétaire à l'ambassade du Mexique, La Haye.

Le Gouvernement de la Nouvelle-Zélande est représenté par :

L'Honorable Paul East, Q.C., *Attorney-General* de la Nouvelle-Zélande;

S. Exc. Madame Hilary A. Willberg, ambassadeur de la Nouvelle-Zélande aux Pays-Bas;

M. Allan Bracegirdle, directeur adjoint de la division juridique du ministère des affaires étrangères et du commerce extérieur de la Nouvelle-Zélande;

M. Murray Denyer, deuxième secrétaire à l'ambassade de la Nouvelle-Zélande, La Haye;

Le Gouvernement des Philippines est représenté par :

M. Merlin M. Magallona, agent;

M. Raphael Perpetuo Lotilla, conseil;

M. Carlos Sorreta, conseil;

M. Rodolfo S. Sanchez, avocat;

M. Emmanuel C. Llana, avocat.

Le Gouvernement de Qatar est représenté par :

S. Exc. M. Najeeb ibn Mohammed Al-Nauimi, ministre de la justice;

M. Sami Abushaikha, expert juridique du Diwan Amiri;

M. Richard Meese, cabinet Frere Cholmeley, Paris.

Le Gouvernement du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord est représenté par :

Le Très Honorable sir Nicholas Lyell, Q.C., M.P., *Attorney-General*;

Sir Franklin Berman, K.C.M.G., Q.C., conseiller juridique du ministère des affaires étrangères et du Commonwealth;

M. Christopher Greenwood, conseil;

M. Daniel Bethlehem, conseil;

M. John Grainger, conseiller;

M. Christopher Whomersley, conseiller;

M. Andrew Barlow, conseiller.

Le Gouvernement de Saint-Marin est représenté par :

Mme Federica Bigi, conseiller d'ambassade, fonctionnaire en charge de la direction politique au ministère des affaires étrangères.

Le Gouvernement de Samoa est représenté par:

S. Exc. M. Neroni Slade, ambassadeur et représentant permanent du Samoa auprès de l'Organisation des Nations Unies, New York;

M. Jean Salmon, professeur de droit à l'Université libre de Bruxelles;

M. James Crawford, professeur de droit international, titulaire de la chaire Whewell à l'Université de Cambridge;

M. Roger Clark, professeur à la faculté de droit de l'Université Rutgers, Camden, New Jersey;.

M. Eric David, professeur de droit à l'Université libre de Bruxelles;

Mme Laurence Boisson de Chazournes, professeur adjoint à l'Institut universitaire de hautes études internationales, Genève;

M. Philippe Sands, chargé de cours à la *School of Oriental and African Studies*, Université de Londres, et directeur juridique de la *Foundation for International Environmental Law and Development*;

M. Jacob Werksman, directeur de programme à la *Foundation for International Environmental Law and Development*;

Mme Ruth Khalastchi, *Solicitor* de la *Supreme Court of England and Wales;*

Mme Louise Rands, assistante administrative à la *Foundation for International Environmental Law and Development*, Université de Londres.

Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request for Advisory Opinion Submitted by the World Health Organization)

The World Health Organization is represented by:

Mr. Claude-Henri Vignes, Legal Counsel;

Mr. Thomas Topping, Deputy Legal Counsel.

Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request for Advisory Opinion Submitted by the World Health Organization)

and/or

Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion Submitted by the General Assembly of the United Nations)

The Government of Australia is represented by:

Mr. Gavan Griffith, Q.C., Solicitor-General of Australia, Counsel;

The Honorable Gareth Evans, Q.C., Senator, Minister for Foreign Affairs, Counsel;

H.E. Michael Tate, Ambassador of Australia to the Netherlands, Counsel;

Mr. Christopher Staker, Counsel assisting the Solicitor-General of Australia, Counsel;

Ms Jan Linehan, Deputy Legal Adviser, Department of Foreign Affairs and Trade, Counsel;

Ms Cathy Raper, Third Secretary, Australian Embassy in the Netherlands, The Hague, Adviser.

The Government of Costa Rica is represented by:

H.E. Mr. J. Francisco Oreamuno, Ambassador of the Republic of Costa Rica to The Netherlands;

Mr. Carlos Vargas-Pizarro, Legal Counsel and Special Envoy of the Government of Costa Rica;

Mr. Rafael Carrillo-Zürcher, Minister Counsellor, Embassy of Costa Rica, The Hague.

The Government of the Arab Republic of Egypt is represented by:

H.E. Mr. Ibrahim Ali Badawi El-Sheikh, Ambassador of Egypt to the Netherlands;

Mr. George Abi Saab, Professor;

Mr. Ezzat Saad El-Sayed, Minister Counsellor, Embassy of Egypt, The Hague.

The Government of the Republic of France is represented by:

Mr. Marc Perrin de Brichambaut, Director of Legal Affairs, Ministry of Foreign Affairs;

Mr. Alain Pellet, Professor of International Law, University of Paris X and Institute of Political Studies, Paris;

Mrs. Marie-Reine Haussy, Directorate of Legal Affairs, Ministry of Foreign Affairs;

Mr. Jean-Michel Favre, Directorate of Legal Affairs, Ministry of Foreign Affairs.

The Governement of the Federal Republic of Germany is represented by :

Mr. Hartmut Hillgenberg, Director-General of Legal Affairs, Ministry of Foreign Affairs;

Ms Julia Monar, Directorate of Legal Affairs, Ministry of Foreign Affairs

The Government of Indonesia is represented by:

H.E. Mr. Johannes Berchmans Soedarmanto Kadarisman, Ambassador of Indonesia to the Netherlands;

Mr. Malikus Suamin, Minister, Deputy Chief of Mission, Embassy of the Republic of Indonesia, The Hague;

Mr. Mangasi Sihombing, Minister Counsellor, Embassy of the Republic of Indonesia, The Hague;

Mr. A. A. Gde Alit Santhika, First Secretary, Embassy of the Republic of Indonesia, The Hague;

Mr. Imron Cotan, First Secretary, Indonesian Permanent Mission of Indonesia to the United Nations, Geneva;

Mr. Damos Dumoli Agusman, Third Secretary, Embassy of the Republic of Indonesia, The Hague.

The Government of the Islamic Republic of Iran is represented by:

H.E. Mr. Mohammad J. Zarif, Deputy Minister, Legal and International Affairs, Ministry of Foreign Affairs;

H.E. Mr. N. Kazemi Kamyab, Ambassador of the Islamic Republic of Iran to the Netherlands;

Mr. Saeid Mirzaee, Director, Treaties and Public International Law Division, Ministry of Foreign Affairs;

Mr. M. Jafar Ghaemieh, Third Secretary, Embassy of the Islamic Republic of Iran, The Hague;

Mr. Jamshid Momtaz, Legal Advisor, Ministry of Foreign Affairs, Tehran, Iran.

The Government of Italy is represented by:

Mr. Umberto Leanza, Professor of International Law at the Faculty of Law of the University of Rome "Tor Vergata", Head of the Diplomatic Legal Service at the Ministry of Foreign Affairs and Agent of the Italian Government before the International Courts, Head of delegation;

Mr. Luigi Sico, Professor of International Law at the Faculty of Law of the University of Naples "Federico II";

Mrs. Ida Caracciolo, Researcher at the University of Rome "Tor Vergata".

The Japanese Government is represented by:

Mr. Takekazu Kawamura, Ambassador, Director General for Arms Control and Scientific Affairs, Ministry of Foreign Affairs;

Mr. Koji Tsuruoka, Director of Legal Affairs Division, Treaties Bureau, Ministry of Foreign Affairs;

Mr. Ken Fujishita, First Secretary, Embassy of Japan in the Netherlands

Mr. Masaru Aniya, Arms Control and Disarmament Division, Ministry of Foreign Affairs;

Mr. Takashi Hiraoka, Mayor of Hiroshima;

Mr. Iccho Itoh, Mayor of Nagasaki.

The Governement of Malaysia is represented by:

Dato' Mohtar Abdullah, Attorney-General - Leader;

Ambassador Tan Sri Razali Ismail, Permanent Representative of Malaysia to the United Nations in New York - Deputy Leader;

Dato' Heliliah Mohd. Yusof, Solicitor-General;

Dato' Sallehuddin Abdullah, Ambassador of Malaysia to the Netherlands;

Dato' Abdul Gani Patail, Head of Advisory and International Law Division, Attorney-General's Chambers;

Dato' Dr. R. S. McCoy, Expert;

Mr. Peter Weiss, Expert.

The Government of Marshall Islands is represented by:

The Honorable Theordore G. Kronmiller, Legal Counsel, Embassy of the Marshall Islands to the United States;

Mrs Lijon Eknilang, Council Member, Rongelap Atoll, Local Government.

The Government of Mexico is represented by:

H.E. Ambassador Sergio González Gálvez, Undersecretary of Foreign Relations;

H.E. Mr. José Carreño Carlón, Ambassador of Mexico to the Netherlands;

Mr. Arturo Hernández Basave, Minister, Embassy of Mexico, The Hague;

Mr. Javier Abud Osuna, First Secretary, Embassy of Mexico, The Hague.

The Government of New Zealand is represented by:

The Honorable Paul East, Q.C., Attorney-General of New Zealand;

H.E. Ms. Hilary A. Willberg, Ambassador of New Zeland to the Netherlands;

Mr. Allan Bracegirdle, Deputy Director of Legal Division of the New Zealand Ministry of Foreign Affairs and Trade;

Mr. Murray Denyer, Second Secretary New Zealand Embassy, The Hague;

The Government of Philippines is represented by:

Mr. Merlin M. Magallona, Agent;

Mr. Raphael Perpetuo Lotilla, Counsel;

Mr. Carlos Sorreta, Counsel;

Mr. Rodolfo S. Sanchez, Advocate;

M. Emmanuel C. Llana, Advocate.

The Government of Qatar is represented by:

H.E. Mr. Najeeb ibn Mohammed Al-Nauimi, Minister of Justice;

Mr. Sami Abushaikha, Legal Expert of the Diwan Amiri;

Mr. Richard Meese, Frere Cholmeley, Paris.

The Government of the Russian Federation is represented by:

Mr. A. G. Khodakov, Director, Legal Department, Ministry of Foreign Affairs;

Mr. S. M. Pounjine, First Secretary, Embassy of the Russian Federation in the Netherlands;

Mr. S. V. Shatounovski, Expert, Legal Department, Ministry of Foreign Affairs.

The Government of Samoa is represented by:

H.E. Mr. Neroni Slade, Ambassador and Permanent Representative of Samoa to the United Nations, New York;

Mr. Jean Salmon, Professor of Law, *Université libre de Bruxelles*;

Mr. James Crawford, Whewell Professor of International Law, University of Cambridge;

Mr. Roger Clark, Distinguished Professor of Law, Rutgers University School of Law, Camden, New Jersey;

Mr. Eric David, Professor of Law, *Université libre de Bruxelles*;

Mrs. Laurence Boisson de Chazournes, Assistant Professor, Graduate Institute of International Studies, Geneva;

Mr. Philippe Sands, Lecturer in Law, School of Oriental and African Studies, London University, and Legal Director, Foundation for International Environmental Law and Development;

Mr. Jacob Werksman, Programme Director, Foundation for International Environmental Law and Development;

Ms Ruth Khalastchi, Solicitor of the Supreme Court of England and Wales;

Ms Louise Rands, Administrative Assistant, Foundation for International Environmental Law and Development, London University.

The Government of San Marino is represented by:

Mrs. Federica Bigi, Official in charge of Political Directorate, Department of Foreign Affairs.

The Government of Solomon Islands is represented by:

The Honorable Victor Ngele, Minister for Police and National Security;

H.E. Ambassador Rex Horoi, Permanent Representative of Solomon Islands to the United Nations, New York;

H.E. Ambassador Levi Laka, Permanent Representative of Solomon Islands to the European Union, Brussels;

Mr. Primo Afeau, Solicitor-General for Solomon Islands;

Mr. Edward Nielsen, Honorary Consul, Solomon Islands, London;

Mr. Jean Salmon, Professor of Law, *Université libre de Bruxelles*;

Mr. James Crawford, Whewell Professor of International Law, University of Cambridge;

Mr. Eric David, Professor of Law, *Université libre de Bruxelles*;

Mrs. Laurence Boisson de Chazournes, Assistant Professor, Graduate Institute of International Studies, Geneva;

Mr. Philippe Sands, Lecturer in Law, School of Oriental and African Studies, London University, and Legal Director, Foundation for International Environmental Law and Development;

Mr. Joseph Rotblat, Emeritus Professor of Physics, University of London

Mr. Roger Clark, Distinguished Professor of Law, Rutgers University School of Law, Camden, New Jersey.

Mr. Jacob Werksman, Programme Director, Foundation for International Environmental Law and Development;

Ms Ruth Khalastchi, Solicitor of the Supreme Court of England and Wales;

Ms Louise Rands, Administrative Assistant, Foundation for International Environmental Law and Development, London University.

The Government of the United Kingdom of Great Britain and Northern Ireland is represented by:

The Right Honorable Sir Nicholas Lyell, Q.C., M.P., Her Majesty's Attorney General;

Sir Franklin Berman, K.C.M.G., Q.C., Legal Adviser to the Foreign and Commonwealth Office;

Mr. Christopher Greenwood, Counsel;

Mr. Daniel Bethlehem, Counsel;

Mr. John Grainger, Adviser;

Mr. Christopher Whomersley, Adviser;

Mr. Andrew Barlow, Adviser.

The Government of the United States of America is represented by:

Mr. Conrad K. Harper, Agent and Legal Adviser, U.S. Department of State;

Mr. Michael J. Matheson, Principal Deputy Legal Adviser, U.S. Department of State;

Mr. John H. McNeill, Senior Deputy General Counsel, U.S. Department of Defense;

Mr. John R. Crook, Assistant Legal Adviser for United Nations Affairs, U.S. Department of State;

Mr. D. Stephen Mathias, Legal Counsellor, Embassy of the United States, The Hague;

Mr. Sean D. Murphy, Legal Attaché, Embassy of the United States, The Hague;

Mr. Jack Chorowsky, Special Assistant to the Legal Adviser, U.S. Department of State.

The PRESIDENT: Please be seated. This morning the Court will resume its public hearings in the case of the two advisory opinions requested by the United Nations General Assembly and the World Health Organization. I will now call upon the distinguished representative of the delegation of the Marshall Islands, the Honourable Theodore Kronmiller.

Mr. Theodore KRONMILLER: Mr. President, Members of the Court, I am honoured to have the privilege of presenting a statement in respect of the two requests for advisory opinions concerning the legality of the threat and use of nuclear weapons. This statement is presented on behalf of Senator Jonsay Riklon for the Government of the Marshall Islands, to which I am counsel. He has asked that I convey his regrets that he is unable to appear before this honourable Court to address these most important questions.

The Marshall Islands will not take up its full entitlement of one and one-half hours in presenting its oral statement. We request that the Solomon Islands might be permitted to use the remaining part of our time to detail the substantive arguments. We have had the benefit of contributing to the preparation of those arguments, and we ask you to treat them as having our full support. We add that we also support the views presented by Samoa yesterday on competence, propriety and applicable law.

It is in light of our experience of the long-term and long-range radiological effects of nuclear weapons that we consider any use of such weapons must be unlawful according to the "elementary considerations of humanity", which this Court affirmed in the *Corfu Channel* case[7]. Those considerations are reflected in international laws governing methods and means of warfare, the protection of fundamental human rights, and the protection of vital environmental resources which sustain human life.

The Marshall Islands was the site of 67 nuclear weapons tests conducted by the Administering Authority, from 30 June 1946 to 18 August 1958, during the period of the United Nations Pacific

[7] *I.C.J. Reports 1949*, p. 22.

Islands Territories Trusteeship. The total yield of those weapons was equivalent to more than 7,000 bombs the size of that which destroyed Hiroshima. The single, thermonuclear "Bravo" shot, carried out at Bikini Atoll on 1 March 1954, had a yield 1,000 times that of the Hiroshima weapon. The radioactive cloud from the Bravo explosion rose 100,000 feet into the atmosphere. As noted in the Final Report of the United States Advisory Committee on Human Radiation Experiments, a panel comprised of distinguished medical ethicists and practitioners, long-range radioactive fallout was carried on the winds to the inhabited atolls of Rongelap, Ailinginae, Rongerik, Utirik, Ailuk and Likiep, and not away from them as we are told had been anticipated by those who planned and conducted the test[8]. I must emphasize that those were not the only atolls contaminated by radioactive fallout. Indeed, we may reasonably conclude based on the evidence of widespread fallout that few, if any, of the 1,225 islands in the Marshall Islands' 850,000 square miles of ocean space escaped radioactive contamination. Only Bikini and Enewetak were the sites of the nuclear detonations, but the effects were experienced on atolls throughout the Marshall Islands, and in fact on distant continents[9].

The nuclear weapons tests conducted in the Marshall Islands are a matter of more than simply historical interest. They are directly relevant to the issues before you, as they indicate that the effects of the nuclear detonations continue to be experienced by persons living today and will persist for generations to come.

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[8]Advisory Committee on Human Radiation Experiments, Final Report, October 1995, Washington, D.C., p. 586 (hereinafter, "Report"). See also, Remarks by the President [of the United States] in Acceptance of Human Radiation Final Report, The White House, Office of the Press Secretary, 3 October 1995, p.2. ("The report I received today is a monumental document - (laughter) - in more ways than one. But it is a very , very important piece of America's history, and it will shape America's future in ways that will make us a more honourable, more successful, and more ethical country".)

[9]Findings of the Nationwide Radiological Study, Summary Report prepared for the Cabinet of the Government of the Marshall Islands, December 1994. Environmental Contamination from Weapons Tests, Health and Safety Laboratory, United States Atomic Energy Commission, New York Operations Office, October 1958. Radioactive Debris from Operation Ivy, United States Atomic Energy Commission, New York Operations Office, Prepared by Staff, Health and Safety Division, Merril Eisenbud, Director, 28 April 1953. Meteorological Data on First Shot - 2/28/54 - 1845Z, K.E. Fields, Director, Division of Military Application, John C. Bughar, M.D., Director, Division of Biology and Medicine, 3 March 1954. An attempt has been made to clean up a small area of contamination. See Report to the Congress, Enewetak Atoll - Cleaning Up Nuclear Contamination, Comptroller of the United States (no date). A dump site has been established at Runit Island on Enewetak Atoll.

That the nuclear weapons tests in the Marshall Islands caused extensive radiation-induced illnesses, deaths and birth defects is clear from documents in the public domain, including those released by the former Administering Authority. Surveys of fall-out patterns and effects have been thorough[10].

Victims have been provided medical treatment since their initial exposures[11]. Compensation for injuries and deaths due to the nuclear testing programme has been provided pursuant to international agreements[12]. The Nitijela - the parliament of the Marshall Islands - has authorized compensation to Marshallese born after 1 March 1954, who have radiation-related illnesses.

An epidemiological study reported in the *Journal of the American Medical Association* in 1987 states:

> "demonstrated that inhabitants of several atolls to the east and south of Bikini had elevated levels of thyroid disease and that there was a 'strong inverse linear relationship' between incidence of thyroid nodules and distance from the [Bravo] blast. It should also be noted that the exposed populations received additional doses of radiation over the years from the later bomb tests and residual radiation on the islands."[13]

There has been extensive documentation of birth defects attributed to radioactive contamination from the nuclear weapons tests. A research programme conducted in the Marshall Islands between 1975 and 1991 showed a "strong correlation between the incidence of congenital anomalies and distance from Bikini..."[14].

Damage to the environment of the Marshall Islands from the nuclear weapons tests has also

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[10]See, for example, Review of Marshall Islands Fallout Studies, Presented by Edward T. Lessard, Brookhaven National Laboratory (no date).

[11]Report, at pp. 583-598.

[12]Section 177, Compact of Free Association Between the Government of the United States and the Freely Associated State of the Republic of the Marshall Islands (hereinafter, "Compact"). Agreement Between the Government of the United States and the Government of the Marshall Islands for Implementation of Section 177 of the Compact of Free Association (hereinafter, "Agreement"). Section 103, Compact of Free Association Act, Public Law 99-239, 14 January 1986. See Admitted Claims by Condition and Amounts Awarded (as of 31 December 1993), and Admitted Claims by Atoll of Birth and Residence (as of 31 December 1993), Marshall Islands Nuclear Claims Tribunal.

[13]Report, p. 816.

[14]Statement of Glenn H. Alcalay Before the Presidential Advisory Committee on Human Radiation Experiments, Washington, D.C., 15 March 1995, p. 5.

been documented[15]. Resettlement of evacuated islands has not been fully achieved, due to the environmental impact of the tests, including the contamination of soil and the uptake of cesium into otherwise edible plant life. Dangerous levels of residual radioactivity have kept areas on four atolls entirely off limits.

It is noteworthy that the 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons acknowledged

> "the existence of a special responsibility towards those people of the former United Nations Trust Territories of the Pacific Islands who have been adversely affected as a result of the nuclear weapons tests conducted during the period of Trusteeship",

and called upon

> "all governments and international organizations which have expertise in the field of clean-up and disposal of radioactive contaminants to consider giving appropriate assistance, as may be requested, for remedial purposes in these affected areas while noting the efforts that have been made to date in this regard"[16].

Similar language was subsequently adopted by the Twenty-Sixth South Pacific Forum (1995) and the 1995 Intergovernmental Conference to Adopt a Programme of Action for the Protection of the Marine Environment from Land-Based Activities[17]. These statements represent a clear recognition that the consequences of nuclear-weapons detonations persist to this day and remain a serious problem for affected human populations and their environment.

Mr. President, I shall not elaborate the legal arguments for the Court, I simply would like to reiterate that we fully support those put forward yesterday on behalf of Samoa, and we fully associate ourselves with the arguments of substance which will be put forward by Solomon Islands later this morning. In particular, we consider that any use of nuclear weapons will unlawfully cause

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[15]See, for example, Report of the United Nations Visiting Mission to the Trust Territory of the Pacific Islands, 1961, United Nations Trusteeship Council, T/1560, 26 May 1961.

[16]Final Report of the 1995 Review and Extension Conference of the Parties to the Treaty on Non-Proliferation of Nuclear Weapons. The Report also noted a special responsibility on the part of the former Administering Authority "to care for the radiation-related illnesses of the exposed Marshallese because of its role as trustee and because it caused the exposures". Report, p. 597.

[17]Forum Communique, Twenty-Sixth South Pacific Forum, Madang, Papua New Guinea, September 1995, pp. 13-15, Washington Declaration on Protection of the Marine Environment from Land-Based Activities, UNEP (OCA)/lba/ig.2/1.3/Add.3, p. 13.

unnecessary suffering and cannot discriminate between civilian and military targets, will violate many fundamental human rights - especially the right to life of present and future generations - and will violate basic environmental norms for the protection of biodiversity and water quality. I shall, in this statement, offer observations born of the experience of the Marshall Islands in these respects.

The experience of the Marshallese people confirms that unnecessary suffering is an unavoidable consequence of the detonation of nuclear weapons, even at great distances from human populations. That is to say, it may reasonably be concluded from the experience of the Marshall Islands that damage cannot be expected to be limited to the immediate vicinity of ground zero of a nuclear detonation which may be aimed at a military target. Drawing upon that experience, it is seen that human populations which are hundreds, or even thousands, of miles from a nuclear blast may be caused to suffer serious injury, death after prolonged illness and severe birth defects. If we accept the statements of the former Administering Authority, the Marshallese experience demonstrates that human suffering and damage to the environment must occur at great distance, both in time and geography, from the sites of detonations, even when the effort is made to avoid or mitigate harm. Such suffering and environmental damage should not be regarded as necessary to the achievement of military objectives, because there are alternative weapons systems that may be utilized with similar military effectiveness, but without the extensive suffering and damage attending nuclear weapons. Of course such suffering and damage would be much more extensive than experienced in the thinly populated Marshall Islands, were targets to be in or near densely populated areas, such as those in Europe, North America, the Middle East, and the Far East, where there is a continuing risk of nuclear exchanges.

The unique characteristics of nuclear weapons that cause unnecessary suffering include not only widespread, extensive, radioactive contamination, with cumulative adverse effects, but also locally intense radiation with severe, immediate and long-term adverse effects, and far-reaching blast, heat, and light resulting in acute injuries and chronic ailments. Permanent, as well as temporary, blindness from intense light, and reduced immunity from radiation exposure, are common and unavoidable to the use of nuclear weapons, but are uncommon or absent from the use of other

destructive devices. Any argument to distinguish between these effects as primary or secondary would be sophistry.

Moreover, nuclear weapons may fail to destroy hardened military targets, while inevitably causing enormous suffering by civilian populations. This is not the case with conventional weapons, particularly those which are capable of precise targeting. From the Marshallese experience, we conclude that birth defects and extraordinarily prolonged and painful illnesses caused by radioactive fallout must inevitably and profoundly affect civilian populations long after any nuclear strike has been carried out and the military operation has been concluded. Such suffering, which may affect generations born long after the tactical or strategic use of those weapons as concluded, cannot be viewed as necessary to the achievement of military objectives. These widespread, adverse effects on future generations are unique to nuclear weapons.

We also conclude, from the great extent of human injury and environmental and property damage inflicted on the Marshall Islands by nuclear weapons detonations, that these devices are inherently indiscriminate in their effects. Those who conducted the tests maintain that the injuries to the Marshallese people and the long-term radioactive contamination of their inhabited islands were not connected with the purpose of the weapons tests. According to reports prepared by the party responsible for the tests, the extensive human injuries and extensive environmental contamination, were consequence of underestimates of the yields of the nuclear explosives and miscalculations of wind patterns. We are assured by the responsible party that every reasonable effort was made to avoid any human injury, as well as any damage to inhabited islands. The only conclusion that we may reasonably reach, then, is that nuclear weapons, by their nature, are indiscriminate in their effects - and very seriously so. The radioactive contaminations of islands far distant from the test sites resulted in the long-term, and perhaps permanent, loss of productive resources and family dwellings - the very foundations of economic, social, and cultural activity and human survival. There is no reason to believe that the use of nuclear weapons in military conflict, even in a limited manner could be calculated successfully to avoid such indiscriminate effects or consequences.

The Marshall Islands may also speak with authority to the issue of the adverse collateral

environmental effects of nuclear weapons. Aside from the immediate damage at and near ground zero, we have experience with the contamination of animals and plants, and the poisoning of soil and water. There are islands, some still abandoned, some recently resettled, where as I have noted the presence of cesium in plants from the radioactive fallout renders them inedible. It is inconceivable that this kind of experience would not be repeated by the use nuclear weapons in military conflict.

For the Marshall Islands, there is no question of the competence of the World Health Organization and the United Nations General Assembly to ask the questions put before this Court. We see no good reason why the Court should decline to answer these questions. Our experience shows that these are not "abstract" issues, as some have rather insensitively suggested. Indeed, our experience compels us to conclude that the Court should answer these questions, as there are no issues of greater importance than these to the rule of international law, and to the future of civilization. As a Member of the United Nations, and as a former United Nations Trust Territory, the Marshall Islands respectfully calls upon this Court, the principal judicial organ of the United Nations, to advise that there are no uses of nuclear weapons that are compatible with international law.

Mr. President, Members of the Court, with your permission, I would now like to invite Ms Lijon Eknilang to describe for you her experience, and that of her family, friends, and community, with the effects of nuclear weapons.

The PRESIDENT: I thank the Honourable Theodore Kronmiller for his statement and now I give the floor to Mrs. Lijon Eknilang, the Honourable Council Member of the Rongelap Atoll Local Government.

Mrs. Lijon EKNILANG: Mr. President, Members of the Court, I would like to begin by thanking you for allowing me to present a statement on the effects which the explosion of nuclear weapons have had on my life and on the lives of my family, friends, and other fellow citizens of the Marshall Islands. These experiences are relevant to the questions put to this Court, because unnecessary injuries, indiscriminate impacts, and adverse collateral environmental effects of the

radioactive fall-out resulting from atmospheric tests which have so gravely affected the Marshall Islands would be repeated for other people and their lands in the event of any military use of nuclear weapons.

I hope that the Court will understand that I cannot be unemotional about the facts of my experience with nuclear weapons. The important point is that they are the facts, and they are not "abstract".

My name is Lijon Eknilang. I was born on Rongelap Atoll in the Marshall Islands, and I lived there at the time of the nuclear weapons testing programme conducted by the Administrating Authority for the United Nations during the period of the Pacific Island Territories Trusteeship. Rongelap is approximately 150 kilometres southeast of Bikini Atoll, and about 470 kilometres downwind from Enewetak Atoll, which were the sites of the nuclear detonations during the testing programme.

On the morning of 1 March 1954, the day of the "Bravo" shot, there was a huge, brilliant light that consumed the sky. We all ran outside our homes to see it. The elders said another world war had begun. I remember crying. I did not realize at the time that it was the people of Rongelap who had begun a lifelong battle for their health and a safe environment.

Not long after the light from Bravo, it began to snow in Rongelap. We had heard about snow from the missionaries and other westerners who had come to our islands, but this was the first time we saw white particles fall from the sky and cover our village.

Of course, in 1954, Marshallese children and their parents did not know that the snow was radioactive fall-out from the Bravo shot. The fall-out that our bodies were exposed to caused the blisters and other sores we experienced over the weeks that followed. Many of us lost our hair, too. The fall-out was in the air we breathed, in the fresh water we drank, and in the food we ate during the days after Bravo. This caused internal exposure and sickness.

We remained on Rongelap for two and one-half days after the fall-out came. The serious internal and external exposure we received caused long-term health problems that affected my parents' generation, my generation, and the generation of my children.

Then we were told that we had to leave Rongelap. Some of us left by airplane, but most of us on a large ship. We did not take our belongings or our animals. We did not know, when we left on 3 March 1954 that we would be leaving our homes for almost three years.

In June 1957, when we did return, we saw changes on our island. Some of our food crops, such as arrowroot, completely disappeared. Makmok, or tapioca plants, stopped bearing fruit. What we did eat gave us blisters on our lips and in our mouths and we suffered terrible stomach problems and nausea. Some of the fish we caught caused the same problems. These were things that had not happened before 1954. Our staple foods had never made us ill.

We brought these problems to the attention of the doctors and officials who visited us. They said we were preparing the foods incorrectly, or that we had fish poisoning. We knew that was impossible because we had been preparing and surviving from these foods for centuries without suffering from the problems that appeared after 1954.

Although our blisters, burns and hair loss eventually cleared up, we later experienced other, even more serious problems. It has always been interesting to me that even the people who were not on Rongelap in 1954, but who went there with us in 1957, began to experience the same illnesses we did in later years. Foreign doctors and other officials called those people the "control group", and we were told the sickness of that group proved our illnesses were common to all Marshallese. We did not believe that, and we learned only recently that the "control group" had come from areas that had also been contaminated by radioactivity from the weapons tests.

Our illnesses got worse, and many of us died. We had to believe that our island was radioactive, and we evacuated ourselves from Rongelap in 1985. The Rongelapese have been living in exile ever since.

My own health has suffered very much, as a result of radiation poisoning. I cannot have children. I have had miscarriages on seven occasions. On one of those occasions, I miscarried after four months. The child I miscarried was severely deformed; it had only one eye. I have also had thyroid surgery to remove nodules. I am taking thyroid medication which I need every day for the rest of my life. Doctors recently found more nodules in my thyroid, which have to be removed in the

near future. I have lumps in my breasts, as well as kidney and stomach problems, for which I am receiving treatment. My eyesight is blurred, and everything looks foggy to me.

Others in my community suffered, as well. Many children and seemingly healthy adults died unexpectedly in the years following Bravo - the reasons for which none of us fully understood at the time. There were strange and strong fevers which killed people and left them mentally retarded.

We began to learn about leukaemia for the first time when the body of Lekoj Anjain, a 15-year old boy who had been strong and healthy, was return to Rongelap in a coffin. We did not understand his illness or the illnesses for which we were sent to the United States to be treated. Many of us were sent from our islands for the first time in our lives to hospital in the United States and Guam. We had surgeries and treatments which we knew little about because we did not speak English and, in most cases, there were no translators. Some of us had brain tumours and other cancers removed. In more recent years, we have come to learn that some of us had our entire thyroids removed.

Lekoj Anjain's father John began to keep a list of all the Rongelapese who died and all of those who went to the United States to have their thyroids removed, because there were so many people involved. We were afraid we would not remember all of them.

Women have experienced many reproductive cancers and abnormal births. Marshallese women suffer silently and differently from the men who were exposed to radiation. Our culture and religion teaches us that reproductive abnormalities are a sign that women have been unfaithful to their husbands. For this reason, many of my friends keep quiet about the strange births they had. In privacy, they give birth, not to children as we like to think of them, but to things we could only describe as "octopuses", "apples", "turtles", and other things in our experience. We do not have Marshallese words for these kinds of babies because they were never born before the radiation came.

Women on Rongelap, Likiep, Ailuk and other atolls in the Marshall Islands have given birth to these "monster babies". Many of these women are from atolls which foreign officials have told us were not affected by radiation. We know otherwise, because the health problems are similar to ours. One woman on Likiep gave birth to a child with two heads. Her cat also gave birth to a kitten with two heads. There is a young girl on Ailuk today with no knees, three toes on each foot and a missing

arm. Her mother had not been born by 1954, but she was raised on a contaminated atoll.

The most common birth defects on Rongelap and nearby islands have been "jellyfish" babies. These babies are born with no bones in their bodies and with transparent skin. We can see their brains and hearts beating. The babies usually live for a day or two before they stop breathing. Many women die from abnormal pregnancies and those who survive give birth to what looks like purple grapes which we quickly hide away and bury.

My purpose for travelling such a great distance to appear before the Court today, is to plead with you to do what you can not to allow the suffering that we Marshallese have experienced to be repeated in any other community in the world. While no government or other organization can fully restore the health of the Marshallese people or our environment, steps can be taken which will make it less likely that the same kinds of horrors will be experienced again. I know first-hand what the devastating effects of nuclear weapons are over time and over long distances, and what those effects mean to innocent human beings over several generations.

The story of the Marshallese people since the nuclear weapons tests has been sad and painful. Allow our experience, now, to save others such sadness and pain. I ask the Court to consider the experience of the Marshallese and to give the people of our world what security you can for their health and for the safety of the environment upon which their survival depends.

Mr. President, Members of the Court, I would like to thank you for your patient consideration. This concludes the statement of the Marshall Islands. Kommol tata and thank you.

The PRESIDENT: Thank you very much Mrs. Eknilang. As you said that that concludes the oral argument of the Marshall Islands, I will now call upon the distinguished representative of the delegation of Solomon Islands, His Excellency the Honourable Mr. Victor Ngele to make his oral statement.

The Honourable Victor NGELE:

1. Mr. President, Members of the Court, I have the honour and pleasure to represent Solomon Islands today, as first appearance for Solomon Islands and for me. The issues before the Court are

of upmost importance to Solomon Islands. For this reason, great effort has been put into the written and oral presentations, and it was deemed appropriate for a Minister of the Crown to deliver the opening address.

2. Solomon Islands as a member of the United Nations has a long standing commitment to peace, the promotion of the health and safety of people and the preservation of the environment. To this end Solomon Islands is a party to many of the treaties which are relevant to the issues before you. They are listed in our written submissions.

3. I would like to begin by associating ourselves fully with Ambassador Slade's introductory statement yesterday, and with the detailed legal arguments put forward on competence, propriety and applicable law. For our part, we will address the issues of legal substance: the application of the rule of law, humanitarian norms, human rights law, and environmental norms.

4. These advisory opinion requests are about use and threatened use. They are not about testing or possession. It is appropriate, however, to recall that with other Pacific Island States Solomon Islands recently sought to intervene in the case between France and New Zealand concerning the resumption of French nuclear testing in the Pacific. Solomon Islands asserted in its Request and Declaration of Intervention, and has continued to assert in other fora, that the French testing is unlawful both under general international law and under treaty law. France has since argued that the treaty in question - the Noumea Convention - is a merely "technical" instrument, as if a treaty obligation could be swept aside by an adjective. I mention this to reaffirm our declared and well-known position on nuclear testing, which is distinguishable from, but related to, our position on the legality of the use or threat of use of nuclear weapons.

5. Solomon Islands supported the requests of the World Health Assembly and the General Assembly because of its concern with human health and the environment. In support of both these requests Solomon Islands has submitted detailed written observations and comments. Now we come to you to reinforce these requests and urge the Court to deliver the two advisory opinions requested. We refer specifically to the submissions in our written observations. By way of introduction, I would like to make five points.

6. First, it has been suggested by some States that acceptance by the Court of the requests for these advisory opinions would adversely affect negotiations on nuclear arms control. As we mentioned in our written pleadings, and as is now evident from the extension of the NPT *after* these advisory opinion requests were submitted, this fear is without foundation. Solomon Islands welcomes indefinite extension of the NPT, hopes for its wider acceptance, and looks forward to the adoption next year of a Comprehensive Nuclear Test Ban Treaty, which will end nuclear tests forever and contribute to the implementation of Article VI of the NPT. We believe that your advisory opinions will similarly assist in the implementation of Article VI.

7. Second, we would remind those States that might consider otherwise that Solomon Islands is a Sovereign State. My government takes its *own decisions* after carefully considering all the factors and circumstances bearing on an issue. In so doing, public opinion and the advice of our legal and scientific counsel play an important but not exclusive role. We look on the NGO community among others as a useful channel and aid to this end. Solomon Islands is *not a Non Government organization or a politically motivated Pressure Group.* We have noted with deep regret the implied and unworthy suggestion in these submissions that those governments which proposed and supported the advisory opinion requests were "NGO driven".

8. Mr. President, Members of the Court, my third point concerns Solomon Islands interest in the question. Solomon Islands is a non-nuclear State which does not propose to engage in nuclear warfare or other nuclear activities. Nor does Solomon Islands anticipate being a primary target of such activity - although there is always the risk of becoming the venue of other people's battles, as we know only too well from our past experience. We nevertheless have a great interest in the present requests for advisory opinions from the Court, perceiving, as an "innocent but very concerned bystander", the serious danger to the safety and health of our people, our economy and the environment from any possible use of nuclear weapons. We are committed to your *confirming* the prohibition of the use and threat of use of nuclear weapons throughout the world because we know that the consequence of high level radioactivity cannot be limited geographically or contained. The damaging effect is horrendous, irreversible, widespread and very long lasting - it will affect

generations to come. This is the actual experience in the Marshall Islands.

9. Those who seek to defend the legality of the use of nuclear weapons in certain circumstances fail to recognize the total consequences to which such action may lead. Apart from the humanitarian, health and environmental considerations, experience has shown that the resources needed to clean up and repair the damage created by these weapons are enormous and have consistently been underestimated. Solomon Islands depends heavily on subsistence agriculture, forestry and fishing. The formal cash economy also depends largely on these activities as well as on a growing tourist industry, all of which depend very much on the unpolluted nature of our environment. The impact of any increase in radioactivity in or around our territory resulting from a nuclear conflict would have grave consequences.

10. In Solomon Islands 85% of the population lives in small coastal villages, and rely on a healthy and flourishing environment for their very survival. They use seawater to flavour their food. They drink water from rivers and wells. If our rain is poisoned by radioactive fall-out we cannot drink the water and our crops will make us sick. If our sea is poisoned, gone is our most bountiful source of food and the salt we use to flavour it. Therefore, we are acutely aware of the need to protect and preserve our fragile environment both now and for future generations.

11. Mr. President, Members of the Court, my fourth point touches upon our experience of armed conflict. In Solomon Islands we live in peace but we have known the cruelty and havoc of modern war. The battles of the Second World War on our soil and in our sea inflicted damage on our environment and on our people. The name of Guadalcanal is known to many, but it was only one of many Second World War battle sites in Solomon Islands. These conflicts have left large quantities of conventional, but dangerous, armament materials which have an injurious effect on human health and safety, and an adverse effect on economic development to this day.

12. The horrifying evidence of the use of atomic bombs on Hiroshima and Nagasaki, the experience and the aftermath of the atomic tests of the 1950s and the 1960s in our region, have alerted us to the much graver risks to which mankind is exposed by the use of nuclear weapons. The possible use of nuclear weapons constitutes a serious hazard to human health, the environment and

sustainable economic development. Any threat of the use of nuclear weapons has a negative influence on health and development, as Ambassador Slade explained yesterday in relation to the WHO Application, which we support.

13. My fifth point concerns the effects of nuclear weapons. By reason of these effects, their use, anywhere and under any circumstances, would be a crime against humanity and cannot be justified by any of the arguments which have been advanced by some States. Their adverse effect is indiscriminate, uncontrollable, unconfinable and virtually permanent - reaching into the distant future of the human race - if it will have a future, which a nuclear conflict would put in doubt. Their impact is disproportionate to any conceivable needs of war, and this precludes any justification for their use.

14. Mr. President, Members of the Court, in this regard we have as a member of our delegation Professor Joseph Rotblat, Emeritus Professor of Physics at the University of London. Regrettably he is unable to travel due to illness, and cannot therefore be with us today. He has prepared a statement, and with your permission, Mr. President, I would like to be able to append it to this introduction. Time does not permit me to read the whole statement, but I would like to draw your attention to certain points. You will recall that Professor Rotblat served as Rapporteur for the 1983 WHO investigation into the *Effects of Nuclear War on Health and Health Services*, and the follow-up report. He was a member of the British team on the Manhattan Project in Los Alamos. you will, I am sure, be aware that earlier this year he was awarded the Nobel Peace Prize. If I may, I would like to quote one passage from his statement to the Court:

> "I have read the written pleadings prepared by the United Kingdom and United States. Their view of the legality of the use of nuclear weapons is premised on three assumptions:
>
> *(a)* that they would not necessarily cause unnecessary suffering;
>
> *(b)* that they would not necessarily have indiscriminate effects on civilians;
>
> *(c)* that they would not necessarily have effects on territories of third States.
>
> It is my professional opinion - set out above and in the WHO reports referred to - that on any reasonable set of assumptions their argument is unsustainable on all three points."

15. Mr. President, Members of the Court, for the reasons set out in our written pleadings, and for the reasons identified by Professor Rotblat, Solomon Islands strongly urges the International Court of Justice to render advisory opinions to the effect that:

- in view of the health and environmental effects, the use of nuclear weapons by a State in war or other armed conflict would be a breach of its obligations under international law including the WHO Constitution;

and

- the threat or use of nuclear weapons in any circumstances is not permitted by international law.

By doing so a great step will have been taken to make our world safer, happier and healthier for mankind.

16. Mr. President, with your permission I call on Professor Salmon to introduce our detailed legal arguments. I thank you for your attention.

Le PRESIDENT : Je remercie S. Exc. M. Victor Ngele, ministre de la police et de la sécurité nationale des Iles Salomon. La Cour se prononcera sur sa demande d'annexer à son exposé oral que nous venons d'entendre il y a un instant, la déclaration écrite du prix Nobel Rotblat. Je donne pour l'instant la parole à M. Jean Salmon, professeur à l'Université libre de Bruxelles.

M. SALMON : Monsieur le Président, Madame, Messieurs de la Cour, Je dois à la bienveillance des Iles Salomon le privilège de m'adresser à nouveau à la Cour. J'en mesure d'autant plus le prix que les deux demandes d'avis consultatifs dont la Cour est saisie sont de celles dont on peut prédire qu'elles feront date dans l'histoire de la Cour sinon dans l'histoire tout court. Il est probable que ces demandes portent sur la question juridique la plus importante qui lui ait jamais été soumise, et qu'il s'agit de déterminer si la menace ou l'emploi de l'arme nucléaire peuvent dans certaines circonstances être licites en droit international.

Les tenants de la licéité de l'emploi de l'arme nucléaire font valoir en commun qu'aucune règle conventionnelle interdisant l'usage des armes nucléaires *comme telles* n'a été souscrite par les puissances nucléaires et que ces dernières se sont toujours opposées à la naissance à leur égard d'une telle règle coutumière, y compris à l'occasion du vote de résolutions de l'Assemblée générale.

Comme ont le verra plus loin, ces Etats tirent de ces faits des conséquences contestables.

Sur le plan de la logique juridique, les tenants de la licéité hésitent entre deux discours : celui de la souveraineté souveraine et celui du non-droit.

Premier discours : la liberté souveraine

Le premier discours, celui de la liberté souveraine, est tenu par un certain nombre de ces Etats. Il a été exposé que le droit international conventionnel ou coutumier ne comportait pas de règle prohibitive interdisant l'emploi - et a fortiori la menace - de l'arme nucléaire *comme telle*. Partant, aux yeux de ces puissances, selon le principe que tout ce qui n'est pas interdit serait permis, l'emploi de l'arme nucléaire ne serait pas *comme tel* prohibé par le droit international (exposé écrit du Royaume-Uni, par. 3.3.; exposé écrit de la Russie; exposé oral de la France; CR 59/23 p. 79).

On ne s'attardera pas longtemps à une vision réductrice du droit international que suppose un tel raisonnement. La Cour sait que le droit international est un ensemble complexe de normes constitué non seulement de normes prohibitives, mais aussi de normes permissives, de normes conférant des compétences ou des pouvoirs. Le droit international connaît aussi des situations de neutralité juridique dans lesquelles une conduite n'est ni permise ni interdite, qu'on qualifie parfois de lacune ou de non-droit. Un tel ensemble complexe exclut le prétendu principe que tout ce qui n'est pas interdit est permis.

Aussi, pour affermir leur position, les tenants de cette vision ajoutent, sans grand souci de logique, que la pratique des Etats corroborerait l'acceptation de la licéité de l'arme, ce qui, on le notera au passage, est une reconnaissance de l'existence, dans l'ordre juridique, de normes permissives.

On a ainsi avancé que les protocoles aux conventions de Genève, en ne se prononçant pas sur l'interdiction de l'usage de l'arme nucléaire, en auraient, par là même, implicitement reconnu la licéité. Ce point de vue est erroné en fait. Ainsi que l'a déjà bien montré M. Abi Saab, les Etats présents à la conférence de Genève de 1977 ont été d'accord de *ne pas traiter la question*. Il s'est agi d'un silence politique qui permettait d'atteindre un accord partiel. Mais cette mise entre parenthèses de la contradiction n'a nullement impliqué une acceptation de la licéité de l'emploi de cette arme au

titre des règles élaborées dans les protocoles.

On a aussi fait valoir que divers traités internationaux relatifs aux armes nucléaires créeraient une présomption par leur simple existence que le droit international ne prohibe pas l'emploi des armes nucléaires en tant que telles (voir par ex. Russie, p. 7).

La conclusion de tels traités emporterait la reconnaissance d'un droit à l'emploi des armes nucléaires. Cette conclusion est aux yeux du Gouvernement des Iles Salomon erronée. Il s'agit d'une confusion entre *possession* et *emploi*. Ces divers traités, s'ils impliquent quelque chose, c'est la reconnaissance de la licéité de la détention, de la possession, voire même le droit de procéder à des essais nucléaires sous certaines conditions. Mais aucun de ces traités n'a admis que l'usage de l'arme nucléaire était autorisé, ni expressément ni implicitement. Cette détention apparaît, au contraire, comme une étape vers un désarmement nucléaire général dont le but final est inscrit dans de nombreux engagements conventionnels souscrits par les puissances nucléaires elles-mêmes.

A aucun moment les Etats membres de la communauté internationale n'ont entendu accepter de transformer l'*inégalité de fait* qui existe entre les puissances nucléaires et les autres Etats en une *inégalité de droit* permettant à ceux qui peuvent posséder les armes nucléaires de les utiliser. Il y a des loups, il y a des agneaux, les agneaux l'admettent, de mauvaise grâce, il est vrai, d'autant qu'il arrive aux loups de manger les agneaux; mais jamais les agneaux n'ont reconnu aux loups le *droit* de les manger.

La même confusion entre possession et usage apparaît dans l'argumentation d'un Etat nucléaire qui invoque la jurisprudence de la Cour dans l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci* où la Cour a déclaré :

> «il n'existe pas en droit international de règles, autres que celles que l'Etat intéressé peut accepter, par traité ou autrement, imposant la limitation du niveau d'armement d'un Etat souverain» (exposé oral de la France, CR 95/23, p. 79).

Il n'aura pas échappé à la Cour qu'on veut lui faire dire ce qu'elle n'a pas dit. Dans cet extrait - dont les Iles Salomon ne contestent pas le bien-fondé - il s'agissait de possession d'armements et non de leur emploi.

Faut-il rappeler à nouveau que la question de la possession n'est pas posée à la Cour ? Et

l'invocation de cette situation ne peut que semer la confusion. Seul l'emploi ou la menace de l'emploi de l'arme nucléaire font l'objet des questions de l'Assemblée générale de l'OMS et de l'Assemblée générale de l'ONU.

Second discours : celui du non-droit

Le second discours tenu devant la Cour est celui du non-droit. Une puissance nucléaire l'a soutenu dans ses premières observations écrites.

Le Gouvernement des Iles Salomon estime que cette thèse est, elle aussi, inexacte. Ce n'est pas parce que la contradiction à laquelle j'ai fait allusion tout à l'heure a été mise entre parenthèses, parce que les politiques se sont refusés d'aborder la question en face, que l'ordre juridique international, conçu comme un système global, ne comporte pas d'autres normes qui règlent la question. Contrairement à cette vision de non-droit, il n'y a pas ici de situation de neutralité du juridique ou de lacune du droit.

Le Gouvernement des Iles Salomon, dans ses exposés écrits, a longuement montré que le droit international comporte des normes coutumières et des principes généraux de droit international susceptibles de gouverner l'hypothèse de l'emploi des armes nucléaires.

Il s'agit de normes relatives à l'emploi des armes en fonction de *leurs effets* ou *modes d'action*, de règles de droit humanitaire, de principes relatifs à l'inviolabilité du territoire des Etats neutres, des principes fondamentaux des droits de l'homme et du droit de l'environnement. Ces règles et principes n'arrêtent pas leurs effets, comme par enchantement, lorsque l'on traite des armes nucléaires; elles sont valables en toutes circonstances. MM. David et Sands auront l'occasion, dans un instant, de développer ces points devant la Cour.

A la vérité, la question centrale est ici de savoir si l'ordre juridique international est un système cohérent ou un «bric à brac» pour reprendre une distinction présentée par un talentueux collègue parisien. Pour les Iles Salomon l'ordre juridique international ne peut être conçu que comme un système cohérent, gouverné par le principe de non-contradiction et il entre dans la fonction judiciaire de la Cour de le rappeler.

Il serait contradictoire d'admettre la coexistence dans le même système qui lie les puissances

nucléaires : d'une part des normes précitées, et d'autre part d'une norme permettant l'usage des armes nucléaires qui porteraient atteinte aux premières.

La prohibition de l'arme de destruction massive

Il est au surplus incontestable que le droit international contemporain prohibe l'usage d'armes de destruction massive.

La Cour me pardonnera de lui imposer la lecture de certains extraits de la résolution de l'Institut du droit international à sa session d'Edimbourg en 1969 qui portait, je vous le rappelle, sur la distinction entre objectifs militaires et non militaires en général et notamment les problèmes que pose l'existence d'armes de destruction massive. L'Institut s'est prononcé comme suit :

> «*Rappelant* les principes généraux du droit international, les règles coutumières et les conventions et accords qui limitent clairement la mesure dans laquelle les parties engagées dans un conflit peuvent nuire à l'ennemi; ...
>
> *Rappelant* les conséquences que la conduite indiscriminée des hostilités, et particulièrement l'emploi des armes nucléaires chimiques et bactériologiques, peut entraîner pour les populations civiles et pour l'humanité tout entière;
>
> *Constate* que les règles suivantes font partie des principes à observer lors des conflits armés par tout gouvernement, *de jure* ou *de facto*», etc.

La résolution, après avoir rappelé le caractère irréductible de certaines obligations classiques du *jus in bello* - je passe cette partie - proclame que :

- sont interdites les armes destinées à semer la terreur dans la population civile;
- est interdit l'emploi de toutes les armes qui, par leur nature, frappent sans distinction objectifs militaires et objets non militaires, forces armées et populations civiles. Est interdit notamment l'emploi des armes dont l'effet destructeur est trop grand pour pouvoir être limité à des objectifs militaires déterminés ou dont l'effet est incontrôlable, ainsi que les armes aveugles;
- sont interdites toutes les attaques menées à quelque titre que ce soit et par n'importe quel moyen et destinées à l'anéantissement d'un groupe humain, d'une région ou d'un centre urbain.

Monsieur le Président, Madame et Messieurs de la Cour, il est remarquable, et ceux qui parmi vous connaissent l'Institut seront d'accord avec moi, que cette résolution fut adoptée par 60 voix pour, une voix contre (celle de M. Phillip Jessup, mais le compte rendu ne permet pas de déceler

pourquoi il a voté contre, il ne s'est jamais exprimé dans un sens ou dans un autre) et deux abstentions (André Gros et Florentino Feliciano).

Parmi ceux qui ont voté, je voudrais souligner le nom de quelques grands juristes dont la plupart sont hélas aujourd'hui disparus : Charles De Visscher, lord McNair, Roberto Ago, Suzanne Bastid, Frede Castberg, Erik Castrén, sir Gerald Fitzmaurice, Paul Guggenheim, Wilfrid Jenks, Robert Jennings, Gaetano Morelli, Charles Rousseau, Max Sørensen, Gregory Tunkin, Paul De Visscher, sir Humphrey Waldock, Wilhelm Wengler, Vladimir Koretsky, sir Lewis Mbanefo, José María Ruda, Oscar Schachter, Kotaro Tanaka, sir Francis Vallat, et j'ai écourté la moitié de la liste.

Monsieur le Président, Madame et Messieurs de la Cour, j'ai la faiblesse de croire que de telles personnalités n'improvisent pas lorsqu'elles *constatent* les principes de droit international en vigueur susceptibles de s'appliquer aux armes de destruction massive.

Faut-il faire une distinction avec d'autres armes ?

La question fut soulevée à la même réunion de l'Institut s'il fallait distinguer les armes nucléaires stratégiques et les armes nucléaires tactiques. Le rapporteur, le baron Freiherr von der Heydte, dont on sait qu'il était un général très connu, répondit que «certaines armes nucléaires dites tactiques ont des effets destructeurs excessifs qui en rendent l'emploi illicite» (*ibid.*, p. 99-100) et un peu plus loin, il précisait que l'on ne possédait encore d'armes nucléaires «propres» *(ibid.)*.

Certes, si on concevait des armes nucléaires qui n'auraient pas plus d'effet qu'un fusil de chasse ou d'une carabine à plomb, pourvu que l'objectif soit licite, cette arme ne serait pas contraire au droit international. Le Gouvernement des Iles Salomon n'a tout fois pas le sentiment que ce soit dans cette direction que se poursuivent les recherches dans le domaine des armes nucléaires. Il lui semble peu probable que les essais coûteux que l'on effectue tendent à des perfectionnements qui permettraient d'assimiler l'arme nucléaire aux armes classiques.

Aux yeux du Gouvernement des Iles Salomon il n'est donc pas possible d'envisager que l'emploi d'armes nucléaires ne viole pas la plupart des règles précitées. Comme la Cour le voit, la

question est donc moins de savoir si l'arme nucléaire est condamnée *en tant que telle* que de déterminer si on peut concevoir *des conséquences de son emploi* qui n'entraînent pas une violation du droit international et des règles précitées.

A cet égard, la Cour aura certainement été frappée par le fait que la plupart des Etats qui prônent la licéité de l'emploi des armes nucléaires ont été forcés de convenir dans leur réponse ou dans leurs exposés écrits que les principes du droit humanitaire posent des limites à l'emploi de l'arme nucléaire (exposé écrit AG Russie, p. 10 et 18; exposé écrit AG Pays-Bas, p. 12 et 13 n° 32; exposé écrit AG Royaume-Uni, p. 40-48; exposé écrit AG Etats-Unis, p. 21-32).

C'est bien parce qu'il y a donc des règles de droit international qui gouvernent la matière que le Gouvernement des Iles Salomon récuse certains arguments qui ont été avancés pour convaincre la Cour de ne pas répondre aux avis consultatifs qui lui sont demandés. La prétention que la question serait politique, ou que la Cour agirait comme législateur repose sur le postulat qu'il existe un vide juridique à combler. La Cour, qui est habituée aux Etats qui se penchent avec une touchante sollicitude sur le respect par elle de sa fonction judiciaire chaque fois qu'ils souhaitent qu'elle se taise, saura faire bonne justice à ces arguments.

Equivalence entre licéité du recours à la force et licéité des moyens utilisés en cette occasion

Pour éviter l'application des règles de droit précitées, une dernière porte de sortie est cherchée dans le principe de *la licéité du recours à la force présenté comme équivalent à la licéité de l'emploi de l'arme nucléaire*.

La règle de légitime défense, plusieurs fois invoquée avec son corollaire de proportionnalité - au même titre que le pouvoir du Conseil de sécurité de recourir à la force dans certaines circonstances (par ex. Russie, exposé écrit AG, p. 8; Pays-Bas, exposé écrit AG nos 3 et 29; Royaume-Uni; France, exposé oral, CR 95/23, p. 78 et suiv.), sont cependant sans pertinence.

Ces deux hypothèses sont des exceptions au *jus ad bellum*; elles permettent le recours à la force dans lesdites situations; mais ces causes d'exonération du *jus ad bellum* sont sans portée sur le *jus in bello*.

La légitime défense, que je sache, n'a jamais autorisé l'Etat qui se trouve dans cette situation à

utiliser des armes chimiques ou biologiques ou à annihiler la population civile de l'agresseur pour défendre son territoire. Pourquoi permettrait-elle l'usage d'armes nucléaires ayant des effets encore plus dévastateurs ?

Certaines puissances nucléaires ont prétendu que la résolution récente du Conseil de sécurité 984 (1995) permettrait l'usage de l'arme nucléaire en cas de légitime défense (Royaume-Uni, exposé écrit AG, par. 3.42; France, exposé oral, CR 95/23). J'ai relu ce texte; il ne dit rien de tel. Au contraire, il se garde bien de définir quelles mesures de protection le Conseil apporterait aux victimes d'une agression nucléaire. Cela montre simplement les sentiments tendres - mais assez indéfinis - de l'assemblée des loups à l'égard des agneaux.

En tout état de cause, il convient d'écarter cette confusion entre *jus ad bellum* et *jus in bello*. On se souviendra que l'Institut, lui encore, s'est prononcé sans équivoque sur le fait que la licéité d'un recours à la force ne justifie jamais une violation du droit humanitaire. Il le fit dans un paragraphe de sa résolution de Bruxelles de 1963 qui portait sur l'égalité d'application des règles du droit de la guerre aux parties à un conflit armé, c'est-à-dire agresseur agressé. Le paragraphe qui fut adopté fut le seul qui resta d'un rapport de M. François, tous les autres ayant été écartés, mais sur ce point-là il y eu consensus. Que disait ce paragraphe :

> «Estimant que les obligations ayant pour but de restreindre les horreurs de la guerre et imposées aux belligérants pour des motifs humanitaires par les conventions en vigueur, par les principes généraux du droit et par les règles du droit coutumier [toutes les sources y sont], sont toujours en vigueur pour les parties dans toutes catégories de conflits armés et s'étendent également aux actions entreprises par les Nations Unies.» (*Annuaire de l'Institut de droit international*, session de Bruxelles, 1963, vol. II, p. 368.)

Qui ne voit, au surplus, la position scandaleusement contraire à l'égalité souveraine des Etats que celle qui admettrait que le droit de légitime défense des puissances nucléaires inclurait un droit d'employer l'arme nucléaire, alors que les autres Etats seraient privés de ce moyen par les obligations de non-prolifération que les mêmes puissances les invitent à adopter ?

Le problème de la menace de l'emploi de l'arme nucléaire

Reste le problème de la menace de l'emploi de l'arme nucléaire. Pour les Iles Salomon cette menace est illicite dans les mêmes hypothèses et dans les mêmes conditions que son emploi. Il y a

certes un problème relatif à la dissuasion, il sera traité tout à l'heure par M. James Crawford.

Monsieur le Président, Madame, Messieurs de la Cour, si les bombes atomiques, au lieu de raser Hiroshima et Nagasaki, étaient alors tombées sur Lille, San Francisco, Liverpool, Léningrad, c'était son nom à l'époque, ou Shangai, les Etats où sont situés ces villes seraient sans doute moins frileux pour reconnaître l'application du droit international aux questions qui nous occupent. Ces Etats, pour diverses raisons - ne pas admettre rétrospectivement l'illégalité des bombardements dont on a célébré le triste cinquantenaire, se prémunir contre l'agression, conserver un douteux privilège stratégique ou pour d'autres motifs encore - ont préféré se réfugier dans des échappatoires. La question est aujourd'hui posée au principal organe judiciaire des Nations Unies qui a pour tâche de dire le droit. Le Gouvernement des Iles Salomon ose espérer que la Cour ne décevra pas les peuples qui attendent d'elle qu'elle désigne clairement quelles sont les règles de droit qui s'imposent en l'espèce.

Je remercie la Cour de sa bienveillante attention. L'orateur suivant auquel il conviendrait de donner la parole, avec votre permission, Monsieur le Président, est le professeur Eric David, mais cela se fera au moment qui vous conviendra.

Le PRESIDENT : Je vous remercie, Monsieur le Professeur Salmon, pour votre exposé oral. Les audiences publiques de la Cour sont suspendues pour une pause de dix minutes.

L'audience est suspendue de 11 h 20 à 11 h 40.

Le PRESIDENT : Veuillez vous asseoir, je vous prie. La Cour reprend ses audiences publiques et j'appelle à la barre M. Eric David, professeur à l'Université libre de Bruxelles.

M. DAVID : Monsieur le Président, Madame et Messieurs de la Cour, c'est à la fois un privilège et un honneur de pouvoir m'adresser à la Cour au nom des Iles Salomon et de comparaître, non seulement pour la première fois, mais encore à l'occasion d'un débat aussi fondamental que celui qui vous est soumis : ce n'est pas tous les jours qu'on a l'occasion de plaider pour la survie de

l'humanité devant une Cour aussi prestigieuse.

C'est donc un sentiment de fierté que j'éprouve, mais aussi un sentiment de honte, «honte» comme l'écrit le philosophe allemand Günther Anders à propos de Hiroshima et de Nagasaki, «honte de ce que des hommes *ont pu* infliger à d'autres hommes», honte «de ce qu'*aujourd'hui encore* ils peuvent s'infliger»[18], et plus simplement, pour le juriste que je suis, honte de devoir prouver une évidence, sinon une trivialité, l'illicéité de l'utilisation d'armes nucléaires. Je me demande d'ailleurs, s'il est encore possible de plaider après le témoignage que nous avons entendu tout à l'heure.

Cette question, en effet, n'est pas très compliquée juridiquement quoi qu'on ait pu en dire. Mais si les Iles Salomon y ont pourtant consacré de longs exposés écrits, c'est parce qu'il y a excès plutôt que pénurie de règles condamnant l'emploi des armes nucléaires et que toutes ces règles méritent d'être recensées eu égard à la gravité du problème soumis. Quand on discute des moyens aptes à supprimer toute vie sur notre planète, ce n'est pas le moment de se montrer avare des moyens juridiques aptes à prévenir pareille catastrophe.

Que la Cour se rassure, le Gouvernement des Iles Salomon est conscient du fait que l'affaire est discutée depuis plus de deux semaines et que la Cour a déjà entendu beaucoup d'arguments proches des thèses des Iles Salomon : nous nous en tiendrons donc à l'essentiel, mais avant d'y arriver, je voudrais commencer par préciser les limites à la fois de cet exposé et du débat juridique.

1. Les limites de l'exposé

Personnellement je n'aborderai la question de la légalité de l'emploi des armes nucléaires qu'au regard du seul droit humanitaire et c'est mon collègue le professeur Philippe Sands, qui traitera de cette question sous l'angle des droits de l'homme et du droit de l'environnement.

2. Les limites du débat juridique

La Cour peut d'ores et déjà tenir pour acquis un certain nombre d'éléments d'accord entre les Etats :

1) Les Etats qui ont voté en faveur de la résolution 1653 (XVI) - la fameuse résolution - et les

[18]G. Anders, «Der Mann auf der Brücke : Hiroshima und Nagasaki (1958)», in *Hiroshima is überall*, Munich, Verlag, 1982, p. 74, reproduit in *Hiroshima 50 ans*, Paris, éd. Autrement, 1995, p. 72.

résolutions ultérieures de l'Assemblée générale des Nations Unies traitant du même objet, sont d'accord pour dire que l'emploi des armes nucléaires dans un conflit armé est illégal[19].

2) Les cinq membres permanents du Conseil de sécurité se sont engagés à ne jamais utiliser d'armes nucléaires contre des Puissances non nucléaires parties au traité sur la non-prolifération, sauf cas de légitime défense contre l'attaque menée par un de ces Etats mais en alliance avec une Puissance qui elle, serait dotée d'armes nucléaires, et on notera au passage que l'engagement de la Chine ne comporte pas cette réserve[20].

On constate donc d'un côté, que pour la grande majorité des Etats Membres des Nations Unies, l'emploi d'armes nucléaires viole le droit international humanitaire, et d'un autre côté, que pour les Etats «nucléaires» parties au traité sur la non-prolifération, le problème juridique de l'emploi de ces armes contre un Etat non «nucléaire», pourvu qu'il soit également partie au traité sur la non-prolifération, ne se pose plus sauf si le second, c'est-à-dire l'Etat non «nucléaire», attaquait le premier avec l'appui d'un Etat «nucléaire». Le débat juridique se circonscrit donc à des hypothèses qui ne concernent plus qu'un nombre limité d'Etats.

Ces hypothèses n'ont pourtant rien d'académique. Elles recouvrent d'une part des comportements qui peuvent mettre en jeu la survie de la planète, d'autre part l'application de règles - le droit international humanitaire, les droits de l'homme, le droit de l'environnement - qui sont de caractère impératif et universel. A ce titre, les questions posées intéressent toute la communauté internationale et justifient que la Cour y réponde.

Ceci nous amène à évoquer le droit applicable à l'emploi des armes nucléaires. Sans entrer dans le détail de cette question, qui a déjà été traitée par M. Clark pour Samoa hier, les Iles Salomon souhaitent toutefois attirer l'attention de la Cour sur un point très important : la plupart des Etats favorables à la légalité de l'emploi des armes nucléaires reconnaissent que cet emploi relève du droit international humanitaire et doit être conforme à ce droit[21].

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[19]Sur l'opposabilité d'une résolution de caractère normatif aux Etats qui l'ont approuvée, cf. *Activités militaires et paramilitaires au Nicaragua, arrêt, C.I.J. Recueil 1986*, p. 106, par. 203.

[20]Doc. ONU S/1995/261-265 et A/50/151-155, 6 avril 1995.

[21]Par exemple, Assemblée générale des Nations Unies, exposés écrits, 20 juin 1995, Russie, p. 18; Royaume-Uni,

Les Iles Salomon accueillent avec enthousiasme cette reconnaissance car, à leur avis, elle contredit la thèse soutenue par ces mêmes Etats selon laquelle l'emploi d'armes nucléaires serait compatible avec le droit humanitaire. Comment peut-on en effet réconcilier l'emploi de l'arme nucléaire avec l'esprit du droit humanitaire - sans même parler de la lettre, - c'est-à-dire avec l'esprit d'un droit fondé sur les principes fondamentaux du moindre mal et de l'assistance aux victimes ?

Les Iles Salomon ont longuement répondu à ces questions dans leurs pièces écrites et elles ne veulent pas fatiguer la Cour avec la répétition de tous leurs arguments. Nous nous bornerons donc à en présenter une synthèse qui portera

- dans une première partie, sur les principales règles interdisant tout emploi de l'arme nucléaire en raison de la qualité et de la quantité de ses effets;
- et dans une deuxième partie, sur la philosophie de l'argumentation relative à l'emploi des armes nucléaires.

Cette synthèse n'implique évidemment aucune renonciation aux arguments développés de manière plus approfondie dans les pièces écrites.

I. Les règles interdisant tout emploi de l'arme nucléaire en raison de la qualité et de la quantité de ses effets

S'il est exact qu'il n'existe pas de convention internationale interdisant expressément l'emploi de l'arme nucléaire, cela n'implique évidemment pas que l'emploi de l'arme nucléaire est licite pour autant. De fait, en reconnaissant que l'emploi d'armes nucléaires doit se conformer au droit humanitaire, la plupart des partisans de l'emploi de l'arme nucléaire admettent que certains de ces emplois pourraient être illicites. Cette reconnaissance par les puissances nucléaires de l'application du droit humanitaire à l'emploi des armes nucléaires est un grand progrès par rapport au passé. Il y a quelques semaines, l'ancien président français Valéry Giscard d'Estaing écrivait qu'à l'époque de son septennat, la politique de la dissuasion de la France comportait des plans impliquant la destruction des «grandes agglomérations urbaines soviétiques»[22]. De tels plans, qui existent aussi

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p. 22 et 46; Etats-Unis, p. 21.

[22] *Le Figaro,* 12 octobre 1995.

chez les autres Puissances nucléaires, sont évidemment contraires à la règle cardinale du droit de la guerre selon laquelle

> «le seul but légitime que les Etats doivent se proposer durant la guerre est l'affaiblissement des forces militaires de l'ennemi» (déclaration de Saint-Pétersbourg des 29 novembre-11 décembre 1868).

Cette règle a été reprise sous des formes diverses dans de nombreux instruments dont je vous épargnerai l'énumération[23], et l'on peut donc déduire des déclarations des puissances nucléaires affirmant que l'emploi de l'arme nucléaire doit être conforme au droit humanitaire qu'elles reconnaissent l'application de cette règle à l'emploi des armes nucléaires.

Le droit international humanitaire n'est cependant pas un droit à la carte où l'on peut choisir certaines règles et en écarter d'autres. A partir du moment où l'on accepte l'application du droit humanitaire, c'est *tout* le droit humanitaire qui s'applique et pas seulement une partie.

Or, le droit humanitaire comprend de nombreuses autres règles dont chacune suffit à prohiber l'emploi des armes nucléaires. Je citerai notamment :

- l'interdiction des armes qui rendent la mort inévitable;
- l'interdiction des armes qui causent des souffrances inutiles;
- l'interdiction des armes qui produisent des effets indiscriminés;
- l'interdiction des armes empoisonnées;
- l'interdiction des armes chimiques.

Les Iles Salomon ont montré dans leurs exposés écrits pourquoi chacune de ces interdictions, considérée individuellement, couvrait l'emploi des armes nucléaires. Dans leurs observations écrites sur la demande d'avis de l'OMS, les Iles Salomon ont longuement réfuté les arguments que les partisans de la légalité de l'emploi des armes nucléaires prétendaient pourtant opposer à l'application de ces règles. Les Iles Salomon regrettent de devoir observer que le débat s'est alors arrêté là, c'est-à-dire après les observations écrites des Iles Salomon sur la demande de l'OMS; le débat s'est

[23] Règlements de La Haye de 1899 et 1907, art. 25; 9e convention de La Haye de 1907, art. 1er; résolution de l'Assemblée de la SdN du 30 septembre 1928; résolutions 2444 (XXIII) et 2675 (XXV) de l'Assemblée générale des Nations Unies des 19 décembre 1968 et du 9 décembre 1970, 1er protocole de 1977 additionnel aux conventions de Genève de 1949, art. 48 et 51.

arrêté là, faute de «débattant» : les partisans de l'arme nucléaire n'ont en effet pas jugé utile de répliquer aux arguments des Iles Salomon alors qu'ils auraient pu le faire dans les observations relatives à la demande d'avis de l'Assemblée générale des Nations Unies ou dans leurs exposés oraux pour ceux qui ont déjà participé à la phase orale de nos débats.

Les Iles Salomon ne peuvent donc que répéter ce qu'elles ont écrit, mais vu le temps assigné aux plaidoiries, nous nous limiterons à ne rappeler que trois types de règles qui nous paraissent spécialement appropriées au cas des armes nucléaires, à savoir

- l'interdiction des armes qui produisent des effets indiscriminés;
- l'interdiction des armes empoisonnées;
- l'interdiction des armes chimiques.

Je commencerai par les armes indiscriminées. On sait que les armes nucléaires produisent des effets indiscriminés en raison principalement des retombées radioactives et de l'impulsion électromagnétique. Ce sont non les Iles Salomon qui le disent mais le titulaire du prix Nobel de cette année, le professeur Rotblat, dont le témoignage a été lu tout à l'heure, et qui l'affirmait déjà *in tempore non suspecto*, dans les rapports préparés pour l'OMS en 1983[24] et en 1987[25] et acceptés alors sans objection par les Etats Membres de l'Organisation.

Or, il faut souligner que si de tels effets sont inévitables dans le cas d'une guerre nucléaire, il ne le sont guère moins dans l'hypothèse de l'explosion d'une seule arme nucléaire, même de faible puissance, pour la bonne et simple raison que toute explosion nucléaire produit des retombées radioactives et une impulsion électromagnétique et que celles-ci ne font pas de distinction entre civils et combattants, entre Etats belligérants et Etats non belligérants.

Juridiquement, une telle arme tombe donc nécessairement sous le coup des règles protégeant la population civile et aussi sous le coup des règles du droit des relations amicales puisque le territoire des Etats tiers au conflit est affecté par les retombées radioactives et l'impulsion électromagnétique. Ces Etats sont donc fondés à s'en plaindre, et ce ne sont pas les Etats qui ont subi les conséquences

[24]Doc. OMS A 36/12, 24 mars 1983, p. 36-41.

[25]*Effets de la guerre nucléaire sur la santé et les services de santé*, 2e éd., Genève, 1987, p. 49-53.

de l'accident de Tchernobyl ou l'Etat victime des fumées de la fonderie de Trail il y a plus de soixante ans qui devraient contester cette évidence...

Deuxième cas, les armes empoisonnées. Toute arme nucléaire produit des effets massifs d'empoisonnement. Ici aussi, ce ne sont pas les Iles Salomon qui l'affirment, mais ce sont les Etats de l'OTAN qui l'ont admis directement ou indirectement à travers les accords de Paris du 23 octobre 1954 relatifs à l'accession de l'Allemagne au traité de l'Atlantique Nord. L'annexe II du protocole relatif au contrôle des armements définit en effet l'arme nucléaire comme toute arme

> «conçue pour contenir ou utiliser un combustible nucléaire ou des isotopes radioactifs et qui par explosion ou autre transformation nucléaire non contrôlée ... est capable de destruction massive, dommages généralisés ou *empoisonnements massifs*»[26] (les italiques sont de moi).

Or l'utilisation d'armes empoisonnées est formellement prohibée par l'article 23 *a)* des règlements de La Haye de 1899 et de 1907.

Troisième cas, les armes chimiques. L'arme nucléaire est assimilable à une arme chimique, c'est-à-dire une arme composée d'agents létaux, incapacitants ou irritants qui n'affectent que la matière vivante. Une fois de plus, ce ne sont pas les Iles Salomon qui le disent, mais c'est le Secrétaire général des Nations Unies qui l'affirme lorsqu'il déclare dans son rapport de 1990 consacré aux armes nucléaires que : «[l]es radiolésions représentent l'effet médical *le plus spécifique* d'une explosion nucléaire»[27] (les italiques sont de moi).

L'arme nucléaire tombe donc sous le coup du protocole de Genève de 1925 sans qu'on doive en solliciter le texte puisque celui-ci interdit : «l'emploi à la guerre de gaz asphyxiants, toxiques ou *similaires*» (les italiques sont de moi).

L'application de ces règles à l'emploi des armes nucléaires a toutefois été contestée par les partisans de ces armes. Ils ont notamment dit que l'interdiction d'employer des armes empoisonnées ou chimiques ne s'appliquaient qu'aux armes dont l'objet principal était, ou bien de provoquer un empoisonnement, ou bien de produire des effets propres aux armes chimiques; or tel ne serait pas le cas des armes nucléaires dont l'effet principal était le souffle et la chaleur. Les Iles Salomon ont

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[26]OTAN, *Documents fondamentaux*, Bruxelles, 1981, p. 61.

[27]Doc. ONU A/45/373, 18 sept. 1990, par. 327.

répondu à cet argument dans leurs observations écrites sur la demande d'avis de l'OMS[28], et elles voudraient souligner à nouveau que leur réponse est, jusqu'à présent, restée sans réplique du côté des partisans de l'arme nucléaire.

En substance, il avait été dit par les Iles Salomon que ce n'est pas parce qu'une activité comprend des aspects licites et des aspects illicites que les premiers peuvent justifier les seconds. Ce n'est pas parce que l'arme nucléaire produit du souffle et de la chaleur que cela justifie qu'elle produise aussi des radiations dont les effets non seulement sont typiques d'une réaction nucléaire - ce qui apparente précisément l'arme nucléaire à une arme chimique et à une arme empoisonnée -, mais dont les effets peuvent en outre se faire sentir bien au-delà du théâtre de la guerre et du temps de guerre lui-même. Ce ne sont pas les dizaines de milliers de victimes des bombardements d'Hiroshima et de Nagasaki décédées *après* la reddition du Japon et qui, encore aujourd'hui, meurent des suites de ces bombardements, ni les habitants de plusieurs atolls des Iles Marshall irradiés en 1954 par les effets de Bikini et dont nous avons entendu tout à l'heure l'émouvant témoignage, ce ne sont pas ces gens qui démentiront ce fait.

Monsieur le Président, Madame, Messieurs de la Cour, les partisans de l'arme nucléaire ont cherché à justifier l'emploi de cette arme en invoquant la légitime défense, les représailles ou la pratique conventionnelle destinée à limiter la détention, le déploiement, les essais ou le recours aux armes nucléaires.

Je ne reviendrai ni sur la légitime défense ni sur la pratique conventionnelle qui ont été examinées tout à l'heure par M. Salmon. Deux mots seulement sur les représailles.

Justifier le recours aux armes nucléaires par la doctrine des représailles n'est pas acceptable en droit international humanitaire. Ce droit, en effet, présente cette différence fondamentale avec les autres branches du droit international, de n'être pas fondé sur l'idée de réciprocité comme le montre l'article 60, paragraphe 5, de la convention de Vienne sur le droit des traités. L'interdiction des représailles de guerre résulte aussi, entre autres dispositions, de l'article premier commun aux quatre conventions de Genève de 1949 et du premier protocole additionnel de 1977, article qui stipule que

[28]Iles Salomon, observations écrites, OMS, 20 juin 1995, p. 35-40, par. 4.13-4.23.

ces instruments s'appliquent «en toutes circonstances». Cette formule signifie, comme l'ont souligné les juristes du CICR, que ces instruments ne sont pas assimilables à

> «un contrat de réciprocité liant un Etat avec ses co-contractants dans la seule mesure où ceux-ci respectent leurs propres engagements»[29].

Enfin, même s'il peut sembler dur de soutenir qu'un Etat victime d'une attaque nucléaire ne peut riposter avec des armes nucléaires, c'est parce qu'encore une fois le droit humanitaire fait primer l'intérêt des victimes sur l'intérêt des Etats. Si l'envoi d'une arme nucléaire provoque la mort d'un million de personnes, l'envoi en représailles d'une autre arme nucléaire qui fera également un million de morts protégera peut-être la souveraineté de l'Etat victime de la première frappe, cela satisfera peut-être le désir de vengeance des victimes, mais cela ne satisfera pas le droit humanitaire qui aura été violé non pas une fois mais deux fois, et deux violations du droit ne font pas un droit.

II. La philosophie de l'argumentation relative à l'emploi des armes nucléaires

Monsieur le Président, Madame, Messieurs de la Cour, j'en viens maintenant à la deuxième partie de cet exposé consacré à la philosophie de l'argumentation relative à l'emploi des armes nucléaires. Quasiment tout ce qui vient d'être dit se trouve largement détaillé dans les documents écrits soumis par les Iles Salomon. Mais je souhaiterais prendre à présent un peu de hauteur par rapport à la technique juridique que je n'ai d'ailleurs fait qu'effleurer fort modestement. Le débat sur la légalité de l'emploi des armes nucléaires n'est pas un débat purement académique. Il porte sur une des réalités les plus monstrueuses de notre époque, et si les hommes ont réussi à s'approprier les mécanismes physiques de fonctionnement du soleil, la plupart d'entre eux ne veulent pas connaître le sort de Promethée.

Les Iles Salomon ont montré que l'arme nucléaire n'était pas une arme comme une autre, mais qu'elle n'en était pas moins, comme toute arme, assujettie au droit humanitaire. Pas plus que les rois, les armes nucléaires ne sont au-dessus des lois, et l'absence de règles spécifiques n'implique pas l'absence de règles génériques. Ainsi, dans les systèmes juridiques issus du Code Napoléon, cinq articles suffisent à fonder tout le régime de la responsabilité civile. De même, en droit humanitaire,

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[29] *Conventions, commentaire*, III, p. 24; aussi *Protocoles, commentaire*, p. 37-38.

le principe de la limitation des moyens de nuire à l'ennemi[30] joint aux «principes de l'humanité» et aux «exigences de la conscience publique» de la clause de Martens suffisent, à eux seuls, à condamner tout emploi d'armes nucléaires. Or, on a vu que bien d'autres règles s'ajoutent pour confirmer cette condamnation.

Il y a en effet un point commun entre les armes nucléaires et la règle de droit : elles produisent toutes deux des effets indiscriminés; comme l'arme nucléaire, la règle de droit s'applique aveuglément à tout comportement qui en relève. Il importe peu que les pères du droit de Saint-Pétersbourg ou du droit de La Haye ne connaissaient pas les armes nucléaires. La sagesse et le bon sens des règles qu'ils codifiaient alors et qui puisaient leur origine dans des coutumes très anciennes s'appliquent d'autant plus facilement aujourd'hui que ces règles étaient destinées à maintenir la guerre dans certaines limites et que les armes nucléaires créées ensuite par les hommes dépassent toutes les limites.

Encore faut-il le dire, car au contraire des piles électriques, si vous permettez cette comparaison, qui ne s'usent que si l'on s'en sert, la règle ne s'use que si l'on ne s'en sert pas. C'est le devoir de mémoire du juge face à la faculté d'oubli du droit par les décideurs. De fait, l'histoire nous enseigne que le juge, lorsqu'il est confronté à certaines horreurs, n'hésite pas à prendre ses responsabilités, même quand le droit positif pourrait sembler imprécis. C'est ainsi qu'à Nuremberg, ou devant d'autres tribunaux alliés après la deuxième guerre mondiale, on n'a pas craint de condamner des gens pour crime contre la paix ou crime contre l'humanité alors que beaucoup pensaient que ces incriminations étaient nouvelles[31]. Aujourd'hui, c'est en vain que le premier accusé déféré devant le Tribunal pénal international pour l'ex-Yougoslavie a prétendu faire échec à la compétence répressive du Tribunal pour l'incrimination des violations des lois et coutumes de la guerre commises dans un conflit armé non international. Face à cette thèse, qui n'était pas dénuée de tout fondement, le Tribunal n'a pas hésité à montrer qu'un certain nombre de textes prévoyaient déjà

[30]Règlements de La Haye de 1899 et 1907, art. 22; résolutions 2444 (XXIII) et 2675 (XXV) de l'Assemblée générale des Nations Unies des 19 décembre 1970, premier protocole de 1977 additionnel aux conventions de Genève de 1949, art. 35, par. 1.

[31]*E.g.* Nuremberg United States Military Tribunal, 10 April 1948, *Ohlendorff, A.d.*, 1948, 658.

cette incrimination[32].

A supposer même que les règles rappelées ici ne condamnaient pas tout emploi de l'arme nucléaire dans un conflit armé au moment où cette arme a été inventée, il serait impensable qu'aujourd'hui ces règles ne le condamnent pas. Dès le premier exposé prononcé devant cette Cour - par le représentant de l'OMS -, un thème essentiel a été évoqué et est revenu comme un leitmotiv dans plusieurs exposés : ce thème, c'est celui d'évolution[33]. L'évolution de l'OMS à l'égard de l'arme nucléaire illustre bien le darwinisme du droit international qui, à l'instar de l'humanité, évolue par bonds.

On le constate aujourd'hui quand on regarde les réactions scandalisées de la plupart des Etats devant la reprise des essais nucléaires français souterrains alors que pendant quarante-cinq ans des centaines d'essais souterrains et atmosphériques ont été effectués dans l'indifférence à peu près générale de la communauté internationale, en dehors de ce que pouvaient penser les populations des territoires voisins des sites de ces essais. Or si des essais souterrains peuvent déclencher aujourd'hui une telle vague d'indignation, qu'en serait-il alors demain de l'emploi d'armes nucléaires, même d'une seule arme nucléaire, même d'une petite arme nucléaire, dans le cadre d'un conflit armé ?

Monsieur le Président, Madame, Messieurs de la Cour, Il viendra sans doute un jour où l'histoire jugera aussi sévèrement l'ère nucléaire que nous jugeons aujourd'hui l'admission de la torture ou de l'esclavage sous l'ancien régime. Les Etats du Pacifique représentés ici portent d'ores et déjà ce jugement sur les armes nucléaires.

Il n'est pas en effet raisonnable de penser que le degré de civilisation atteint aujourd'hui par la communauté internationale puisse s'accommoder d'un système juridique qui tolérerait que des hommes utilisent des armes nucléaires contre d'autres hommes. Il n'est pas raisonnable d'imaginer que le monde entre dans le troisième millénaire de l'ère chrétienne sans achever le second sur une condamnation juridique formelle et sans appel de l'emploi et de la menace d'emploi des armes nucléaires dans un conflit armé.

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[32]Tribunal pénal international pour l'ex-Yougoslavie, app., 2 octobre 1995, *Tadic*, par. 128-136.

[33]CR 95/22, OMS, p. 24 et suiv.; Australie, p. 46 et suiv; CR 95/23, Egypte, p. 39; etc.

Si cette condamnation était prononcée - et les Iles Salomon espèrent qu'elle le sera -, elle pourrait peut-être donner un pâle commencement de sens à l'holocauste d'Hiroshima et de Nagasaki. Si cette condamnation était prononcée, elle justifierait la supériorité du droit sur la force débridée ou, comme le disait Pascal, celle de la conscience sur la nature aveugle[34]. Si cette condamnation était prononcée, elle fournirait au moins une partie de réponse, car limitée au droit, à la question posée par Hubert Reeves à propos de l'holocauste nucléaire, cette question qui est : «L'intelligence n'émergerait[-elle] - en quinze milliards d'années - que pour s'éliminer en quelques minutes ?»[35]

Monsieur le Président, Madame et Messieurs de la Cour, je vous remercie infiniment pour votre patience et la compréhension que vous accorderez aux vues du Gouvernement des Iles Salomon, et je vous prie, Monsieur le Président, de bien vouloir autoriser le professeur Philippe Sands de venir à cette barre.

Le PRESIDENT : Je vous remercie beaucoup, Monsieur le professeur Eric David, pour votre exposé oral et j'appelle à la barre le professeur Philippe Sands.

Mr. SANDS:

1. Mr. President, Members of the Court, on my first occasion before you, I would like to express my very great sense of privilege and honour, all the more so because of the importance of the issue and the legal points you are called upon to consider.

2. My task is to address an issue on which much has been written and much has been said, and on which views are divided: the relevance to the questions before you of international human rights and environmental laws. Solomon Islands, with many other States, considers that any use of nuclear weapons would be unlawful by reference to international humanitarian law, the principal body of applicable rules. But beyond that, unlawfulness additionally arises by application of human rights and environmental norms. Without wishing to overstate their significance, they go beyond

[34]B. Pascal, *Pensées*, 1670, p. 264.

[35]Hubert Reeves, *L'heure de s'enivrer - L'univers a-t-il un sens ?*, Paris, Seuil, Coll. «Points», 1992, p. 189.

humanitarian law. They are broader in scope. In some respects they are more precise in content. And they establish institutional mechanisms to ensure that the rights they guarantee can be enforced by individuals[36].

3. Another group of States, a small but important minority, considers these norms to be irrelevant or to be inapplicable. But this position is contradicted by State practice, by doctrine, by jurisprudence, and by common sense: armed conflict does not automatically suspend or terminate these rules, as set forth in treaties or in custom. Nuclear weapons are not above these laws.

4. Human rights and environmental rules represent, as we know, significant achievements of international law this century, seeking to guarantee what René Cassin called "the right of human beings to exist"[37]. Norms "concerning the basic rights of the human person" fall within a special category of rules of international law, as this Court recognized in the *Barcelona Traction* case[38]. The International Law Commission has affirmed that obligations "of essential importance for safeguarding the human being ...[or] for the safeguarding and preservation of the human environment" represent "fundamental interests of the international community". Their serious breach gives rise to an international crime[39]. Two years ago this Court signalled its commitment to the enforcement of environmental laws by establishing an Environmental Chamber. And just two months ago, in a matter of a different nature on which Solomon Islands had hoped to be heard, this Court recognized "the obligation of States to respect and protect the natural environment"[40]. As Ambassador Slade indicated yesterday, these words brought some comfort to the Pacific region.

5. In the matter before you these norms can be applied in various ways. Indirectly, by

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[36]These and other differences are identified in the 1970 Report on Respect for Human Rights in Armed Conflict prepared by the Secretary General of the United Nations ("1970 Secretary General's Report"), A/8052, 18 September 1970, paras. 32-68 and 71.

[37]1970 Secretary-General's Report.

[38]*I.C.J. Reports 1970*, p. 32.

[39]ILC Draft Articles on State Responsibility, Art. 19 (2) and (3), 1980, *Yearbook of the International Law Commission*, Vol. II (Part 2), p. 30.

[40]Request for an Examination of the Situation in accordance with paragraph 63 of the Court's Judgment of 20 December 1974 in the *Nuclear Tests Case (New Zealand* v. *France*), *Order, 22 September 1995*, para. 64.

informing what this Court has called "elementary considerations of humanity"[41], or directly, as we have suggested in our Written Observations, and as the Institut de droit international has indicated in its 1985 Helsinki resolution. That resolution confirms that armed conflict does not *ipso facto* terminate or suspend treaties between belligerents[42]. And it provides:

> "The existence of an armed conflict does not entitle a party unilaterally to terminate or suspend the operation of treaty provisions relating to the protection of the human person, unless the treaty otherwise provides."

These considerations apply equally to customary norms. Given the effects of nuclear weapons on the human person, in the target State and beyond, this provision is especially pertinent to the issues before you.

6. The efforts of certain nuclear-weapon States to limit attention to the narrower confines of humanitarian norms alone should be resisted. Their first round written statements are silent on human rights, they are silent on the environment and yet these are the same States which pride themselves - with some justification - on their role in promulgating the rule of law, promoting human rights and preserving the environment. Yet when it comes to those very weapons of mass destruction which pose a greater threat to human rights and the environment than anything else imaginable, these States ask you to set aside that body of principles and rules so carefully put in place over the past 50 years. They ask you, in effect, to re-situate yourself in 1945, to ignore all subsequent developments and to follow Balzac's dubious proposition, "that laws are spider webs through which the big flies pass and the little ones get caught".

7. In their second round of written statements, some of these States responded to some of the legal arguments, affirming the relevance of human rights and environmental norms. In making such references, Solomon Islands has been guided by three simple principles: first, the fundamental norms for the protection of human rights and the environment apply in times of war as in times of peace; second, these norms apply to the effects of nuclear weapons; and third, on the basis of the evidence provided by the various WHO reports on the effects of nuclear weapons, it is inconceivable

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[41] *Corfu Channel, I.C.J. Reports 1949*, p. 4, para. 22.

[42] The Effects of Armed Conflicts on Treaties, Art. 2.

that any use of nuclear weapons would not violate these norms.

8. On this last point, some States are frankly economical in their sense of reality. One claims, "the assumption that any use of nuclear weapons would inevitably [deposit radioactive fall-out on the territory of States not part to the conflict] is unfounded"[43]. This is conjecture bordering on science fiction, as Professor Abi-Saab put it[44]. The 1987 WHO report, the statement by the WHO Legal Adviser to this Court two weeks ago, make it perfectly clear that the health and environmental effects, "would not be limited to the people of the area where the bombs fell; some of them would be felt by people throughout most of the world"[45]. Effects would inevitably be felt in the target State, but they would also be felt in other States and in areas beyond national jurisdiction. Those effects would be widespread and they would be massive - this is the experience of Hiroshima and Nagasaki. It is also the experience of the atmospheric tests carried out in the Pacific region - as Mrs Eknilang indicated this morning - and in North Africa, and it is confirmed scientific opinion. It is finally confirmed by the Chernobyl accident which led to widespread radioactive fall-out over most of Europe.

9. Direct and transboundary consequences affect human rights and the environment widely, yet the nuclear-weapon States deny the relevance of the norms. What they say, in effect, is that the human right to life is not absolute, or that environmental agreements do not expressly address nuclear-weapon use or that the application of environmental agreements to this issue would lead to absurd results. I would like to address, with your permission, each of these points in turn.

Human Rights: the right to life

10. Mr. President, I turn first to human rights. Whilst our focus is on the right to life, our approach applies equally to other fundamental rights which would necessarily be violated by large-scale releases of radioactivity. I am thinking in particular of the rights to privacy and to peaceful enjoyment of property.

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[43]United Kingdom, WHO written observations, p. 92, para. 44.

[44]CR 95/23, p. 43.

[45]WHO, *Effects of Nuclear War on Health and Health Services*, 2nd Ed., 1987, p. 9.

11. As guaranteed by the Universal Declaration and the International Covenant on Civil and Political Rights, as well as all the regional instruments, the right to life is applicable during armed conflict. The 1970 Report of the United Nations Secretary-General on Human Rights in Armed Conflict underscores their importance:

> "These guarantees differ from those set forth in the 1949 Geneva Conventions by the fact that they apply always and everywhere and that they can be invoked irrespective of whether there exists a war, declared or undeclared, or any other armed conflict, again irrespective of whether this armed conflict does or does not meet certain qualifications of general international law."[46]

12. Human rights treaties do not, as it has been suggested, "exist in a quite different dimension" when it comes to the use of nuclear weapons. Indeed, in 1976, the European Commission on Human Rights found that the right to life set forth in the European Convention had been violated by Turkey during the armed conflict with Cyprus beginning in July 1974[47]. The Commission refused to apply the derogation provided by Article 15[48], since essential procedural requirements had not been satisfied.

13. The right to life is *especially* pertinent to the use of nuclear weapons, as the General Assembly affirmed in 1983[49]. In 1984 the Human Rights Committee adopted by unanimity a General Comment entitled "The Right to Life and Nuclear Weapons"[50]. It endorses the view of the General Assembly. It recognizes the use of nuclear weapons is subject to Article 6 of the Covenant. It states that nuclear weapons are among the greatest threats to life and the right to life. And it proposes that the "use of nuclear weapons should be prohibited and recognized as crimes against humanity". The suggestion of one State that this approach constitutes, in respect of human rights instruments, a "détournement de leur sens"[51], was evidently not shared by the eminent drafters of the

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[46]1970 Secretary-General's Report, Annex I, para. 32.

[47]Cyprus *v.* Turkey, Applications 6780/74 and 6950/75, 10 July 1976, 4 *EHRR* 482.

[48]*Ibid.*, para. 528.

[49]UN General Assembly resolution 38/75, *Condemnation of nuclear war*, first operative paragraph.

[50]GenC 14/23, reproduced in M. Nowak, *UN Covenant on Civil and Political Rights* (1993), p. 861.

[51]CR 95/24, p. 22.

General Comment acting unanimously. These included Roger Errera, now of the French Conseil d'Etat, Sir Vincent Evans and Anatoly Movchan.

14. Mr. President, Members of the Court, it is said by some that the right to life is not absolute and derogations may be permitted in times of war. Solomon Islands does not disagree. But we must be clear: these derogations apply only to "lawful acts of war"[52]. No derogations are possible for unlawful acts of war, acts of war which violate *jus in bello* or *jus ad bellum*, or the rules of neutrality prohibiting transboundary consequences.

15. At the very least an unlawful use of nuclear weapons would *also* and additionally violate the right to life of victims. Since the effect of any use of a nuclear weapon would violate, in Solomon Islands' view, any or all of the rules of international humanitarian law, it is also our view that any use of a nuclear weapon must necessarily also violate the right to life of those persons situated in the target State. And even if it could be maintained that the use of a nuclear weapon was lawful against a target State, which Solomon Islands denies is ever the case, its effects on third States and areas beyond national jurisdiction can leave little doubt that principles of neutrality would inevitably be violated. Mrs. Eknilang's testimony makes it painfully clear that such effects would also violate the human rights of civilians at great distances from nuclear explosions in time and in place.

16. Mr. President, Members of the Court, the law is clear. We call on you to affirm the relevance of the right to life and to find that it is applicable and would be violated by any use of a nuclear weapon in any circumstances.

Environmental Laws

17. I turn now to consider the relevance of rules of international environmental law. I would like to distinguish between those rules which are specifically intended to address the protection of the environment in times of war, and those rules of general international environmental law, rules of general application. Our detailed arguments are elaborated in the written pleadings: I will only deal

[52]1970 Secretary-General's Report, para. 46.

with specific points.

18. The *jus in bello* rules are set forth in the 1977 ENMOD Convention and the 1977 Geneva Additional Protocol. The nuclear-weapon States take the view that neither is applicable to the use of nuclear weapons. They say that the former prohibits only "deliberate manipulation" of nature, and that the use of nuclear weapons would not therefore be caught. And they say that the latter is not applicable because the 1977 Additional Protocols simply do not apply to nuclear weapons. And they go one step further: they deny that these rules exist as customary law. For example, it is said:

> "il serait hasardeux de prétendre établir l'existence ... de principes de droit international général ou coutumier ... concernant la protection de l'environnement en cas de conflit armé"[53].

We beg to differ.

19. First, the treaty law is not reflected in custom. It has been superseded by custom. Security Council resolution 687, adopted in 1991, reaffirmed that Iraq was "liable under international law for ... environmental damage" as a result of its unlawful invasion of Kuwait[54]. That liability could only have arisen under custom, since Iraq was a party to neither the 1977 ENMOD Convention nor the 1977 Protocols. The clear implication of resolution 687 is the existence of a customary norm prohibiting significant environmental damage in war. The use of a nuclear weapon causing significant environmental damage would thus also violate international law.

20. A second point: Solomon Islands considers that multilateral environmental agreements which protect essential environmental resources which have obtained widespread support, which do not have provisions expressly excluding their application in times of war, apply in times of war.

21. A number of regional and global instruments satisfy these criteria, and they reflect, in our submission, customary norms. Paramount among these is Principle 21 of the Stockholm Declaration, recently affirmed by Principle 2 of the Rio Declaration. Recall that it requires States:

> "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction"[55].

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[53]CR 95/24, p. 23.

[54]UN Security Council resolution 687/1991, UN doc. S/RES/687 (1991).

[55]11 *ILM* (1972) 1416.

That rules applies in all times, in war and in peace. Indeed, just two months ago, before this very Court, France described that rule as reflecting, without any limitation, "l'existence d'un devoir général de prévention des dommages à l'environnement"[56]. "Un devoir général" is "un devoir général". It applies at all times, as resolution 687 suggests. These "devoirs généraux" apply equally to protect freshwater resources, the marine environment, biodiversity, the climate system, the ozone layer[57]. Any use of a nuclear weapon would, according to actual experience, confirmed by the WHO reports, inevitably threaten these vital resources.

22. These and other instruments establish international obligations which are, in the words of the International Law Commission, of "essential importance for the safeguarding and preservation of the human environment"[58]. They guarantee the conditions which sustain life on earth. It is sweepingly claimed by one that "aucun de ces instruments n'est applicable en temps de conflit armé"[59]. For the reasons explained in our written observations, as between belligerents these obligations apply in times of war and in peace, unless their terms expressly provide otherwise. Practice confirms the approach. Did these same States opine that the Balkans conflict brought to an end the protection afforded to Dubrovnik and the bridge at Mostar under the 1972 World Heritage Convention?[60] Apparently not. During the 1991 Gulf conflict did they accept that the terms of the 1978 Kuwait Convention prohibiting oil pollution in the Gulf no longer applied?[61] There is no indication that they did. These and other obligations are intended to protect the human person, in the sense envisaged by the Institut de droit international, in the target State, in third States, and in areas beyond national jurisdiction. The extraterritorial aspect is of cardinal importance given the

[56]CR 95/20, p. 71.

[57]For the rules of international law addressing these and other environmental matters, see P. Sands, *Principles of International Environmental Law* (1995, Manchester University Press).

[58]*1980 Yearbook ILC*, Vol. II (Part 2), p. 30.

[59]CR 95/24, p. 24.

[60]Convention for the Protection of World Cultural and Natural Heritage, 11 *ILM* (1972), 1358.

[61]Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, 17 *ILM* (1978) 526.

transboundary effects of radioactive fall-out. It is most relevant, therefore, that these rules remain in force as between belligerants and third States. As Professor Pellet and his collaborators state in the most recent edition of their treaties: "ils demeurent en vigueur ... dans les rapports entre les belligérants et les non-belligérants"[62].

23. Another, perhaps less direct, route to inapplicability involves arguing that multilateral environmental agreements are not applicable because they were not intended to address the use of nuclear weapons.

24. It is surprising to claim that treaties designed to protect environmental resources do not apply to nuclear weapons because they do not expressly mention them, or because they do not include provisions on their applicability during armed conflict, or because they were not intended to apply during armed conflict to nuclear weapons. These instruments do not follow that approach they follow a common approach to regulation: what they do is they begin by identifying an environmental resource to be safeguarded and they then apply their rules to *all* activities which might threaten that resource. Environmental agreements do not come bedecked, as some might suggest, with tables of individually proscribed activities. The Biodiversity Convention and Climate Change Convention do not mention nuclear weapons any more than they mention coal-fired power plants. No one would suggest that such plants are not covered by the Convention.

25. If France, the United Kingdom and other States wanted to exclude the application of these agreements from war, they should have so ensured during their negotiations, as they claim (erroneously in our view) to have done in relation to the application of the 1977 Protocols to nuclear weapons. There is no such "exclusionary" provision or understanding in the case of environmental agreements, either that they do not apply in times of armed conflict or that they do not apply to the effects of nuclear weapons specifically.

26. The correct view we submit, is that which has been recently applied by the International Law Commission in respect of its 1994 Draft Articles on the Law of Non-Navigational Uses of International Watercourses, which many consider to reflect customary law for the protection of vital

[62]Nguyen Quoc Dinh, et al, 5th ed. 1994, p. 304.

freshwater resources. The Commentary states that "the present articles themselves remain in effect even in time of armed conflict".[63] The Court should, in respect of these essential environmental obligations, which aim to protect vital resources and which have overwhelming support, apply the same principle in the absence of express provisions to the contrary and there are almost no express provisions to the contrary.

Conclusion

27. Mr. President, Members of the Court, in conclusion Solomon Islands believes that one aspect of these proceedings which all should welcome are the Statements of strong commitment to human rights and the environment which have come from such a large number of States participating, including so many from the developing world. These statements of commitment will themselves contribute to the progressive development of international law. They affirm that legal developments over the past 50 years in the field of human rights and the environment are applicable to the consequences of the use of nuclear weapons. They must be. A failure by this Court to reaffirm their applicability to the questions could only undermine their effectiveness during the times when they are needed most.

28. Mr. President, Members of the Court, I would like to thank you for your patient consideration. With your permission, I would like to invite Professor Crawford to the bar.

Le PRESIDENT : Je vous remercie, professeur Sands, pour votre exposé oral, et j'appelle à la barre le professeur James Crawford.

Mr. CRAWFORD: Mr. President, Members of the Court,

1. It is again an honour to appear before you, and to present these closing remarks on behalf of Samoa, the Marshall Islands and Solomon Islands. But having said that, the Court might perhaps feel that there is nothing else that I need to say! The particular arguments, the relevant treaty

[63] *Report of the ILC on the work of its forty-sixth session*, 2 May - 22 July 1994, GAOR, 49th session, Supplement No. 10, p. 316, para. 3.

provisions, the considerations pertaining to custom and general principle, the long and honourable history of the *jus in bello* and its implications for new weapons of mass destruction - all these things have been repeatedly and well rehearsed before you - if rehearsal is the name for such a long-running performance.

2. So I propose to restrict these closing remarks to a few considerations of a general order. They relate first to the Court's role in responding to the two requests, and secondly, to the issues that it is asked to address in these proceedings.

The Court can and should give the two Opinions

3. First then, the issues of competence and admissibility.

4. Here the first point to be made, and it was made very clearly by Ambassador Slade, is that the present cases are about the use or threatened use by a State of nuclear weapons in armed conflict. They are not about the legality of possession, testing or deployment, considered as such. This is so, despite the attention that some countries have devoted to the broader questions. This point is of particular significance so far as the NPT nuclear powers are concerned. Their continued possession of nuclear weapons is accepted as part of the NPT system, of course as Judge Schwebel's question implies, that is not necessarily a permanent settlement - but that it is a present settlement cannot be doubted. But no one could possibly argue that the qualified acceptance of possession under the NPT licenses the nuclear power States to threaten, let alone use, nuclear weapons. These are plainly distinct issues.

5. Professor Pellet (CR 95/23, p. 59) sought to argue that the General Assembly's question was "inadequately framed". Ambassador Slade has already dealt with the point, in response to the question asked by Judge Vereschetin. I only note Professor Pellet's enormous difficulty in accepting that the question could be framed in terms of a permissive as distinct from a prohibitory rule. Even the General Assembly, even in asking the very question of legality, was compelled by his logic to assume the prima facie legality of the threat or use of nuclear weapons. To him, no other way of putting the question made sense. I shall return to that point.

6. In this context I should also note that the questions asked in no way cast doubt on the

legality of a policy of nuclear deterrence, the deterrence on which Mr. Perrin de Brichambaut relied as "la clef de voûte de [la] sécurité" [de la France] (CR 95/23, p. 45). Deterrence of the kind described by Mr. Perrin de Brichambaut in no way involves a threat of the use of nuclear weapons in the sense explained by Ambassador Slade yesterday. There is no present threat to use those weapons, as distinct from the capacity to do so, capacity which is inherent in the distinct concepts of possession and deployment. An armed camp is different from an invasion force, for that matter it is different from a defensive force intending to break the nuclear taboo and unleash weapons of mass destruction on the cities of its adversary.

7. Whether the peace of Europe has been kept by the policy of deterrence is another question. Students of international incidents are as inclined to attribute the non-use of nuclear weapons during the last 45 years to good luck as much as to grand strategy. A still further question is the impact of the nuclear arms race and the policy of deterrence outside Europe.

8. But for present purposes the point is simply this: that deterrence and actual threat to use weapons to achieve one's ends are different things. In this regard Solomon Islands agrees with the definition of "threat" given by France: "a coercive element intended to lead a State to conduct or acts different from those it would otherwise freely choose" (CR 95/23, p. 80). By deterrence a State does not impose any conduct on others which they might otherwise freely choose.

9. Mr. President, if I give an illustration: I may be big enough and strong enough to hurt you, if you punch me in the nose, and you may know this, but I am not threatening you, not in the event that you do not punch me on the nose - it is simply a fact. I would add, Mr. President, that I do not know of any aggressor who would not be deterred merely because the possible response might be unlawful. The law does not often enter into the calculations of aggressors.

10. On the question of the so-called abstract character of the two requests, the Court is asked to apply the law, as it exists, to facts, as they exist, to real weapons, and the real weapons that exist are weapons of mass destruction, multi-megaton bombs. The questions the Court has been asked are not abstract in the sense of being purely hypothetical, moot or - to use a word which is a favourite of mine - academic. That is the only relevant sense of the word "abstract"; for all other purposes the

fact that a question is put as a general or abstract question is no obstacle to the Court giving an answer, provided only that the question is a legal question and that it relates to matters of current, as distinct from purely historical, concern. Those conditions are met here.

11. We endorse, and do not need to repeat, what Professor Abi-Saab said for Egypt on the character of the "discretion" not to give an advisory opinion (CR 95/23, pp. 18-29). That is a judicial discretion and, as the Court has said, it should in principle answer a legal question asked by a principal organ for its own legitimate purposes. For the reasons we have already given there are no "compelling reasons" not to answer the questions (cf. *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, I.C.J. Reports 1973*, p. 166). In particular, there is no evidence whatever that the Court's opinion will interfere with ongoing disarmament negotiations.

12. In any event, reviewing the Court's record in responding to advisory opinions, something it has invariably done, one notes a consistent sensitivity to the needs of the situation: I refer, for example, to the *Namibia* Opinion, the *Western Sahara* Opinion, the *WHO Regional Office* Opinion, and I could cite others. We are confident the Court will show the same adroitness and awareness in the present proceedings.

13. I turn then, secondly, Mr. President, Members of the Court, to the merits. There are here three specific questions to be answered, and one important general observation to be made.

14. The *first* question: is there a category of weapons whose use is above the law? The answer is self-evidently no, and as a general matter it now seems that the proponents of nuclear weapons do not disagree.

15. The *second* question: what does international law say about the use of nuclear weapons as weapons of mass destruction? These weapons were defined, for example, in the Paris Accords of 1954 under which the Federal Republic of Germany acceded to NATO and which Professor David has cited. Under that definition (Ann. II, Art. 1, *(a)*), atomic weapons are defined as those which, through nuclear explosion or analogous processes are "capable of causing massive destruction, generalized damage or massive poisoning" - I note the word poisoning. For the reasons given by

Professor David, the body of international humanitarian law, established by treaty and custom before 1945 and developed and refined along the same lines since, is fully applicable to nuclear weapons. Moreover that body of law is applicable in armed conflict, whether the State concerned is acting in self-defence or not.

16. The *third* question. What about battlefield nuclear weapons? Mr. President, that question has been answered by Professor Salmon. The truth is that the arsenal of weapons currently deployed is not an arsenal of battlefield weapons analogous to conventional weapons. If the police raided a bomb factory, I doubt their suspicions would be assuaged by being told there was someone out the back making fireworks for a party, or cartridges for the forthcoming pheasant shoot. The Court can deal with the problem by limiting its findings to nuclear weapons having the effects which are the defining characteristics of such weapons in agreements, for example, as the 1954 NATO Agreement. But it may not wish to do so. The truth is - and it may be a rather scary *opinio* - that there is a widespread taboo against the use of *any* nuclear weapons, in *any* circumstances, no matter how friendly the weapons, no matter how dire the circumstances. Those in a position to know say that battlefield nuclear weapons are unrealistic as well as terribly dangerous in terms of their proliferation potential. I note the statements made by president Mitterrand (cited in Solomon Islands Further Written Observations, para. 19, note 6) and General Colin Powell (cited by Senator Gareth Evans, QC, CR 95/22, p. 58), to which you have been referred.

17. The *general observation* is the following. The main opposing tendencies before the Court reflect sharply different conceptions of international society and of the position of individual States. The position of Solomon Islands is quite clear. States are not prior to international law. They do not exist in a *Lotus* land of complete freedom to act except as they have expressly consented to the contrary (but cf. CR 95/29, p. 47 (Mr. Khodakov)). The principle of sovereignty - on which so much of the opposing argument expressly or by implication relies - is a normative principle, it is part of a *system* of international law. It is a system in which States move, and live, and have their being. Of course there is a world of fact, not always concordant with the prescriptions of international law. But the Court is the principal judicial organ of an organized international community under the

Charter. The first universal organized international community that humanity has known. It is not an organ of a *de facto* community of powers, who would, anyway, have little use for courts. No doubt the NPT nuclear States, and for that matter any other non-NPT States which have or may acquire nuclear weapons, retain the "power" to use those weapons - power in the sense of technological power. And the power the non-nuclear States share in, to invoke and develop international law, might seem to pale against that glaring possibility. The Court can be realistic about these facts, but the development of international law is not simply a progress towards the acknowledgement of the unsocialized power of the few.

18. The point is significant, and it concerns the States which have never deigned to become parties to the NPT, more than the nuclear States acknowledged by the NPT. The NPT nuclear States are in an agreed association with the vast majority of non-nuclear States, seeking over time to resolve the problems presented by the existence and likely long-term proliferation of this dreadful physical force.

19. But take the arguments that some have deployed here and apply them to a non-NPT State or, for that matter, to a non-State organization which has obtained access to nuclear weapons. The Security Council, at the level of Heads of State and Government, on 31 January 1992 affirmed - as M. Perrin de Brichambaut rightly recalled (CR 95/23, p. 47) - that proliferation of nuclear weapons would constitute a threat to international peace and security. And yet, according to arguments that have been made, so far as the non-NPT States are concerned, such proliferation would be *lawful*, and they would be *legally entitled* to do whatever they could to acquire those weapons. So also, on the arguments presented, would be lawful various scenarios of the use or threat by such States of their lawfully acquired *force de frappe*.

20. The same point can be drawn from the preamble to resolution 984 (1995) of 11 April 1995, in which the Security Council reaffirmed "the need for all States parties to the Treaty on the Non-Proliferation of Nuclear Weapons to comply fully with all their obligations". It is the NPT parties who have these obligations. But what of the non-parties? On the logic now presented to the Court, the Security Council is taken as having said, by necessary implication, that there is no

obligation on non-parties to the NPT; they are free. And this is in a resolution intended to provide "security guarantees"! It is as well that the Security Council did not say that! But it has been said on behalf of certain Members of the Security Council before this Court.

21. Mr. President, Members of the Court, now are the non-nuclear States which have expressly accepted these obligations and constraints in the NPT to be mocked by those States which have not? Is the logic of this major multilateral treaty to be: that you do not have to join and that, not having joined, you are free? Is the policy of the international community to be thus controverted, overturned just at the time when that policy is acquiring some permanence and some coherence? More to the point, perhaps, is the overwhelming treaty majority, the States which have expressly accepted not to develop nuclear weapons, is that majority powerless to deploy general international law against the States who stand outside? That would be to add one form of powerlessness to another. It is certainly not required by any distorted logic of freedom.

22. The answers to these questions are *a fortiori* in the case of the application of existing and well-established norms of international humanitarian law. The United Kingdom, referring to Additional Protocol I, argues that its prohibition on reprisals against the civilian population (Art. 51, para. 6) and against objects indispensable for their survival or for the survival of the natural environment (Art. 55, para. 2) are inapplicable to the use of nuclear weapons because these articles are "innovative" (UK, written submissions on the WHO request, p. 94). Again we have the distorted logic of freedom. Individual States are unaccountably free to innovate the means of destruction, but the international community is powerless to hold them to account in the absence of their consent. And I mean, to hold them to account by law rather than merely by Security Council resolution, however useful that might be.

23. The fact is that these provisions are, as Professor Clark yesterday and Professor David today showed, in the line of earlier and general restraints on the conduct of armed conflict, restraints which are widely acknowledged to have acquired the force of general international law. The Russian Federation may have disowned M. Martens (Russian comments on the WHO application, p. 13), a distinguished civil servant of the Tsar, but, I am pleased to say, his clause has been embraced by

much of the rest of the world, ourselves included. Moreover the specific conventional restraints are cognate with and are underpinned by the "elementary considerations of humanity", "the general principles of humanitarian law" to which this Court referred in a series of cases (e.g., *Corfu Channel, I.C.J. Reports 1949,* p. 22; *Nicaragua, I.C.J. Reports 1986,* p. 114). Neither general principles of law nor general considerations of humanity have to be consented to before they bind *all* States.

Conclusions

24. Mr. President, Members of the Court, what, in this situation of disagreement, can the Court do? No doubt it could, abstractedly, duck the issue, although there are compelling reasons to give the answers, whereas what the Court's jurisprudence requires is compelling reasons not to give them.

25. Assuming that the Court agrees with this view and decides to answer the questions, in our respectful submission, the first and the least thing the Court can do is to indicate that any use or threat of use of nuclear weapons is subject to international law. Nuclear-weapon States, present or future, whether or not parties to the NPT, are subject to international law in relation to their use or potential use of those weapons in armed conflict. They are subject to the corpus of the rules of international humanitarian law; to the rules protecting the neutrality of non-belligerents; to the rules guaranteeing fundamental protection of human rights, and to the rules ensuring the preservation of essential environmental resources, in particular the means of subsistence of peoples.

26. Further, we submit, the Court should indicate that, on the basis of the available evidence, any use of nuclear weapons would violate international law. This conclusion assumes the character of existing nuclear arsenals: the nuclear weapons that States dispose of, and which are at the centre of the debate, are weapons of mass destruction. Any use of such weapons must be unlawful, taking into account, in particular:

- their indiscriminate character;
- their effects across time and space, transboundary and transgenerational;
- the poisonous effects they produce, analogous to that of poisonous gases, contrary to laws of

war;

- the superfluous injury and unnecessary suffering they cause;
- the fact that they render death inevitable not merely for individuals but for substantial populations.

Such a use cannot be justified by considerations of self-defence, since these rules are specifically applicable in times of armed conflict however arising. Nor can they be justified as belligerent reprisals.

27. Indeed, having regard to the definitions of international crime in Draft Article 19 of Part 1 of the ILC Draft Articles on State responsibility, the Ago Draft as we might call it, such a use of nuclear weapons as weapons of mass destruction would evidently constitute a crime against humanity.

28. Mr. President, Members of the Court, the Welsh poet, Dylan Thomas, in one of his finest lyrics, refused to mourn the death, by fire, of a child in London. The poet gave the reason for his refusal to mourn in the following line: "After the first death, there is no other."[64]

29. But in the case of a use of nuclear weapons, the first deaths would not be the only deaths, nor even perhaps the worst. The death of many others, over generations, the impact on the environment over millennia, and worse evils too, in terms of the progress or even retention of civilization on this planet. No-one is naive enough, Mr. President, to suggest that international law is a sovereign antidote to the risks and dangers presented by the threat or use of nuclear weapons. But neither is international law merely a charlady, a *femme de ménage* called in to clean up after the event is over and all the participants have gone home. It can be part of the solution to the problem. But it can only be part of the solution if it is brought to bear on the problem while it, and we, are still around. For the Court to declare that the use or threat of use of nuclear weapons is unlawful in all conceivable circumstances would contribute to a solution to one of our greatest modern problems.

Mr. President, Members of the Court, that concludes the presentation on behalf of Samoa, the

[64]Dylan Thomas, "A Refusal to Mourn the Death, by Fire, of a Child in London", in M. Roberts and P. Porter (Eds.), *The Faber Book of Modern Verse*, 4th Ed., 1982, p. 325.

Marshall Islands and Solomon Islands. May I thank you for your patience.

Le PRESIDENT : Je vous remercie, professeur Crawford, pour votre exposé oral au nom des Iles Salomon, des Iles Marshall et de Samoa. Et ainsi s'achèvent les exposés oraux présentés cette fin de matinée au nom des Iles Salomon. Mais avant de lever la séance, je voudrais donner la parole au Vice-Président, M. Schwebel, qui voudrait poser une question.

VICE-PRESIDENT SCHWEBEL: Thank you, Mr. President, actually two questions.

First, if as appears from its argument this morning, it is the position of Solomon Islands that the possession of nuclear weapons is not unlawful, whereas the threat or use of nuclear weapons is unlawful, does it follow that, until the achievement of general and complete disarmament under effective control, a nuclear Power may continue lawfully to possess nuclear weapons as an implicit deterrent to aggression against it?

Second, if, as counsel for the Solomon Islands argued just now, an aggressor will not count on its potential victim not responding unlawfully, does that argument suggest that law-abiding States will do well to possess a capacity to deter or respond to aggression, especially aggression by threat or use of weapons of mass destruction, by possession of nuclear weapons, at any rate, until the achievement of general and complete disarmament under effective control?

Le PRESIDENT : Le texte de ces questions vous sera communiqué immédiatement par écrit et il vous sera loisible d'y répondre, également par écrit, dans un délai de quinze jours. La Cour reprendra ses audiences publiques cet après-midi à 15 h 30. La séance est levée.

La séance est levée à 13 heures.

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Annex to the statement of the Honourable Victor Ngele
of the Solomon Islands

PROFESSOR JOSEPH ROTBLAT FRS
EMERITUS PROFESSOR OF PHYSICS AT THE UNIVERSITY OF LONDON

STATEMENT

14 November 1995

From 1933 to 1939 I was a Research Fellow at the Radiological Laboratory of the Scientific Society of Warsaw and from 1937 to 1939 Assistant Director of the Atomic Physics Institute of the Free University of Poland. In 1939 I left Poland for England to take up a scholarship under James Chadwick at the University of Liverpool. My research in Liverpool, which helped to establish the feasibility of the atomic bomb, led to my joining the British team on the Manhattan Project in Los Alamos. After the War I was made Director of Research in nuclear physics at Liverpool University, a position I held until 1949. In 1950 I changed my field of research to the study of the application of physics to medicine, specialising in radiation physics and radiation biology. From 1950 to 1976 I was Professor of Physics at the University of London and Chief Physicist at St. Bartholomew's Hospital where I established a large team specialising in the study of the effects of radiation on living organisms.

In 1981, while a visiting scholar at the Stockholm International Peace Research Institute (SIPRI), I wrote *Nuclear Radiation in Warfare* which examined the biological effects of radiations on man; the radiations from nuclear explosions, and the effects of these radiations on human, animal and plant life; and the protection from radiation that might be afforded by civil defence. I served as rapporteur for the 1983 WHO investigation into the *Effects of Nuclear War on Health and Health Services* and the follow up report in 1987 which had an expanded remit covering in addition environmental consequences of nuclear warfare. I would like to summarise the effects of nuclear radiation in warfare as follows.

Of the three main injurious agents of nuclear weapons — blast, heat and ionizing radiations — one aspect of the last agent, fall-out, is the least amenable to quantitative assessment, owing to its dependence on a number of unpredictable factors. Yet, in any nuclear war, local and/or global fall-out are likely to produce a heavy casualty toll.

In a counterforce attack, with the underground ICBM silos as targets, the great accuracy of modern missiles might make it possible to avoid direct hits on large centres of population, but millions of civilians are likely to be killed or suffer long-term effects of radiation from exposure to fall-out. I have noted the statements made to the Court on 20 October 1995 by M. Vignes, Legal Adviser to the World Health Organization, and I share his conclusions on this point. In an all-out war, into which any nuclear conflict is very likely to escalate, the largest immediate casualty toll would be from the effects of blast, heat and initial radiation in the cities hit by nuclear weapons. But in this case too fall-out would add immensely to the numbers of dead and injured, as well as greatly diminishing the extent of post-war recovery. Civil defence measures such as deep shelters, which may provide some protection against blast, would be much less effective against local fall-out, owing to problems arising from the necessary long stay in such shelters. Huge areas of land, remote from the target zones, would remain uninhabitable for long periods, probably years if nuclear reactors were targets of attack, and most of the livestock and crops would be lost.

The effects of local fall-out would be felt just as badly in some non-combatant countries, but global fall-out would result in long-term damage to *all* countries, including the Antarctic; it would be expressed in an increased incidence of cancers, and it is to be expected that there would be an increase in genetic defects in future generations. The property of fall-out to extend the injurious

action both in space and in time, is a novel and unique characteristic of nuclear warfare. Not only the inhabitants of the combatant countries, but virtually the whole population of the world, and their descendants, would be victims of a nuclear war — therein lies the radical change which nuclear weapons introduce into the whole concept of warfare.

I have read the written pleadings prepared by the United Kingdom and United States. Their view of the legality of the use of nuclear weapons is premised on three assumptions:

(a) that they would not necessarily cause unnecessary suffering;

(b) that they would not necessarily have indiscriminate effects on civilians;

(c) that they would not necessarily have effects on territories of third states.

It is my professional opinion — set out above and in the WHO reports referred to — that on any reasonable set of assumptions their argument is unsustainable on all three points. Even in the hypothetical case that at some time in the future nuclear weapons are developed that have a negligible effect on the civilian population, any use of such a weapon is likely to start a nuclear conflict in which other nuclear weapons are used that have all the effects described above.

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