

Written Comments of the Government of Solomon Islands

**Request by the United Nations General Assembly
for an Advisory Opinion on the Legality
of the Threat or Use of Nuclear Weapons**

**Further Written Observations Submitted
by the Government of Solomon Islands
to the International Court of Justice**



Government of Solomon Islands

20 September 1995

INTRODUCTION

1. On 20 June 1995 Solomon Islands submitted Written Observations to the International Court of Justice pursuant to the request by the UN General Assembly for an Advisory Opinion on whether the threat or use of nuclear weapons was in any circumstances permitted under international law. These brief Further Written Observations are now submitted by Solomon Islands in response to the Court's Order of 1 February 1995 fixing 20 September 1995 as the time-limit within which States and organisations having presented written statements may submit written comments on the other written statements.
2. Solomon Islands welcomes the fact that 28 members of the United Nations have submitted Written Observations, reflecting the importance of the question posed by the General Assembly. Since this number includes seven States which did not submit observations in the WHO request, a total of forty-two States have now submitted written observations in the two requests. Of these, an overwhelming majority have made submissions arguing against the legality of the use of nuclear weapons in any circumstances.
3. Solomon Islands has carefully considered all of the Written Observations submitted in relation to the General Assembly's request. They do not generally raise new issues or arguments beyond those addressed by States in their Written Observations in the WHO request. Accordingly, Solomon Islands refers the Court to its Further Written Observations of 20 June 1995 in the WHO Request, which apply *mutatis mutandis* to the issues and arguments raised by proponents of the legality of the use or threatened use of nuclear weapons in their written statements in the request. Solomon Islands also refers the Court and other States submitting written statements to the Annexes to its Written Observations in the WHO request, filed with the Court on 20 September 1994, which include all relevant General Assembly resolutions and documents relating to scientific aspects of its arguments.
4. In these Further Written Observations Solomon Islands wishes only to respond briefly to selected points made by these States, and reserves its right to respond in greater detail to these and other points during the oral phase envisaged by the Court.
5. Solomon Islands re-emphasises three introductory points. First, nothing it has read in the written statements submitted in the General Assembly's request alters its views on the procedural and substantive aspects of the question asked by the General Assembly, or on the need for the Court to address the substantive issues raised by the question. Second, concerning the scope of the question posed by the General Assembly request it is important to emphasize that:-
 - (a) the Court is not being asked to act as a legislator or to advise on the type of actions the nuclear weapon States should or should not adopt in international

disarmament negotiations, but only to record that the use or threatened use of nuclear weapons would be a breach of international law; and

- (b) that the Court is not being asked to advise on the possession of nuclear weapons, or on the policy of dissuasion or deterrence, neither of which Solomon Islands considers amounts to a threatened use of nuclear weapons.
6. And third, Solomon Islands reaffirms its view that the Court has never before been so acutely in a position to make a major contribution to the affirmation of the rule of law in international relations, and to uphold the necessity of the principle of non-contradiction in the global system of international law.

COMPETENCE

7. The General Assembly is clearly competent to make the request. No State has objected to the competence of the General Assembly to make the request.
8. The suggestion by certain States that General Assembly resolution 49/75K was adopted by a small number of States¹ and in controversial circumstances which reflected its political sensitivities is wholly irrelevant to the issue of competence or propriety (see e.g. France, pp. 4-13; the United Kingdom, paras. 2.4-2.11). Equally irrelevant is the implication in the view of the United Kingdom that the involvement of non-governmental organisations in lobbying efforts might in some way taint the *bona fides* or legitimacy of resolution 49/75K (the United Kingdom, Written Observations, paras. 1.2 and 2.2-2.3). The resolution was adopted by a majority of the members of the United Nations which voted on the matter. As previously stated by Solomon Islands (WHO, Further Written Observations, para. 2.5), its support for the request, and its observations on these matters, are driven by interest in clarifying and confirming the rules of international law in relation to the use and threatened use of nuclear weapons has rather more to do with the past (and current) activities of certain nuclear weapons States in and around its territory. The efforts of responsible non-governmental organisations, including associations of professional physicians, in raising public awareness and contributing to the processes of international law are to be welcomed.

PROPRIETY

9. Only a small number of States have expressed the view that the Court should, for the

¹ France notes that only about 40% of the United Nations' 185 members supported resolution 49/75K; a similar statistical analysis, which Solomon Islands does not consider to be a particularly authoritative way of making arguments in international law, would reveal that only about 3% of the UN members would consider the use of nuclear weapons to be lawful in any circumstances: see *infra*, para. 18.

first time in its history, exercise its discretion and refuse to give the Advisory Opinion requested. An overwhelming majority of the 185 members of the United Nations have either expressed a clear preference in favour of the Court's giving the Advisory Opinion or have not opposed it on grounds of propriety or otherwise. These include not only *all* developing countries submitting Written Observations, but also a significant number of developed countries (Ireland, Japan, New Zealand, Sweden). At least one nuclear-weapon State (China) has not objected to the propriety of the Court's giving an opinion on the substance. Just seven States (Finland, France, Germany, the Netherlands, Russia, the United Kingdom, the United States) objected on the grounds of propriety. Two States which objected in relation to the WHO request (Australia and Italy) have not objected in relation to the General Assembly request. In this context the burden is again very much on these States to satisfy the Court with compelling reasons why an Advisory Opinion should not be given.

10. Solomon Islands has already set out its reply to the views of these States, indicating why there are no such "compelling reasons", and it refers to these here *mutatis mutandis* (WHO, Further Written Observations, paras. 3.3-3.27). The Court is competent to give and should give an Opinion on the legal question posed by the General Assembly. The following paragraphs restate Solomon Islands' position.
11. The Opinion requested is undoubtedly a "legal question".² It has been made to the Court as the principal judicial organ of the United Nations, and it invites the Court to contribute to the effective functioning of the United Nations system, and in particular that of the General Assembly within that system. The question posed by the General Assembly clearly falls within the objective and functions of the Charter of the United Nations, which embraces a broad range of activities relating to international peace and security, including the legality of the use or threatened use of force.
12. A substantial number of United Nations member States have voted in favour of Resolution 49/75 K requesting the Court to give an Advisory Opinion. No member of the UN has denied that the resolution was not validly adopted. Moreover, for the reasons set out below, contrary to the assertions by the United States (Written Statement, p.6) and France (Written Statement, pp.16-17), the request is appropriate and will help the General Assembly in its activities relating to international peace and security.
13. First, Solomon Islands reiterates the importance for the United Nations General Assembly to be advised by the Court on the legal status of the use of nuclear weapons. The Court, in accordance with its long standing and well-established practice, should give an Advisory Opinion on the question posed. As Egypt has

² Conditions of Admission of a State to Membership in the United Nations, Adv.Op., 28 May 1948, ICJ Reports 1947-1948, p. 61.

indicated, there are no compelling reasons which require the Court not to give an Advisory Opinion (Written Statement, p.5).

14. Second, the Opinion requested is of genuine importance for the General Assembly in the conduct of its activities related to the use of nuclear weapons. In line with the views expressed by Samoa (Written Statement, p.5) and Egypt (Written Statement, p.6), Solomon Islands considers that the Court's Opinion will, in concrete terms, enlighten the General Assembly in the conduct of its activities in promoting further negotiations on nuclear disarmament.³ Contrary to the assertion of Finland (Written Statement, p.2), the Netherlands (Written Statement, p.4) and the United Kingdom (Written Statement, pp.19-20), the viability of existing achievements in the field of nuclear disarmament and non-proliferation would not be undermined by the Court giving an Opinion. In any event, the issues of legality of threat and use and disarmament are related but clearly distinguishable. The ascertainment of the legal status of the use of nuclear weapons would allow the General Assembly to ensure that its activities are carried out properly and in a manner which takes fully into account the priority needs of the international community.
15. Third, Solomon Islands recalls that the political character which the question might have does not prevent the Court from giving an Opinion. The question put by the General Assembly relates to the compatibility of the threat and the use of nuclear weapons with international law. The General Assembly is therefore inviting the Court to address a legal question and carry out a task clearly within its judicial function. In this context, contrary to the assertions of some States (see France, pp.19-20 and Germany, p.2), the fact that the question has political implications is not in itself an obstacle to the competence of the Court.⁴ It should also be added that in giving the Opinion the Court would not go beyond its judicial function and embark upon a legislative or policy-making course, as some States have suggested (France, p.19, Finland, p.1).
16. Fourth, it is for the Court to decide if a request for an Opinion fulfils the conditions of Article 96(2) of the United Nations Charter. There are no criteria other than those set forth in this provision which should prevent the Court from giving an Opinion. In this respect, the United Kingdom has misunderstood or even misinterpreted the practice of the Court (Written Statement, pp.9-18). The Court has obvious competence to give an Opinion.
17. Finally, Solomon Islands points out that the answer cannot be detrimental to on-going disarmament negotiations (*quite the contrary*). This should be clear enough from the successful indefinite extension in May 1995 of the 1968 NPT after the WHO and

³ Western Sahara, Adv.Op., 16 October 1975, ICJ Reps. 1975, p.37.

⁴ See Certain Expenses of the UN, Adv.Op., 20 July 1962, ICJ Rep. 1962, p.155.

General Assembly requests had been made. Rather, it is actions such as France's decision of 13 June 1995 to resume nuclear testing in the Pacific region and its explosion of a nuclear device on 5 September 1995 which are far more likely to be detrimental to on-going disarmament negotiations than an Advisory Opinion which the Court might render. These actions are incompatible with France's commitment of May 1995 to exercise "utmost restraint" on the conduct of nuclear tests following the indefinite extension of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons and before the adoption of a comprehensive test-ban treaty in 1996.⁵ It is actions such as this which "pourrait avoir qu'une incidence négative sur les négociations en cour pour parvenir à un monde plus sur." (France, p. 16, para. 7). If a State is able to act thus in time of peace, Solomon Islands feels all the more concerned about what might happen in time of war or armed conflict. Solomon Islands maintains its hope that no further tests will take place before or after the Court gives this Advisory Opinion.

SUBSTANTIVE LEGAL ARGUMENTS

18. Whilst a small number of States have been silent or ambiguous on the substantive aspects of the question posed by the General Assembly, the overwhelming majority have expressed the view that any use or threatened use would be contrary to international law. Of the twenty-eight States submitting Written Observations just six (France, Italy, the Netherlands, Russia, the United Kingdom, the United States) have been prepared to positively express the view (or suggest) that the use of nuclear weapons could *in any circumstances* be lawful.
19. The arguments put forward in favour of the legality of the use or threatened use of nuclear weapons in relation to the request for an Advisory Opinion by the General Assembly are essentially the same as those relied upon in arguments made pursuant to the WHO request. Solomon Islands has already responded to these arguments in some detail (see WHO, Further Written Observations to the WHO request, paras. 4.2-4.96). Since these Further Written Observations address most of the arguments made in favour of the legality of the use of nuclear weapons, these should be referred to and treated as applying *mutatis mutandis* to the arguments in favour of legality put forward by some States in responding to the General Assembly's request.
20. Not wishing to burden the Court with an unnecessary restatement of its earlier Written Observations, Solomon Islands recalls only its essential submissions:-
 - (a) international humanitarian law prohibits the use of nuclear weapons even if it does not do so expressly: UN General Assembly resolutions prohibiting their use provide evidence of this rule, and the opposition of certain States to these

⁵ Principles and Objectives for Disarmament for Nuclear Non-Proliferation and Disarmament, para. 4(a), NPT/CONF.1995/L.5.

resolutions cannot limit a prohibition based upon customary obligations; with regard to the numerous agreements which regulate their possession, testing, dissemination or elimination, as well as the hitherto unsuccessful efforts to conclude an agreement prohibiting their use, they show that possession or elimination of nuclear weapons is beginning to be regulated but do not indicate that their use would be lawful (on these points see Solomon Islands' WHO Further Written Observations, paras. 4.25-4.42, 4.55-4.71);

- (b) risks of general nuclear war,⁶ effects on civilians, violations of the neutrality of third States, and of genocide similarly indicate a general prohibition on the use of nuclear weapons (on these points see *ibid.*, paras. 4.8-4.9, 4.11, 4.45-4.53, 4.71);
 - (c) international law prohibits the use of nuclear weapons by reason of their effects (as weapons causing inevitable death and unnecessary suffering, poisoning or asphyxiation) (see *ibid.*, paras. 4.5-4.7, 4.4.13-4.23); and
 - (d) the rules of the 1977 First Additional Protocol, as well as those relating to the protection of the environment and human rights, are applicable to any use of nuclear weapons; the rules on self-defence, reprisals or the protection of the environment do not justify their use (see *ibid.*, paras. 4.44, 4.73-4.74, 4.81, 4.88-4.93).
20. Since one State - the United Kingdom - has referred extensively in its Written Observations to some of the arguments made by Solomon Islands in its WHO Written Observations, it is appropriate for Solomon Islands to respond briefly to some of those British arguments. Some of these are also taken up in the Written Observations of other States arguing in favour of the legality of the use or threatened use of nuclear weapons.
21. According to the United Kingdom, the American, British and French declarations on the inapplicability to nuclear weapons of the 1977 First Additional Protocol reflect a general agreement of all States participating in the Geneva Diplomatic Conference on the negotiation of the Protocol. The United Kingdom submits that Solomon Islands is wrong to affirm that there was no consensus in favour of the views expressed in the declarations of these three States.

⁶ Solomon Islands' view that the use of tactical nuclear weapons would lead to wholesale nuclear war appears to be shared by President Francois Mitterrand of France: "On ne peut pas se servir des armes tactiques. S'en servir, c'est déclencher la guerre nucléaire ... [Les armes tactiques] ne peuvent pas être l'appendice d'un armement conventionnel, et donc d'une guerre classique" (16 October 1986, cited in J. Attali, *Verbatim II (1986-1988)*, Fayard, 1995, at pp. 180 and 197).

22. Solomon Islands considers that the United Kingdom's interpretation is quite wrong and should not be relied upon or endorsed by the Court. No support has been put forward to challenge the fact that:
- at the time of the first session of the Conference, several States wanted the Conference to address nuclear weapons (*ibid.*, para. 3.48); and
 - at the close of the Conference, India and Rumania stated their view that various provisions of the First Additional Protocol did apply to nuclear weapons (*ibid.*, para. 3.50).
23. The United Kingdom apparently considers that the declarations of these two countries were ambiguous. It is difficult to see why. Without entering into the precise details of the language used, Solomon Islands believes that these two declarations were enunciated in a clear manner and were not the subject of any greater or lesser discussion than the declarations of the United States, the United Kingdom and France. The Conference was equally silent about both sets of declarations. No greater weight or authority attaches to either set, each of which, in effect, neutralises the other; i.e. there was no consensus. If, as is claimed, a genuine consensus had existed as to the inapplicability of the First Additional Protocol to the use of nuclear weapons, the Court may well ask why France felt impelled to state and restate in its Written Observations to this request for an Advisory Opinion that
- "elle n'avait pas discerné, lors de la conférence, un consensus suffisant sur la portée exacte des obligations qu'assumeraient en matière de dissuasion les Etats qui accepteraient d'être liés par cet instrument." (France, Written Observations, p. 33)
24. Declarations on the inapplicability of the First Additional Protocol were made subsequently by certain members of NATO, at the time of their ratification of the Protocol, and these were not subject to objections by other parties to the Protocol. However, each of these were in the nature of "declarations": they were not "reservations". Since only reservations can modify the legal effect of a treaty (1969 Vienna Convention on the Law of Treaties, Arts. 2(d) and 21(1)), and only reservations have legal effects vis-a-vis States that do not object to them (*ibid.*, Art. 21(3)), these "declarations" cannot be considered as modifying in any way the nature or scope of the legal obligations set forth in the Protocol (on this point see Solomon Islands, Written Observations, para. 3.99).
25. Moreover, the United Kingdom (Written Observations, para. 3.55) and other nuclear weapon States accept that those provisions of the First Additional Protocol which reflect customary international law are applicable to the use of nuclear weapons. Without prejudice to Solomon Islands' other arguments, this important point should be reaffirmed by the Court. The Court should also take the opportunity to restate the relevance of the Martens Clause and its applicability to the use of nuclear weapons. Contrary to the views of at least one nuclear weapon State ("As to nuclear weapons

the 'Martens Clause' is not working at all ... today the 'Martens Clause' may formally be considered inapplicable", Russia, p.13), Solomon Islands shares the views of the International Law Commission that the Martens Clause

"now has the status of general international law. In essence, it provides that even in cases not covered by specific international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."⁷

26. The Court might also wish to consider the scope and effect of the rule set forth in the 1868 Declaration. The United Kingdom (Written Observations, para. 3.65) considers that it is wrong to argue for the illegality of the use of nuclear weapons on the basis of the prohibition on weaponry which renders death inevitable (as envisaged by the 1868 St Petersburg Declaration). The United Kingdom's view is that the Declaration was only intended to prohibit the use of explosive bullets directed against individuals. It was not, it is claimed, intended to protect persons who find themselves close to the explosion from incidental injury or fatality, and it is not applicable to explosive artillery shells.
27. Solomon Islands does not share this narrow interpretation of the Declaration, and has already explained why the principles underlying it are applicable to nuclear weapons (Written Observations, para. 4.5). The rule in the St Petersburg Declaration, enunciated in an abstract and non-specific manner, is to be interpreted more broadly. The humanitarian basis of the Declaration of St Petersburg requires that the prohibition on the use of weapons which render death inevitable is entirely separate and independent from the particular rule enunciated *in concreto* on the prohibition of the use of explosive bullets. The principles of the Declaration, as set forth in its preamble, apply to all types of weapons, including nuclear weapons.
28. The St Petersburg Declaration recognises the necessities of warfare whilst safeguarding certain fundamental principles of humanity. In this perspective, an explosive bullet prohibited by the Declaration is to a non-explosive bullet what a nuclear weapon is to a conventional weapon. A bullet is aimed at a single combatant. A shell is aimed at a group of combatants. That which is prohibited for an "individual" projectile (the explosive bullet) need not necessarily be prohibited for a "collective" projectile (bombs or shells), if the latter does not have the same effects as the explosive bullet. If, however, a nuclear weapon (or an explosive shell) has on a group of combatants the same effect as that produced by an explosive bullet on a single combatant, it will, it is submitted, be prohibited as contrary to the principle and rule set forth in the St Petersburg Declaration.
29. The United Kingdom (Written Observations paras. 3.68, 3.70 and 3.73) further

⁷ United Nations. Report of the International Law Commission on the work of its forty-sixth session, 2 May - 22 July 1994. GAOR A/49/10, p. 317.

challenges Solomon Islands' view that the use of nuclear weapons will necessarily entail indiscriminate effects and heavy losses in the civilian population, leading to a possible genocide. Solomon Islands has sufficiently responded to this argument in its Written Observations (Paras. 4.8-4.11, 4.45-4.48) and does not feel the need to develop its arguments further.

30. With regard to the applicability and effect of human rights and environmental instruments to the use of nuclear weapons, Solomon Islands is pleased to note that most of the nuclear weapons States have now seen fit to address the relevance of these rules which impose fundamental norms of international law. The fact that the views of States do differ widely does present the Court with an opportunity to address an issue of fundamental importance.
31. As to the effect of international human rights instruments, a number of States have sought to challenge the arguments of Solomon Islands and others as to the applicability of such instruments to the use of nuclear weapons. Discussion has in particular focused on the right to life (see the United Kingdom, paras. 3.99-3.108; the Netherlands, para. 27; the United States, pp. 42-46). Solomon Islands agrees that the right to life is not to be construed in these instruments as absolute, and has never suggested otherwise. Two points need to be made. First, the Netherlands, the United Kingdom etc now appear to accept the relevance and applicability of human rights instruments to the use of nuclear weapons. They do not deny that these instruments apply in times of war as in times of peace, at least insofar as the right to life is concerned. Second, they appear to agree that death from an *unlawful* use of a nuclear weapon would also violate Article 6 of the 1966 ICCPR (and similar provisions in regional instruments).
32. Since, in Solomon Islands' view, it is difficult to conceive of any situation in which the use of nuclear weapons could be lawful under international law (i.e. because it had no radioactive effect likely to endanger civilian health or third States, would not be detrimental to the environment, and would conform to all rules of international humanitarian law) it follows that the use of nuclear weapons will also violate the right to life. The inevitability and extent of, and risks relating to, such a violation justifies the view that any use of a nuclear weapons would constitute "a crime against humanity" (on this point see Written Observations, paras. 3.36 and 3.42).
33. As to the effect of international environmental agreements, it is clear that most States share Solomon Islands' views on the interpretation and applicability of the *jus in bello* rules concerning the protection of the environment, as well as the applicability of general international environmental law to the use of nuclear weapons.
34. Some states have sought to show that environmental agreements are not relevant to this issue because they have not "in terms" addressed the use or threat of use of nuclear weapons (the United Kingdom, para. 3.111), or because an implicit conclusion to that effect would lead to absurd results (the United Kingdom, para.

3.112 allowing, for example, the 1987 European Convention for the Protection of Pet Animals to be construed as prohibiting the use of nuclear weapons) or because they are not expressly or impliedly applicable in armed conflict or to nuclear weapons per se (the United States, p.34). These arguments miss the point. As with human rights, the unlawful use of nuclear weapons which causes environmental damage beyond that which is permitted by international environmental agreements or customary law would also violate those instruments or rules (in particular those relating to the protection of resources whose use would be significantly impaired as a result of contamination by radioactive material, i.e. biodiversity, watercourses, the marine environment). Moreover no response has been given by these States to the view of Solomon Islands and others that international environmental agreements and customary law in the field apply in times of war as in times of peace, unless their provisions direct otherwise (Written Observations, paras. 4.37-4.41) and that accordingly contamination arising out of any use of a nuclear weapon would violate the provisions of applicable treaties. This view has been applied in express terms by the International Law Commission in respect of its own 1994 Draft Articles on the Law of Non-Navigational Uses of International Watercourses: in the Commentary, but not in the Articles themselves, it is stated that "the present articles themselves remain in effect even in time of armed conflict" (*ibid.*, p. 316, para. 3). (Report of the ILC on the work of its forty-sixth session, 2 May - 22 July 1994, GAOR, 49th session, Supplement No. 10). The Court should, in respect of environmental agreements, apply the same presumption in favour of applicability where an instrument is silent.

SUBMISSIONS

35. Accordingly, and for the reasons set out in its earlier Written Observations and in these Further Written Observations it is submitted that the International Court of Justice should give an Advisory Opinion which states:
- (A) that the General Assembly is competent to request an Advisory Opinion from the International Court of Justice on this question, and that the Court is competent to and should give an Advisory Opinion on the question submitted;
 - (B) that any use of a nuclear weapon by a State would violate its obligations under international law as reflected in the rules of international law concerning methods and means of warfare (*jus in bello*) and neutrality. ALTERNATIVELY that any use of nuclear weapons must not violate applicable rules of international law concerning methods and means of warfare (*jus in bello*) and neutrality;
 - (C) that any use of a nuclear weapon by a State would violate its obligations under international law as reflected in the rules of international law for the protection of human health and the

environment and fundamental human rights. ALTERNATIVELY that the use of nuclear weapons must not violate applicable rules of international law for the protection of human health and the environment and fundamental human rights;

- (D) that any use of a nuclear weapon by a State would constitute a crime against humanity, ALTERNATIVELY that the use of nuclear weapons in violation of international law constitutes a crime against humanity; and
- (E) that any use by a State of a nuclear weapon gives rise to its international responsibility, ALTERNATIVELY that the violation by a State of its obligations under international law relating to the use of nuclear weapons gives rise to its international responsibility; and
- (F) that any threat of use by a State of a nuclear weapon would, by consequence of the illegality of actual use, be prohibited under international law.