XIV. Disputes

State Responsibility — Consequences Attaching to State Crimes — Countermeasures and Dispute Settlement — International Liability — Australian View

The following is an extract from the text of the statement made by Mr James Baxter on 20 October 1995 on behalf of the Australian Delegation to the Sixth Committee of the General Assembly of the United Nations, concerning the Report of the International Law Commission on the Work of its Forty-Seventh session, and focusing on Chapters IV and V:

> Mr Chairman, I turn now to Chapter IV of the Report.
>
> My delegation notes the progress made by the Commission this year on the subject of State responsibility. A large portion of the Commission's time on State responsibility was spent on elaborating the normative and institutional consequences of State crimes. While greatly respecting the idealism and intellectual commitment of those who have laboured on this topic, especially the Special Rapporteur Mr Arangio Ruiz, we must express some reservations as to the value of this work. As we stated last year, the issue of State crimes raises difficult and basic questions. The difficulties include the consequences attaching to an international crime by a State. That is an issue which was grappled with by the Special Rapporteur and the Commission, without resolution.
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> In this respect, draft Article 19 raises a number of fundamental issues concerning the proposed roles for political organs such as the General Assembly and the Security Council in initially identifying that an international crime has been committed. Another set of issues relate to the proposed function of the International Court of Justice in finally resolving the matter: for example, is the Court suited to carry out this function, assuming it continues to operate in the manner in which it does now? Would it be able to respond quickly enough to an ongoing international crime being committed by a State? These are but a few of a multiplicity of questions raised—but not resolved—in relation to crimes by States.
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> My delegation does not consider that the practical benefits for States deriving from this aspect of the Commission's work are sufficient to justify the further expenditure of its limited time on the subject of State crimes. In this respect, my delegation endorses the views of many other delegations which have expressed concern about the focus of the Commission on the concept of State crimes. Given the length of time that the topic of State responsibility has been under consideration by the Commission, we would urge the Commission to place its goal of completing the first reading of the draft articles by next year above undertaking further work on State crimes.
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> Mr Chairman, by contrast, my delegation welcomes the Commission's work on countermeasures and dispute settlement. Articles 13 and 14 of Part Two on countermeasures and their associated commentaries are a valuable summary of State practice in this area. My delegation considers that this work will be of

immediate practical utility to States. We commend the Commission's work on this subject, and again urge the Commission to ensure the completion of the first reading of the draft articles on State responsibility next year.

Mr Chairman, I should also like to make a few observations on Chapter V of the Report on International Liability.

My delegation notes that the Commission was unable to consider the Special Rapporteur's latest two reports on this subject in an other than preliminary fashion. We regard this as unfortunate. As we have stated in this Committee in previous years, we regard the liability aspect of this topic as most important and useful to states, and we welcome the fact that the Special Rapporteur is now addressing liability in his reports. We urge the Commission to ensure that sufficient time is devoted in future years to consideration of this topic to ensure that progress is made on liability. My delegation notes in particular the intervention of the delegation of Ireland, advocating a refocusing of this topic. We believe the Commission could usefully examine whether its consideration of the issues which have arisen in the course of its consideration on liability might be reorganised.

My delegation made initial comments on the Special Rapporteur's Tenth Report last year. Without repeating what was said then, my delegation wishes to stress that we do not accept that a victim of injury from an incident causing transboundary damage can be left uncompensated, merely because the private operator in the State in which the incident occurred did not have sufficient financial resources to provide adequate compensation. We regard residual State liability as essential for this reason. My delegation therefore strongly favours Alternative A of the two versions of Article 21 set out in Paragraph 30 of the Tenth Report. Indeed, the Special Rapporteur may wish to consider a further alternative for Article 21, whereby the State in which the incident occurs is liable for any residual damage not compensated by the operator, regardless of any fault on the State's part—as in Option C to Paragraph 26 of the Tenth Report.

Turning now to the Eleventh Report, my delegation has some specific comments on the issue of harm to the environment. We would caution against limiting the notion of harm to the environment to so-called "use values". In certain circumstances, the intrinsic values of a landscape, such as its wilderness or aesthetic values, may be among those for which compensation for damage should be sought. In this context, my delegation would draw the attention of the Commission to the ongoing work in developing a liability annex to the protocol on environment protection to the Antarctic Treaty.

The Commission in 1995 provisionally adopted four new draft articles with commentary, Articles A to D. While welcoming especially the progress on Article C on liability and reparation, my delegation is concerned about three aspects. First, we remain concerned that the references to "significant" transboundary harm will serve as a means whereby genuine harm suffered is not compensated where it does not reach the possibly quite high threshold implied by the term "significant". Secondly, the use of a due diligence standard to prevent or minimise risk of transboundary harm, and the fact that this obligation is not an obligation of result (see Paragraph 4 of the Commentary to Article B in the Report), does not seem to us to be appropriate in all circumstances. My delegation accordingly welcomes the reference to "specific obligations owed to other States in that regard" in Article A, which indicates that specific treaty regimes may in fact contain obligations of result concerning measures to prevent

or minimise the risk of transboundary harm. Thirdly, my delegation is concerned with the introductory words to Article C "in accordance with the present articles". The commentary indicates that those words are designed to convey the understanding that the principles of liability are treaty based. If this means the Commission considers there is no customary international law basis for the principle, my delegation strongly disagrees. Australia has long held the view that liability arises under customary law for transboundary pollution.

In conclusion, Mr Chairman, my delegation considers the issues which have arisen during consideration of this topic are important. We urge the Commission to devote sufficient time to them at future sessions. The issues raised are under consideration in several multilateral forums at present, including the work of Antarctic Treaty parties on a liability annex, the International Maritime Organization's development of an international convention on liability and compensation for damage in connection with the carriage of hazardous and noxious substances by sea, the International Atomic Energy Agency's Standing Committee on Nuclear Liability and the development of a liability and compensation protocol to the Basel Convention.

Convention on the Settlement of Investment Disputes Between States and Nationals of Other States — Contracting Parties and Signatories

On 30 November 1995, in the House of Representatives, the Attorney-General, Mr Lavarch, answered a question upon notice from Mr Melham (Banks, ALP). The following is the text of the question and answer (House of Representatives, *Debates*, vol 205, p 4505):

Mr Melham asked the Attorney-General, upon notice, on 25 September 1995:

(1) Will he bring up-to-date [sic] the list of contracting states and signatories of the 1975 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States which he provided [in] his answer to question No. 79 (*Debates*, 28 September 1993, page 1286).

(2) Have there been communications concerning the convention between the Commonwealth and Western Australian Governments since his answer to question No. 545 (*Debates*, 21 February 1994, page 967); if so, with what result.

Mr Lavarch—The answer to the honourable member's question is as follows:

(1) The Attorney-General's Department has corresponded with the International Centre for Settlement of Investment Disputes (ICSID) and ICSID has provided the Department with a list of contracting states and signatories of the Convention as at 4 August 1995. The list of the 122 parties to the Convention, together with the date of entry into force for each country, is set out below.

(2) No, I am advised that there have been no further communications concerning the Convention between the Commonwealth and Western Australia Governments since my answer to question No. 545.

List of Contracting States and Other Signatories of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID)

(as at August 4, 1995)

The 134 States listed below have signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States on the dates indicated. Of these, 122 States have deposited their instruments of ratification, and the dates of such deposit and of the attainment of the status of Contracting State by the entry into force of the Convention for each of them are indicated.

Participant	*Signature*	*Ratification*	*Entry into Force*
Afghanistan	30 Sep 1966	25 Jun 1968	25 Jul 1968
Albania	15 Oct 1991	15 Oct 1991	14 Nov 1991
Algeria	17 Apr 1995		
Argentina	21 May 1991	19 Oct 1994	18 Nov 1994
Armenia	16 Sep 1992	16 Sep 1992	16 Oct 1992
Australia	24 Mar 1975	2 May 1991	1 Jun 1991
Austria	17 May 1966	25 May 1971	25 Jun 1971
Azerbaijan	18 Sep 1992	18 Sep 1992	18 Oct 1992
Bangladesh	20 Nov 1979	27 Mar 1980	26 Apr 1980
Barbados	13 May 1981	1 Nov 1983	1 Dec 1983
Belarus	10 Jul 1992	10 Jul 1992	9 Aug 1992
Belgium	15 Dec 1965	27 Aug 1970	26 Sep 1970
Belize	19 Dec 1986		
Benin	10 Sep 1965	6 Sep 1966	14 Oct 1966
Bolivia	3 May 1991	23 Jun 1995	23 Jul 1995
Botswana	15 Jan 1970	15 Jan 1970	14 Feb 1970
Burkina Faso	16 Sep 1965	29 Aug 1966	14 Oct 1966
Burundi	17 Feb 1967	5 Nov 1969	5 Dec 1969
Cambodia	5 Nov 1993		
Cameroon	23 Sep 1965	3 Jan 1967	2 Feb 1967
Central African Republic	26 Aug 1965	23 Feb 1966	14 Oct 1966
Chad	12 May 1966	29 Aug 1966	14 Oct 1966
Chile	25 Jan 1991	24 Sep 1991	24 Oct 1991
China	9 Feb 1990	7 Jan 1993	6 Feb 1993
Colombia	18 May 1993		
Comoros	26 Sep 1978	7 Nov 1978	7 Dec 1978
Congo	27 Dec 1965	23 Jun 1966	14 Oct 1966
Costa Rica	29 Sep 1981	27 Apr 1993	27 May 1993
Côte d'Ivoire	30 Jun 1965	16 Feb 1966	14 Oct 1966
Cyprus	9 Mar 1966	25 Nov 1966	25 Dec 1966
Czech Republic	23 Mar 1993	23 Mar 1993	22 Apr 1993
Denmark	11 Oct 1965	24 Apr 1968	24 May 1968
Ecuador	15 Jan 1986	15 Jan 1986	14 Feb 1986
Egypt	11 Feb 1972	3 May 1972	2 Jun 1972
El Salvador	9 Jun 1982	6 Mar 1984	5 Apr 1984

Participant	*Signature*	*Ratification*	*Entry into Force*
Estonia	23 Jun 1992	23 Jun 1992	23 Jul 1992
Ethiopia	21 Sep 1965		
Fiji	1 Jul 1977	11 Aug 1977	10 Sep 1977
Finland	14 Jul 1967	9 Jan 1969	8 Feb 1969
France	22 Dec 1965	21 Aug 1967	20 Sep 1967
Gabon	21 Sep 1965	4 Apr 1966	14 Oct 1966
Gambia, The	1 Oct 1974	27 Dec 1974	26 Jan 1975
Georgia	7 Aug 1992	7 Aug 1992	6 Sep 1992
Germany	27 Jan 1966	18 Apr 1969	18 May 1969
Ghana	26 Nov 1965	13 Jul 1966	14 Oct 1966
Greece	16 Mar 1966	21 Apr 1969	21 May 1969
Granada	24 May 1991	24 May 1991	23 Jun 1991
Guinea	27 Aug 1968	4 Nov 1968	4 Dec 1968
Guinea-Bissau	4 Sep 1991		
Guyana	3 Jul 1969	11 Jul 1969	10 Aug 1969
Haiti	30 Jan 1985		
Honduras	28 May 1986	14 Feb 1989	16 Mar 1989
Hungary	1 Oct 1986	4 Feb 1987	6 Mar 1987
Iceland	25 Jul 1966	25 Jul 1966	14 Oct 1966
Indonesia	16 Feb 1968	28 Sep 1968	28 Oct 1968
Ireland	30 Aug 1966	7 Apr 1981	7 May 1981
Israel	16 Jun 1980	22 Jun 1983	22 Jul 1983
Italy	18 Nov 1965	29 Mar 1971	28 Apr 1971
Jamaica	23 Jun 1965	9 Sep 1966	14 Oct 1966
Japan	23 Sep 1965	17 Aug 1967	16 Sep 1967
Jordan	14 Jul 1972	30 Oct 1972	29 Nov 1972
Kazakhstan	23 Jul 1992		
Kenya	24 May 1966	3 Jan 1967	2 Feb 1967
Korea, Republic of	18 Apr 1966	21 Feb 1967	23 Mar 1967
Kuwait	9 Feb 1978	2 Feb 1979	4 Mar 1979
Lesotho	19 Sep 1968	8 Jul 1969	7 Aug 1969
Liberia	3 Sep 1965	16 Jun 1970	16 Jul 1970
Lithuania	6 Jul 1992	6 Jul 1992	5 Aug 1992
Luxembourg	28 Sep 1965	30 Jul 1970	29 Aug 1970
Madagascar	1 Jun 1966	6 Sep 1966	14 Oct 1966
Malawi	9 Jun 1966	23 Aug 1966	14 Oct 1966
Malaysia	22 Oct 1965	8 Aug 1966	14 Oct 1966
Mali	9 Apr 1976	3 Jan 1978	2 Feb 1978
Mauritania	30 Jul 1965	11 Jan 1966	14 Oct 1966
Mauritius	2 Jun 1969	2 Jun 1969	2 Jul 1969
Micronesia	24 Jun 1993	24 Jun 1993	24 Jul 1993
Moldova	12 Aug 1992		
Mongolia	14 Jun 1991	14 Jun 1991	14 Jul 1991
Morocco	11 Oct 1965	11 May 1967	10 Jun 1967
Mozambique	4 Apr 1995	7 Jun 1995	7 Jul 1995

Participant	*Signature*	*Ratification*	*Entry into Force*
Nepal	28 Sep 1965	7 Jan 1969	6 Feb 1969
Netherlands	25 May 1966	14 Sep 1966	14 Oct 1966
New Zealand	2 Sep 1970	2 Apr 1980	2 May 1980
Nicaragua	4 Feb 1994	20 Mar 1995	19 Apr 1995
Niger	23 Aug 1965	14 Nov 1966	14 Dec 1966
Nigeria	13 Jul 1965	23 Aug 1965	14 Oct 1966
Norway	24 Jun 1966	16 Aug 1967	15 Sep 1967
Oman	5 May 1995	24 Jul 1995	23 Aug 1995
Pakistan	6 Jul 1965	15 Sep 1966	15 Oct 1966
Papua New Guinea	20 Oct 1978	20 Oct 1978	19 Nov 1978
Paraguay	27 Jul 1981	7 Jan 1983	6 Feb 1983
Peru	4 Sep 1991	9 Aug 1993	8 Sep 1993
Philippines	26 Sep 1978	17 Nov 1978	17 Dec 1978
Portugal	4 Aug 1983	2 Jul 1984	1 Aug 1984
Romania	6 Sep 1974	12 Sep 1975	12 Oct 1975
Russian Federation	16 Jun 1992		
Rwanda	21 Apr 1978	15 Oct 1979	14 Nov 1979
Saudi Arabia	28 Sep 1979	8 May 1980	7 Jun 1980
Senegal	26 Sep 1966	21 Apr 1967	21 May 1967
Seychelles	16 Feb 1978	20 Mar 1978	19 Apr 1978
Sierra Leone	27 Sep 1965	2 Aug 1966	14 Oct 1966
Singapore	2 Feb 1968	14 Oct 1968	13 Nov 1968
Slovenia	7 Mar 1994	7 Mar 1994	6 April 1994
Slovak Republic	27 Sep 1993	27 May 1994	26 Jun 1994
Solomon Islands	12 Nov 1979	8 Sep 1981	8 Oct 1981
Somalia	27 Sep 1965	29 Feb 1968	30 Mar 1968
Spain	21 Mar 1994	18 Aug 1994	17 Sep 1994
Sri Lanka	30 Aug 1967	12 Oct 1967	11 Nov 1967
Saint Lucia	4 Jun 1984	4 Jun 1984	4 Jul 1984
St Kitts and Nevis	14 Oct 1994	4 Aug 1995	3 Sep 1995
Sudan	15 Mar 1967	9 Apr 1973	9 May 1973
Swaziland	3 Nov 1970	14 Jun 1971	14 Jul 1971
Sweden	25 Sep 1965	29 Dec 1966	28 Jan 1967
Switzerland	22 Sep 1967	15 May 1968	14 Jun 1968
Tanzania	10 Jan 1992	18 May 1992	17 Jun 1992
Thailand	6 Dec 1985		
Togo	24 Jan 1966	11 Aug 1967	10 Sep 1967
Tonga	1 May 1989	21 Mar 1990	20 Apr 1990
Trinidad and Tobago	5 Oct 1966	3 Jan 1967	2 Feb 1967
Tunisia	5 May 1965	22 Jun 1966	14 Oct 1966
Turkey	24 Jun 1987	3 Mar 1989	2 Apr 1989
Turkmenistan	26 Sep 1992	26 Sep 1992	26 Oct 1992
Uganda	7 Jun 1966	7 Jun 1966	14 Oct 1966
United Arab Emirates	23 Dec 1981	23 Dec 1981	22 Jan 1982

Participant	*Signature*	*Ratification*	*Entry into Force*
United Kingdom of Great Britain and Northern Ireland	26 May 1965	19 Dec 1966	18 Jan 1967
United States of America	27 Aug 1965	10 Jun 1966	14 Oct 1966
Uruguay	28 May 1992		
Uzbekistan	17 Mar 1994	26 Jul 1995	25 Aug 1995
Venezuela	18 Aug 1993	2 May 1995	1 Jun 1995
Western Samoa	3 Feb 1978	25 Apr 1978	25 May 1978
Yugoslavia, Socialist Federal Republic of	21 Mar 1967	21 Mar 1967	20 Apr 1967
Zaire	29 Oct 1968	29 Apr 1970	29 May 1970
Zambia	17 Jun 1970	17 Jun 1970	17 Jul 1970
Zimbabwe	25 Mar 1991	20 May 1994	19 Jun 1994

International Court of Justice — East Timor Case — Australian Statement

On 22 February 1991, the Portuguese Government filed an application instituting proceedings against Australia in the Registry of the International Court of Justice, concerning East Timor. Oral argument before the Court in the Hague began on 30 January 1995, and on 6 February 1995, Australia's first statement was presented to the Court by the Solicitor-General of Australia, and Agent and Counsel in the case, Dr Gavan Griffith. Extracts from the text of the submission follow:

> Mr President, Members of the Court,[1]
>
> Australia is committed to this Court as a means for the peaceful settlement of international disputes. This commitment is manifested in Australia's long-standing acceptance, without reservation, of the Court's jurisdiction under the optional clause. But Australia must protest its international good citizenship being taken advantage of by Portugal. Australia has maintained throughout its pleadings, and today it repeats its position, that Portugal is bringing the wrong case against the wrong party. And it is doing so for the wrong reasons.
>
> Our position is that there simply is no real dispute capable of resolution by the Court.
>
> Portugal casts itself in the role of the champion of the people of East Timor, and of non-self-governing peoples generally. The good guy. It seeks to depict Australia as the avaricious exploiter of a defenceless people, taking advantage of a situation to plunder East Timor's natural resources. The bad guy. Portugal also conveys the impression that judgment for Australia in these proceedings would be a judgment against the people of East Timor. A judgment for Portugal is represented as a vindication of the rights of the people of East Timor. But, Mr President, such a portrayal is a perversion not only of the facts but also of the legal issues in this case.
>
> Mr President, let us be clear about one thing: contrary to what Portugal asserts, this case is not about whether the people of East Timor have the right to

self-determination. They do. Portugal says they do. Australia says they do. There is no dispute on this matter.

And, in repeating Australia's position on this issue of self-determination for the people of East Timor, Australia must remind Portugal that it has the longer, the better principled and the more consistent record of support than does Portugal. Australia's support of this right of the people of East Timor commenced long before Portugal's colonial recantations of 1974. Notwithstanding the emotional shroud attached by Portugal to the presentation of its case, the Court deals with this matter on the basis that it is common ground between the parties that the people of East Timor have the right to self-determination.

Thus the lengthy arguments in Portugal's written pleadings and oral proceedings, that the people of East Timor have the right to self-determination, deal with matter not in dispute. Portugal pushes against an open-door, which it does not want to admit is open.

In an effort to keep the issue of self-determination "in play" in these proceedings, Portugal seeks to construct a denial of the Australian position of continuing support. Portugal says that Australia is now modifying the position that it previously took. This is not so. We say again: Australia recognises that the people of East Timor have the right to self determination.

It is true that Australia also has recognised that Indonesia exercises *de jure* sovereignty over the territory. But there is nothing inconsistent between the fact of this recognition, and the continuation of Australia's recognition of the right to self-determination of the people of East Timor.

In most colonial situations you will find both the recognition of the colonial power as the *de jure* sovereign, and the recognition of the right to self-determination of the people of the territory. Immediately prior to its unilateral declaration of the independent Democratic Republic of East Timor, even FRETILIN itself "continued to recognise Portuguese sovereignty over the Territory" (Portuguese Memorial, Annex II.24, vol II, p 159, para 112, and p 160, para 117 (vol II, p 141, para 112 and p 142, para 117 of the English version)). The two kinds of recognition are perfectly compatible. Indeed, they usually co-exist.

Prior to 1974, Portugal's constitution claimed East Timor as a province of Portugal. Today, Indonesia claims it as a province of Indonesia. But the description of the territory under the domestic law of a State exercising sovereignty over a territory is irrelevant to its position and entitlement to self-determination under international law. Australia's present recognition of Indonesian sovereignty is no more inconsistent with this right to self-determination of East Timor than Australia's earlier recognition of Portugal's sovereignty over East Timor. Australia can, and does, recognise both that East Timor is a province of Indonesia and that the people of East Timor continue to enjoy the same right to self-determination which they enjoyed when under the colonial administration of Portugal. The right continued, although its enjoyment continued to be postponed.

Mr President, Members of the Court

If this case is not about whether the people of East Timor have the right to self-determination, what is it about? Australia looks for the answer in the Portuguese

submissions. It is, of course, the submissions of the parties which fix the limits of a dispute.

In the written pleadings the only conduct of Australia of which Portugal complains is the conduct referred to in Portuguese submissions 2 and 3 (Portuguese Memorial pp 205–206; Portuguese Reply pp 273–275). Portugal's sole complaint is that Australia has dealt with a State other than Portugal in respect of East Timor, and has excluded any negotiation with Portugal. In the oral proceedings, Professor Correia confirmed that the only actions which Portugal considered as wrongful related to the negotiation, conclusion and implementation of the Treaty with a State other than Portugal, namely Indonesia (CR 95/2, p 34).

Thus, this case is about the alleged rights of Portugal: the only question for decision is whether under international law Australia could conclude, and implement, the 1989 Treaty with Indonesia. Portugal says Australia should have dealt with Portugal and only with Portugal. Australia disputes this.

Mr President, Members of the Court,

Effectively Portugal maintains that Indonesia, the State with which Australia has dealt, unlawfully exercises sovereign rights in the territory. Portugal says that Indonesia's presence in the territory is illegal, and that Portugal is the only legitimate authority. Indonesia disputes this. And it is this dispute between Portugal and Indonesia that is the real subject-matter of the case. The Court necessarily would have to decide the merits of this dispute between Portugal and Indonesia before it could begin to address the question of Australia's position.

But if Indonesia is entitled to exercise of sovereign rights over the territory, Australia cannot be in breach of international law by dealing Indonesia. Thus, unless and until this Court holds and declares that Indonesia's presence in the territory is illegal, no question of any breach of international law by Australia can arise. But it is obvious to Portugal that the Court cannot determine the right of Indonesia to administer the territory in the absence of Indonesia. Indonesia is not a party to these proceedings, and has not consented to the Court determining this question.

The consequence is unavoidable: that the Court must lack jurisdiction to decide the Portuguese claims, or the claims must be inadmissible, on the ground that a decision by the Court would require a prior determination of the rights and responsibility of a third state, which is not a party to the proceedings. The *Monetary Gold* principle is directly applicable.

In its attempts to evade this necessary consequence, on behalf of Portugal Professor Dupuy said expressly that the Court is not asked to examine or to judge the legality of Indonesia's conduct in East Timor (CR 95/5, p 70). Maitre Galvão Teles said unequivocally that Portugal does not base its claim on any alleged violation by Australia not to recognise a factual situation created by the use of force (CR 95/5, p 56).

What Portugal says, is that this issue of Portugal's status is a "given" matter to the Court, because on various occasions between 1975 and 1982 the General Assembly has designated or recognised Portugal as the "administering Power" of East Timor. Thus, Portugal says, the Court may determine, as an abstract proposition, that all States are under a continuing obligation to deal solely with it in respect of the territory. Portugal says the fact of Australia dealing with any

State other than Portugal can be declared to be a violation of international law. As Portugal presents its claim, the conduct of that other State is immaterial. Indeed, on Portugal's view, there is no need to even consider with which other State Australia has dealt. All that is relevant is that Australia has dealt with some State, any State, other than Portugal, as the administering Power of the territory.

But Mr President, and Members of the Court, if the conduct of Indonesia is irrelevant, why does Portugal have so much to say about it? For instance, Volume III of Portugal's Reply contains over 90 pages of material relating to the massacre at Santa Cruz, and the reaction of the international community to this event (Portuguese Reply, vol III, pp 245–338). In argument before the Court, Portugal has said that "indescribable scenes of massacre" followed the Indonesian intervention in East Timor and that Indonesia has "carried out a genocidal policy against the East Timorese people with total and systematic disregard of the most elementary human rights" (CR 95/2, pp 28–29).

Mr President, Australia has been consistently critical of Indonesia's conduct in East Timor. But why does Portugal refer to these distressing circumstances in these proceedings? Indonesia's conduct is relevant (as by their content Portugal's arguments strongly suggest) and this underscores Australia's contention that the real subject-matter of these proceedings is the continuing dispute between Portugal and Indonesia. But, we say, Australia cannot, and should not, be haled into Court to answer for Indonesia's conduct. In the absence of Indonesia, the Court cannot pass judgment on it.

If, on the other hand, Indonesia's conduct is not relevant (and Portugal says it is not), why these constant references to it in the written pleadings and oral submissions? Having "manufactured" a dispute against Australia, Portugal uses the opportunity to ventilate allegations against Indonesia which, it then submits, are of no relevance to the case it has formulated against Australia. The language used by agents and co-agents was emotive, and highly charged, and it was pointedly addressed to the press in the galleries. It was not relevant to the issues which Portugal itself says are before the Court.

Australia is thus no more than an opportune decoy. It is clear that these proceedings are brought against Australia only because Australia is, and Indonesia is not, a party to the Optional Clause.

Portugal's appalling colonial history is known, and is glossed over rather than denied in these proceedings. Its colonial policy was characterised by the General Assembly as a crime against humanity (resolution 2184 (XXI) of 12 December 1966, para 3; resolution 2270 (XXII) of 17 November 1967, para 4). Portugal now seeks to take on a new image, as the international champion of non-self-governing peoples. It frankly admits its hope that these proceedings will "enter the history of international jurisprudence" (CR 95/2, p 50). Thus, Australia, merely because it has submitted to jurisdiction under the optional clause, becomes vehicle for Portugal's long journey to rehabilitate its tarnished image as a former colonial power.

In order to play convincingly the role of champion, Portugal must cast Australia in the role of villain. In its opening, Portugal gratuitously, by innuendo and misquotation, sought to impugn the reputation of Australia. In the opening statements by its agents, Portugal went so far as to suggest that Australia knew of, and approved in advance of, Indonesian plans to occupy East Timor, with a

view to obtaining access to the petroleum resources in the Timor Gap (CR 95/2, pp 26–30).

Mr President, Member of the Court,

This allegation, so made, is dishonourable. It is wholly untrue. And, it is an allegation wholly irrelevant to Portugal's case. Portugal has made it clear, time and time again, that its claim is based solely on Australia's dealings with Indonesia since 1978. Its insinuations concerning Australia's conduct in 1974–1975 are both unfounded and untrue, and, also, are (as it admitted) irrelevant to its case. They were intentionally made as statements of mere prejudice, and for the sole objective of tarnishing the image of Australia.

Counsel of Portugal has quote from a book by a Timorese leader, which states that he sees no reason why the Timorese people should have to pay for Portugal's crimes (CR 95/3, p 51). This is of course true. But, in taking this case to the Court, Portugal is trying to make Australia pay both for Portugal's own crimes, and for Indonesia's behaviour.

In this process, Portugal seeks to sweep its own colonial record under the carpet. Indeed, it puts itself on a completely new carpet, swept clean of its history. Everything it did (or did not do) prior to 1974 it says is now irrelevant (CR95/2, pp 14–15). But it is not irrelevant. The events in East Timor in 1975 were the result of the conditions prevailing in the territory at the time. These were the responsibility of Portugal.

Far from ceasing in 1974, as Portugal pretends (CR 95/2, p 24), this history of neglect culminated in 1975 when Portugal determined to withdraw from the territory ... It was Portugal's withdrawal that was the immediate cause of the conflict. When the FRETILIN counter-coup occurred, most of the local military took sides. This led Portugal to withdraw unilaterally from the mainland. By then Portugal had only two platoons of its own troops (CR 95/3, p 57). And, in December, it refused to re-engage, despite FRETILIN's requests. It withdrew from Atauro on the first opportunity. Portugal did nothing to restore order. It abdicated its responsibilities entirely. All its "courage" and "determination" came later. All too late.

Mr President, Members of the Court,

The conclusion by Australia of the 1989 Treaty with Indonesia had nothing to do with a desire to gain access to the natural resources of East Timor. Australia's purpose was to exploit Australia's own natural resources. The whole of the area to which the Treaty relates is an area over which Australia had claimed sovereign rights years before the events of December 1975. And Australia continued to claim sovereign rights over the entire area. Australia's claims were, and are, disputed by Indonesia. A practical solution to this conflict of claims was necessary before Australia could explore and exploit what, we repeat, it continues to claim as its own natural resources in the area. Like all peoples, Australians have an inherent right to the exploitation of their off-shore natural resources. The central element in this case is the right of Australia, as a coastal State, to exercise its maritime rights by negotiating a settlement to a dispute with the State in control of the opposing coastal territory. In the absence of any authoritative United Nations solutions to the contrary, a coastal State like Australia is not required to refrain from asserting and exercising its own claims

and interests in its offshore maritime zones, until a self-determination dispute concerning the opposing coastal State has been settled.

Of course, the 1989 Treaty with Indonesia is not a maritime delimitation treaty. It does not affect the sovereign rights claimed in the Zone of Cooperation by each contracting State (Article 2, paragraph 3 of the Treaty). The Treaty does not bind Portugal. It is merely a treaty between Indonesia and Australia which resolves, on an interim basis, a dispute between states presently exercising sovereign rights over adjacent territory.

Negotiation with Indonesia implied recognition by Australia of this existing fact of the exercise of Indonesian sovereign rights over East Timor. But this is a fact. As I have said, Australian recognition of this is not inconsistent with the right of the people of East Timor to self-determination.

Portugal says that no other State has gone as far as Australia has in recognising *de jure* Indonesian sovereignty over East Timor. This is untrue. Australia's Counter-Memorial points to numerous (indeed many) other States which have recognised Indonesian sovereignty over East Timor (Australian Counter-Memorial pp 78–86). In particular, States of the region, (such as Malaysia, Papua New Guinea, the Philippines and Singapore) have gone further, indeed much further, than Australia, and have recognised also that an act of self-determination has already taken place in East Timor, as a result of which that people chose integration with Indonesia.

Australia does not doubt that Portugal may have a genuine concern for the welfare of the people of East Timor. Australia shares that concern, and has been active in the assistance that it has given the people of East Timor. But this issue of self-determination is primarily one for the political organs of the United Nations. There are no United Nations resolutions requiring, or even calling upon, States to refrain from any dealings with Indonesia in respect of the territory. The facts are that as much as other States have recognised the incorporation of East Timor by Indonesia, they also have entered into treaties with Indonesia, applying to the territory of East Timor.

The United Nations has never criticised Australia or any other State for recognising Indonesian sovereignty over East Timor, or for dealing with Indonesia in respect of that territory. In particular, no United Nations organ has ever criticised Australia in respect of 1989 Treaty with Indonesia. And no United Nations organ, or any State other than Portugal, has ever suggested that, under international law, all States are required to deal solely with Portugal in respect of East Timor.

In 1982, in the last of the resolutions it adopted on the question of East Timor, the General Assembly requested the Secretary-General to invite consultations with "all parties directly concerned, with a view to exploring avenues for achieving a comprehensive settlement of the problem" (resolution 37/30 of 23 November 1982, operative para 1). The resolution the previous year had identified the "interested parties" as Portugal, the representatives of the East Timorese people, and Indonesia (resolution 36/50 of 24 November 1981, operative para 3). Clearly Portugal is not recognised by the United Nations as the sole legitimate authority in East Timor. It is merely one of several parties directly concerned.

Pursuant to the General Assembly's request, consultations involving Indonesia and Portugal have been held under the auspices of the Secretary-

General, and are still continuing. The Secretary-General held a fifth round of meetings in Geneva with the foreign ministers of Portugal and Indonesia on 9 January 1995. A statement issued following that meeting is before the Court as Document 3 in our folder provided this morning. It notes that the two ministers "agreed to consider at the next round of talks substantive issues identified by the Secretary-General regarding possible avenues towards achieving a just, comprehensive and internationally acceptable solution to the question of East Timor" (p 2, para 6). It notes also "the need for continued restraint by both parties in the interest of maintaining a favourable atmosphere for further progress towards a comprehensive solution to the question of East Timor" (p 3, para 8). Thus, the United Nations itself recognises that achievement of self-determination in East Timor requires a prior resolution of a difference between Portugal and Indonesia.

Portugal now seeks unilaterally to remove the issue of East Timor into the new forum of this Court. It does so notwithstanding its own recognition of "the need for continued restraint ... in the interest of maintaining a favourable atmosphere for further progress" in the ongoing consultations with the Secretary-General.

If Portugal wants to pursue this matter, the place to do it is through the appropriate political organs of the United Nations and in the framework of the Secretary-General's negotiations. Australia hopes that the situation in East Timor will be satisfactorily resolved through an act of self-determination by the people of East Timor. But the Court cannot produce that result, nor resolve the question of East Timor in these proceedings.

Mr President, Members of the Court,

Here there simply is no bilateral legal dispute between Portugal and Australia capable of resolution by the Court. No decision by the Court on the merits of this case will lead to any practical resolution of the situation in East Timor. There is only a negative side, for a decision by the Court certainly has the potential to affect adversely relations between Australia and Indonesia and the help Australia can offer to the people of East Timor; to affect adversely the continuing efforts of the Secretary-General; and to affect adversely the exploitation by Australia of its own natural resources.

Mr President, Members of the Court,

In this case Australia did not raise preliminary objections for separate and prior determination. The same factual material is relevant both to the jurisdiction and admissibility arguments, and to the arguments on the merits. Many of the arguments are interrelated. It is possible to respond to each of the various propositions made by Portugal at the level of admissibility and at the level of merits, as is demonstrated in Australia's Rejoinder (Australian Rejoinder, paras 9 to 31).

If the Court finds that it has no jurisdiction, or that the Portuguese claim is inadmissible, the Court cannot determine the merits even though they have been argued by the parties. Consistently with the nature and limits of international adjudication, the Court can only determine issues of merits if it first determines that the application by Portugal is admissible and that the Court has jurisdiction in relation to it.

But, if contrary to what Australia argues, the Court does decide the merits of the case, Australia submits that the Portuguese argument is untenable. The question then is whether, as a consequence of Chapter XI of the Charter, all States must deal solely with Portugal in respect of the territory of East Timor. Portugal asserts, in effect, that Chapter XI has the result of entrenching a colonial State's existing rights and powers in respect of a territory, irrespective of subsequent political developments. But Chapter XI is concerned with the rights of non-self-governing peoples, and not the rights of the States administering them. It is intended to bring about an early termination of all colonial regimes. It is not concerned with ensuring the protection of a former colonial State's rights in respect of a territory, let alone their survival long after the [S]tate has ceased to exercise any control over the territory.

As has been said, the abstract question put by Portugal is whether all States are required to deal solely with Portugal, so that it is a breach of international law to deal with any other State. The [C]ourt is not asked to consider with which other State Australia has dealt, let alone whether the conduct of that other, unnamed, State is illegal.

Portugal says that an obligation to deal solely with it arises from its objective legal status as "administering Power" of the territory. Australia denies that there is any such objective legal status under international law having the legal effects contended for by Portugal. And in the absence of any particular status which would carry the attributes Portugal alleges, Portugal simply has no case which the Court can decide against Australia. Our case is that Australia cannot, and is not, required to deal exclusively with Portugal, a State which has been totally absent from the territory for 20 years. And, beyond this, the Court is not asked to determine, and cannot determine, with which State Australia may deal.

Mr President, Australia's arguments have been elaborated in its written pleadings. Counsel for Australia will now proceed to deal with the matters put in Portugal's oral pleading. We will proceed as follows:

First, Ambassador Tate will deal with Australia's policy towards East Timor and refer to the making of the Treaty.

I will then address certain key issues relevant to the case and their legal significance.

Professor Crawford and Professor Pellet will then deal with Australia's argument that the Court cannot proceed to hear and determine this case in the absence of a necessary third party, Indonesia.

Mr Burmester will argue that Portugal lacks the requisite standing to bring the present proceedings against Australia.

Professor Crawford and Mr Burmester will then deal with the issue of self-determination, and will show that nothing in the Treaty denies this right, that the implementation of self-determination in the present circumstances is a matter for the political organs of the United Nations, and that in the absence of a contrary direction by the United Nations, Australia is entitled to deal with the State in effective control of the territory.

Professor Bowett will then present Australia's arguments on the legal effect of the United Nations resolutions on the question of East Timor. He will show that no United Nations resolution imposes a binding obligation on Australia not to deal with Indonesia in respect of East Timor.

Dr Staker will then argue that in the international law there is no special juridical status of "administering Power" which would require Australia to deal solely with Portugal in respect of East Timor.

Professor Pellet and Professor Bowett will then present argument on Australia's right to negotiate for the protection of its own maritime resources, and show that, in so doing, it has not infringed any right belonging to other "interested parties".

Finally, I will argue that the Court should not decide the merits of the case for reasons of judicial propriety, I will also make related submissions on the question of remedies...

On 6 February, Australia's second statement was made to the Court by the Co-Agent and Counsel in the case, Mr Michael Tate, Ambassador of Australia to The Netherlands. The following are extracts from the statement:

Mr President, distinguished Members of the Court, I regard it as a great honour to appear before this Court. I intend to deal with some important features of Australia's policy towards East Timor.

Firstly, I turn to the issue of self-determination...

The Court can ... have the fullest confidence as you read the Working Paper of the United Nations Secretariat on Timor of 22 May 1975 (A/AC.109/L.1015, Portuguese Memorial, Annex II.11, volume II, page 61 (volume II, page 57 of the English version)) which reads that:

> The Australian Government has repeatedly stated that the right to self-determination of the people of Timor must be the decisive factor in the examination of the Territory's future.

The document notes also that on 23 October 1974, the then Prime Minister of Australia, Mr Gough Whitlam, had said in Parliament that Australia did not seek any special position in that Territory and that the wishes of the Timorese would be decisive in determining their independence or their integration with Indonesia.

This attitude was reiterated in the wake of the December 1975 events. Speaking before the Security Council on 14 April 1976, the Australian representative said:

> The Australian position on the Timor conflict has been clearly stated. It accords with the resolutions adopted in December by the General Assembly and the Security Council. We support the main thrust of both resolutions, notably their call for a withdrawal of outside forces and a process by which the people of East Timor can determine their own future.

It remains the firm policy of the Australian Government that the people of the territory should exercise freely and effectively their right to self-determination.

(Portuguese Memorial, Annex II.25, volume II, p 234, paragraph 36 and 38 (volume II, p 214, paragraph 36 and 38 of the English version). On that occasion the Australian delegate also emphasised the importance of resumption of international humanitarian aid to the Territory (ibid, paragraph 41 on p 235 (p 215 of the English version)).

Further details of statements made by Australian Ministers or representatives both before and after the events of December 1975 are given in Australian Counter-Memorial (paragraphs 57–71) and its Rejoinder (paragraph 41). It can be seen that in these statements, Australia expressed regret at the actions of Indonesia and maintained Australia's opposition to the manner of Indonesia's incorporation of East Timor.

Mr President, if there was one matter properly highlighted by Portugal last Monday it concerned the meeting of the so called Popular Assembly in Dili in May 1976 (CR 95/2, p 71). Portugal properly emphasised that the United Nations declined the invitation from Indonesia to attend the meeting.

I emphasise that Australia acted entirely in harmony with the United Nations in that regard. Indeed, it was precisely because the United Nations had not participated in or observed any so-called act of self-determination that the Australian Foreign Minister stated to the Parliament:

> But without that United Nations participation, this Government did not believe it could lend its presence to what took place as a further act in the tragic affair. (Australian Counter-Memorial Annex 19, p A67)

This is an early demonstration of Australia's assessment of, and support for, the role of the United Nations as being absolutely crucial.

Australia recognises that the implementation of the right to self-determination of the people of East Timor is a matter pre-eminently for the responsible organs of the United Nations. Throughout the period that East Timor has been on the United Nations agenda, Australia has supported the Secretary-General in his efforts to find a solution to the situation. Australia has continued to encourage Portugal and Indonesia to consult one another, either directly or under the auspices of the Secretary-General, with a view to resolving the situation. Australia has been and remains ready to accept and act on any authoritative decision made by the competent organs of the United Nations in the matter, or on any internationally acceptable resolution of the issue arrived at by the "parties directly concerned", of which Australia is not one.

But to return to the aftermath of the meeting of the so-called Popular Assembly. Following the Indonesian announcement of integration in July 1976, the Australian Foreign Minister said that "the process of decolonisation in East Timor should be based on a proper act of self-determination" and that "the present situation is that Indonesia has moved, without United Nations involvement, to integrate East Timor as its twenty-seventh province". He said that therefore "in the circumstances Australia cannot regard the broad requirements for a satisfactory process of decolonisation as having been met" (Australian Counter-Memorial, Annex 20, p A68).

This position is recorded yet again in the United Nations Secretariat's Working Paper on Timor later that year, which notes that "Australia has furthermore expressed its support for a genuine act of self-determination and the early resumption of international humanitarian aid to the Territory" (Committee of 24, "Timor", Working Paper prepared by the Secretariat, Addendum, 2 September 1976, A/AC. 109/L.1098/Add. 1; Portuguese Memorial, Annex II.12, volume II, p 86, paragraph 40 (volume II, p 80, paragraph 40 of the English version)).

This humanitarian aid aspect is another theme of Australia's policy toward East Timor. While Australia did not endorse the vote of the Popular Assembly as a satisfactory exercise of the right of self-determination, it did seek to deal with Indonesia in relation to East Timor with a view to promoting the interests of the people of East Timor. This is the motive of practical concern to alleviate the human suffering of the East Timorese people...

Mr President, Members of the Court,

I turn finally to a brief consideration of the situation with respect to the making of the Timor Gap Treaty.

Australia's motivation in entering into the 1989 Treaty with Indonesia was to enable Australia to exercise what Australia considered to be its own sovereign rights in the area. The whole of the area to which the Timor Gap Treaty relates is an area over which Australia claims sovereign rights under international law, and over which Australia has claimed sovereign rights since well before the events of 1975.

Prior to the events of 1975, this position was made clear to Portugal in two diplomatic notes from the Australian Government in 1971 and 1974 respectively (Portuguese Memorial, Annex IV.6, volume V, pp 287–288; Annex IV.11, volume V, pp 327–331). When in 1974 Australia sought to negotiate with Portugal, Portugal responded that it preferred to await the results of the Law of the Sea Conference, scheduled to take place later that year (Portuguese Memorial, Annex IV.10, volume V, p 326).

Australia's position was maintained in negotiations with Indonesia from 1979, and Australia continues to maintain that position today (Portuguese Memorial, Annex IV.12, volume V, p 333). Australia was prevented from enjoying these rights because they were disputed by Indonesia. Because Indonesia was effectively acting as the opposite coastal State, Australia had to reach agreement with Indonesia so as to enable Australia to enjoy its own rights.

Australia does not in any way deny that prior to 1975, Portugal disputed Australia's claims, and that subsequently Indonesia has and still does dispute those claims. That is precisely the point. Australia had to negotiate with whichever State was effectively acting as the coastal State.

By late 1978, Australia had to negotiate with Indonesia if any kind of effective agreement were to be implemented. Portugal was not in a position to give effect to such an agreement. But more importantly, Portugal was not in a position to resolve Australia's dispute with Indonesia. Even if Australia had concluded a futile agreement with Portugal in 1989, Indonesia would still have made conflicting claims to rights in the area. Because Indonesia was effectively acting as the opposite coastal State that dispute could not be ignored.

In short, a dispute between Australia and Indonesia existed in fact, and this real dispute could only be resolved by negotiations between Australia and Indonesia. The Preamble to the Treaty properly notes the commitment of the parties to "their policies of promoting constructive neighbourly cooperation" (Application Instituting proceedings, Annexes, p 25). When Australia is in dispute with the State effectively acting as the opposite coastal State, surely such co-operation, here expressed in Treaty form, is highly desirable.

As has been said by the Agent, the Treaty is not a maritime delimitation agreement which establishes permanent maritime boundaries. Therefore, as he

said, it does not bind Portugal, and, Mr President and Members of the Court, it would not be binding on a future independent East Timor should that be the result of a genuine exercise of their still existing right of self-determination.

International Court of Justice — East Timor Case — Judgment — Australian Reaction

On 30 June 1995, the Minister for Foreign Affairs, Senator Evans, issued the following news release:

The International Court of Justice today decided in Australia's favour the case brought against it by Portugal concerning the Timor Gap Treaty. By a majority, the Court held that the case should not have been brought against Australia, and that the proceedings were artificial and futile.

As we have said from the outset, it is unfortunate Portugal chose to deal with this highly complex political issue in a legal case against Australia. The court accepted Australia's argument that the issues involved in the case could not be determined in Indonesia's absence. We have always argued that the concerns of the world community about the situation in East Timor can be most effectively dealt with under the auspices of the UN Secretary-General, and through the talks now being conducted by him with the parties directly concerned. In this spirit, Australia will continue to give its full support to the UN Secretary-General's efforts to achieve a resolution of the East Timor issue.

The Court has taken the opportunity to affirm the right of the people of East Timor to self-determination. Successive Australian governments have long recognised Indonesian sovereignty over East Timor, but in addition, we have never denied the existence of the right of the East Timorese to self-determination. How that right might be exercised is ultimately a matter for the United Nations, but it may well be—as I have suggested in the past—that the East Timorese people will opt for measures such as better protection and recognition of human rights, greater encouragement of Timorese culture and a greater level of political autonomy, without affecting Indonesia's sovereignty. Our conclusion of the Timor Gap Treaty with Indonesia in no way infringes the rights of the East Timorese people.

The Government welcomes the decision which now removes any possible uncertainty about Australia's rights in the Timor Gap. It confirms our view that the Timor Gap Treaty is a responsible and proper framework under which Australia can secure access to its own resources in an area which we have always claimed as Australia's.

The judgment means that Australia will have continued access to its resources in a secure and stable environment. Companies will continue to be able to operate in the Zone of Cooperation under the terms of the Treaty.

It is difficult to see how Portugal's action could have assisted the East Timorese people. The Indonesian Government, which is in control of the territory, could not have been bound by it. For Australia's part, we will continue our substantial program of development assistance to the people of East Timor, and continue to make every diplomatic effort we can to improve the human rights situation there.

International Court of Justice — 1973 New Zealand Nuclear Tests Case — Revival — Australian Application to Intervene

On 8 August 1995, the Minister for Foreign Affairs, Senator Evans, issued the following news release:

> Australia is likely, subject to further consideration of the legal issues involved, to intervene in support of New Zealand's proposed application to the International Court of Justice, announced today, to reopen its 1973 case against French nuclear testing.
>
> We have already made clear that the legal advice available to us is that there is no prospect of success for any attempt by Australia to reopen its own 1973 case and no other credible avenue available for commencing a new action.
>
> There is however a difference in the way the two 1973 applications were framed which may give the New Zealand case a better chance of success: Australia's 1973 case was entirely concerned with atmospheric testing, whereas New Zealand's was more broadly drafted, relating to contamination from nuclear testing generally.
>
> There still remain formidable procedural and substantive hurdles for any such action to jump, but we are happy to support the New Zealand initiative in any way we usefully can.
>
> As a Prime Ministerial spokesman has already said today, in welcoming the New Zealand initiative, our particular focus in the International Court will continue to be on mounting oral argument on the tests issue in the forthcoming hearings on the Advisory Opinions sought by the World Health Organisation and UN General Assembly on the legality of use of nuclear weapons.

Australia did apply to intervene in support of the New Zealand case. On 23 August 1995, the Minister for Foreign Affairs, Senator Evans, issued a media release concerning the application. The text of the release follows:

> Australia will tonight lodge documents at the International Court of Justice (ICJ) to intervene in support of New Zealand's case against France. New Zealand has applied to the ICJ to reopen its 1973 Nuclear Tests case against France and is seeking urgent orders that the tests be suspended pending the hearing of the case.
>
> The case raises important issues of international environmental law which affect all countries. By intervening, we will have the opportunity to put to the ICJ our views on these matters, and to reiterate our opposition to the resumption of nuclear testing in the Pacific.
>
> The Government is confident that adding Australia's voice to that of New Zealand will reinforce to the ICJ the concerns we share with South Pacific countries about French testing in the region.
>
> It is hoped that the first hearings in the case will be held in early to mid-September. This would allow the Court to rule on New Zealand's application for interim relief before commencement of the tests.

The International Court of Justice decided that New Zealand could not revive its 1973 Nuclear Tests case against France. On 22 September 1995, the Minister for Foreign Affairs, Senator Evans, issued a news release concerning this decision. The following is the text of the release:

The Government is disappointed that the International Court of Justice decided that New Zealand could not revive its 1973 Nuclear Tests case against France.

New Zealand had argued that conducting the tests would be in breach of international law relating to protection of the marine environment. It had also sought orders from the Court that the current round of tests be suspended pending the hearing of its case. A majority 12–3 held that New Zealand could not re-open the 1973 case as it was about atmospheric testing, while the current test series is being conducted underground.

This decision should in no way be seen as an endorsement of French nuclear testing—the Court did not look at this issue.

Both Australia and New Zealand acknowledged from the outset that these proceedings faced formidable procedural hurdles. Nevertheless, we are pleased that New Zealand was able to raise in such a prominent forum, in a very forceful way, the serious concern that countries of the Pacific have about the environmental risks of French nuclear tests. It was also significant that New Zealand was able to draw the French into appearing before the Court to answer the case of environmental damage. New Zealand made a telling and credible case against French testing.

By applying to intervene in support of the New Zealand case, Australia and four other countries of the Pacific have demonstrated their commitment to opposing the resumption of nuclear tests in the region and put on the record their views on the important questions of international environmental responsibility raised by the New Zealand case.

Australia will, of course, continue to do whatever it can to apply pressure on the French government to reverse its decision to resume testing. In that regard, we will now focus our efforts in the International Court of Justice on mounting Australia's oral argument on the test issue in the hearing on the Advisory Opinions sought by the World Health Organisation and the UN General Assembly on the legality of use of nuclear weapons.

International Court of Justice — Requests for Advisory Opinions on the Legality of Nuclear Weapons — Australian Statement

When the World Health Organization and the United Nations General Assembly submitted requests for Advisory Opinions on Nuclear Weapons to the International Court of Justice, thirty-five States submitted written statements to the ICJ. At the hearings before the ICJ in the Hague, Australia presented a two part oral submission, beginning on 30 October 1995. The Solicitor-General of Australia, Dr Gavan Griffith, made the opening statement to the Court. The following is the text of the statement:

Mr President, Members of the Court,

1. Over the last 6 years I have had the honour to act as Agent for Australia in proceedings in the Court's contentious jurisdiction. I appreciate the honour now to appear in these advisory proceedings
2. The questions before the Court raise issues of profound significance both for the Court in its judicial role and the whole world community at the level of substance. Australia welcomes the opportunity to be the first State to appear in these oral proceedings.

3. It is Australia's initial submission that the Court should, in the exercise of its discretion, decline to give either of the advisory opinions that have been requested of it. This is for the reasons set out in the written statement filed 9 June 1994 in relation to the request by the World Health Organization. I adopt what was said in that written statement in relation also to the advisory opinion requested by the United Nations General Assembly. In the course of the oral arguments today I will not detain the Court unnecessarily by repeating what we have already said in writing. On this aspect our oral submissions today will be confined to the making of a few additional points.
4. In anticipation of the possibility that the Court might, nonetheless, be inclined to address the substantive issues and give one or both of the requested advisory opinions, following my arguments on procedural issues, Australia's Minister for Foreign Affairs, Senator Gareth Evans QC, will present Australia's case on the substance of the questions before the Court. Put shortly, Australia's position on these questions is that customary international law has now developed to the stage where the threat or use of nuclear weapons would be contrary *per se* to international law.
5. With your permission, Mr President, we will not read out our citations, but will provide references to the Registry for inclusion in the verbatim record.

Mr President, Members of the Court,

6. I turn to the issue of whether the Court should answer the two requests for advisory opinion. It is well established that the Court is not required by its Statute to give an advisory opinion in every case in which it is requested to do so.[1] It is entirely a matter for the Court whether or not to give the opinion.[2] In 1989 the Court said that, in principle, it will give an advisory opinion when requested by a competent body unless there are

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1 *Interpretation of Certain Peace Treaties, Advisory Opinion,* ICJ Reports 1950, p 65, at pp 71–72; *Reservations to the Genocide Convention, Advisory Opinion,* ICJ Reports 1951, p 15, at p 19; *Judgments of the Administrative Tribunal of the ILO upon Complaints made against Unesco, Advisory Opinion,* ICJ Reports 1956, p 77, at pp 86, 111–112 (sep. op. Judge Klaestad); *Certain Expenses of the United Nations, Advisory Opinion,* ICJ Reports 1962, p 151, at p 155; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) Advisory Opinion,* (hereafter *Namibia Advisory Opinion*), ICJ Reports 1971, p 16, at p 21; *Application for Review of Judgment No 158 of the United Nations Administrative Tribunal,* ICJ Reports 1973, p 166, at p 175; *Western Sahara Advisory Opinion,* ICJ Reports 1975, p 12, at p 21; *Application for Review of Judgment No 333 of the United Nations Administrative Tribunal,* ICJ Reports 1987, p 18, at p 31. See also *Status of Eastern Carelia, Advisory Opinion,* PCIJ Ser. B, No 5 (1923), pp 28–29.

2 *Application for Review of Judgment No 333 of the United Nations Administrative Tribunal,* ICJ Reports 1987, p 18, at pp 31, 78.

"compelling reasons to the contrary".[3] It is Australia's submission that the present proceedings exemplify the exceptional case, admitted by the Court as a possibility, in which there are such "compelling reasons" for declining to answer the requests. We say so for three main reasons.

7. As we make clear in our written submission, the first of these reasons is that the two questions are framed in such broad and abstract terms that to give the advisory opinions would be inconsistent with the judicial character of the Court.

8. The Court has affirmed that it may give advisory opinions on "abstract" questions. However, to date the Court has never given an advisory opinion on a question of law which is both wholly abstract, and hypothetical, in the sense that it is completely unrelated to any particular fact situation, past, present or future. As the Court itself said in its 1980 Advisory Opinion on the *Interpretation of the Agreement of 25 March 1951*:[4]

> "...a rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part. Accordingly, if a question put in the hypothetical way in which it is posed in the request is to receive a pertinent and effectual reply, the Court must first ascertain the meaning and full implications of the question in the light of the actual framework of fact and law in which it falls for consideration. Otherwise its reply to the question may be incomplete and, in consequence, ineffectual and even misleading as to the pertinent legal rules actually governing the matter under consideration by the requesting Organization."

9. It must not be forgotten that even when exercising its advisory jurisdiction, the Court functions as a court of law,[5] and must remain faithful to the requirements of its judicial character.[6] These requirements

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3 *Applicability of Article VI, Section 22, of the Convention of the Privileges and Immunities of the United Nations, Advisory Opinion,* ICJ Reports 1989, p 177 at p 191; *Application for Review of Judgment No 333 of the United Nations Administrative Tribunal,* ICJ Reports 1987, p 18, at pp 31, 78. See also *Interpretation of Certain Peace Treaties, Advisory Opinion,* ICJ Reports 1950, p 65, at pp 71–72; *Reservations to the Genocide Convention, Advisory Opinion,* ICJ Reports 1951, p 15, at p 19; *Judgments of the Administrative Tribunal of the ILO upon Complaints made against Unesco, Advisory Opinion,* ICJ Reports 1956, p 77, at pp 86; *Certain Expenses of the United Nations, Advisory Opinion,* ICJ Reports 1962, p 151, at p 155; Namibia Advisory Opinion, ICJ Reports 1971, p 16, at p 27; *Application for Review of Judgment No 158 of the United Nations Administrative Tribunal, Advisory Opinion,* ICJ Reports 1973, p 166, at p 183.

4 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion,* ICJ Reports 1980, p 73, at p 76.

5 *Namibia Advisory Opinion,* ICJ Reports 1971, p 16, at p 23.

6 *Judgments of the Administrative Tribunal of the ILO upon Complaints made against Unesco, Advisory Opinion,* ICJ Reports 1956, p 77, at p 84; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation, Advisory Opinion,* ICJ Reports 1960, p 150, at p 153; *Certain Expenses of the United Nations, Advisory Opinion,* ICJ Reports 1962, p 151, at p 155; *Northern Cameroons case, Advisory Opinion,* ICJ Reports 1963, p 15; *Application for Review of Judgment No 158 of the United Nations*

must impose limitations on the types of questions on which the Court can appropriately give advisory opinions. The point here made may be illustrated by a hypothetical example. What if the General Assembly requested the Court to give an advisory opinion on the question: "What are the rules of customary international law?" Such a question would be a legal question. And no doubt, an answer to the question could be of assistance to the General Assembly in the conduct of its activities. Yet, we submit, to give an advisory opinion on a question as broad and abstract as this would clearly be an act beyond the bounds of the judicial function. A court attempting to answer such a question would rather be assuming the role of a body such as the International Law Commission engaged in the codification of international law.

Mr President, Members of the Court,

10. The second reason why Australia submits that the Court should decline to give the opinions relates to the question of the practical effect of such a decision so far as the bodies requesting it are concerned.

11. In 1950 the Court noted that when exercising its advisory jurisdiction, "[t]he Court's Opinion is given not to the States, but to the organ which is entitled to request it."[7] The resolutions of the World Health Assembly and the United Nations General Assembly deciding to request the advisory opinions give no indication of any particular activity or course of action proposed to be taken by those bodies or any related body in which they would be influenced or guided by the requested advisory opinion. The apparent intention is for the advisory opinion to clarify the rules of international law with respect to the threat or use of nuclear weapons,[8] and thereby to influence and affect the conduct, not of the General Assembly, but of States. This conclusion is supported by other resolutions concerning nuclear disarmament and non-proliferation adopted by the General Assembly on 15 December 1994 which stress that "it is the responsibility of all States to adopt and implement measures towards the attainment of general and complete disarmament under effective international control",[9] and call on States to take specific actions with respect to nuclear disarmament.[10]

12. Similarly, while the World Health Organization may have an interest in the health effects of the use of nuclear weapons, it is not evident that

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Administrative Tribunal, Advisory Opionion, ICJ Reports 1973, p 166, at p 175; *Application for Review of Judgment No 273 of the United Nations Administrative Tribunal, Advisory Opionion,* ICJ Reports 1982, p 325, at p 334. See also *Status of Eastern Carelia, Advisory Opinion,* PCIJ Ser. B, No 5 (1923), p 29.

7 *Interpretation of Certain Peace Treaties, Advisory Opinion,* ICJ Reports 1950, p 65, at p 71.

8 Cf preambular paragraph 7 of resolution 49/75K, which refers to "the need to strengthen the rule of law in international relations".

9 Resolution 49/75L, preambular paragraph 6; 49/75P, preambular paragraph 6.

10 See especially resolutions 49/75E ("Step-by-step reduction of the nuclear threat"); 49/75H ("Nuclear disarmament with a view to the ultimate elimination of nuclear weapons"); 49/75L ("Bilateral nuclear-arms negotiations and nuclear disarmament"); 49/75P ("Bilateral nuclear-arms negotiations and nuclear disarmament").

there is any particular course of action that this Organization may be proposing to take in which it would be influenced or guided by the requested advisory opinion.

Mr President, Members of the Court,

13. The third reason why Australia submits that the Court should exercise its discretion not to give an advisory opinion relates to the possible adverse impact of such a decision on the larger interests of the whole international community. The proponents of the two requests no doubt consider that the giving of an advisory opinion on the legality of the threat or use of nuclear weapons would contribute positively to the process of nuclear disarmament. But were the Court to advise (contrary to Australia's submission on the merits) that the threat or use of nuclear weapons is not illegal in all circumstances, it is Australia's gravest concern that such an opinion may well have exactly the opposite effect.

14. The international community is now engaged in an intensive process of strengthening existing security norms and frameworks and developing new ones. This is being done through the United Nations, regional dialogues and bilateral frameworks. Progress toward nuclear disarmament has been achieved of a kind, and on a scale, which would have seemed impossible even five years ago. In May this year, the States Parties which comprise almost all the world community, including all five nuclear-weapon States, committed themselves to a program of action on nuclear disarmament. Fundamental changes in the global balance of power an intense and sustained diplomatic dialogue and negotiation between all members of the international community have made this advance possible.

15. An opinion from the Court that the use of nuclear weapons was not illegal in some circumstances could have very negative implications for global nuclear non-proliferation norms. For example, a conclusion that nuclear weapons could be used in come circumstances in self-defence could be relied upon by the handful of "threshold" States outside the Non-Proliferation Treaty as doctrinal support for their acquisition of nuclear weapons. This would have serious and adverse consequences for efforts to counter the proliferation of nuclear weapons and to achieve elimination of existing nuclear weapons.

16. As another example, an opinion that nuclear weapons could be used in response to a non-nuclear attack, or even a strong dissenting opinion to this effect, could jeopardise further progress on strengthening negative security assurances, and the potential contribution that they can make to non-proliferation. It must be the case that any finding of legality, even in limited circumstances, has the real potential to undermine the present pressure and impressive on the nuclear weapon States to engage in the negotiations for the banning of testing and the elimination of nuclear weapons.

17. A further problem associated with a finding of legality of use or threat, even one relatively limited in scope, is that it would be perceived by some States as a definitive pronouncement on the issue by the principal judicial organ of the United Nations. This may have the effect of impeding future and beneficial developments of international law. The

rules of customary international law can change in a very short space of time.[11] The issue of the legality of use or threat of nuclear weapons is one area where rapid changes in customary international law are occurring. With the end of the Cold War, many countries are in the process of reviewing their security policies, including, in the case of some nuclear weapon States, their nuclear strategies and doctrines. Any finding of legality may hold back the development of principles of international law directed against nuclear weapons.

Mr President, Members of the Court,

18. For these reasons, Australia submits that as a matter of discretion, the Court should decline to give the advisory opinions requested by the World Health Organization and the United Nations General Assembly. In Australia's respectful submission, the fact that the giving of an advisory opinion might actually have a detrimental effect on the nuclear disarmament and non-proliferation negotiations being constructively carried out elsewhere in relevant forums and through bilateral arrangements makes this conclusion inevitable.

The second part of Australia's submission, the case for illegality, was then made by the Minister for Foreign Affairs, Senator Evans. The following is the text of that Oral statement:

Mr President, Members of the Court

1. As Minister for Foreign Affairs of Australia, former Attorney-General and counsel, it is an honour and a pleasure for me to appear today before this Court. Given Australia's long-standing support of the Court, and given the importance which Australia has long attached to nuclear non-proliferation and disarmament as part of its foreign policy, I take particular personal satisfaction in speaking on behalf of my country in these proceedings.
2. My observations today are directed to both questions before the Court, but I will focus particularly on the broader question asked by the United Nations General Assembly. I will seek to establish the following three propositions:

   First, nuclear weapons are by their nature illegal under customary international law, by virtue of fundamental general principles of humanity. It is therefore illegal not only to use or threaten use of nuclear weapons, but to acquire, develop, test, or possess them. The right of States to self-defence cannot be invoked to justify such actions.

   Second, it follows that all States are under an obligation to take positive action to eliminate completely nuclear weapons from the world. To implement this obligation, States which do not possess such weapons cannot lawfully acquire them, and States which do possess nuclear weapons cannot add to, improve or test them. States which possess nuclear weapons must, within a reasonable time frame, take systematic action to eliminate completely all nuclear

11 *North Sea Continental Shelf* cases, ICJ Reports 1969, p 3, at p 43.

weapons in a manner which is safe and does not damage the environment.

Third, while requiring elimination, international law must nonetheless deal with the reality of the present existence of large stocks of nuclear weapons. It is accordingly necessary and appropriate that during the course of the elimination process the principle of stable deterrence be maintained: this will enable for that period the possession or threat of use of nuclear weapons for the sole purpose of ensuring that nuclear weapons are never used by others. Given the inherently illegal nature of nuclear weapons, such deterrence can only be a temporary necessity, and can never make lawful the indefinite possession or threat of use of nuclear weapons.

Customary International Law and Fundamental Principles of Humanity

Mr President, Members of the Court

3. As to the basic issue of the legality or illegality of nuclear weapons, there is manifestly a vast range of international law rules which might be violated by a threat or use of nuclear weapons in particular circumstances. The use of nuclear weapons in an armed attack on another State may constitute a violation of Article 2, paragraph 4, of the Charter of the United Nations. Equally, it might violate the customary international law rule to the same effect, recognized by this Court.[12] Such an act directed against or affecting a neutral State might contravene the law of neutrality.[13] The use by a State of a nuclear weapon against a particular group might constitute the crime of genocide. The conduct of nuclear weapons tests might be contrary to international law on the ground that it causes radioactive contamination of the environment of a third State or the global commons.
4. Many States have submitted written statements to the Court on one or both of the questions asked by the WHO and the General Assembly. A number of these have dealt in detail with the substance of the questions. The Court already has before it a considerable body of argument on issues such as the effect of Article 2, paragraph 4, of the Charter; the law of armed conflict and international humanitarian conventions such as the 1977 Additional Protocol I to the Geneva Conventions;[14] international conventions restricting the manufacture, acquisition, deployment and use of nuclear weapons; international conventions prohibiting biological and chemical weapons; international law relating to human rights and the environment; and General Assembly resolutions declaring the use of nuclear weapons to be illegal. These arguments are powerfully put, for

12 *Case concerning Military and Paramilitary Activities in and against Nicaragua,* ICJ Reports 1986, pp 93–100.

13 Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, The Hague, 18 October 1907, Article 1; Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, The Hague, 18 October 1907, Article 1.

14 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Geneva, opened for signature 12 December 1977, UNTS vol. 1125, p 3 (1977 Additional Protocol I).

instance in the submission of the Solomon Islands, but clearly the application of these individual provisions and resolutions to nuclear weapons issues will be contested equally vigorously, as evidenced by the written submissions of States such as the United Kingdom and the United States.

5. We certainly consider that all these arguments are pertinent to the question. But the difficulty confronted by the Court in these proceedings is the impossibility in practice of it considering every conceivable situation in which a nuclear weapon might be threatened or used, and every conceivable permutation of surrounding circumstances, in order to determine each of the specific rules of international law which might be violated by such conduct.
6. Rather than focusing on these matters as separate and discrete issues, we submit that a more direct route to the same conclusion is to address the question whether there is some general principle today which would render the use or threat of nuclear weapons illegal *per se*. If so, any threat or use in any circumstances, irrespective of context, would be contrary to international law, on the basis that it is inconsistent with that principle. If such a general principle can be identified, the Court need not consider all of the different situations in which nuclear weapons might be threatened or used.
7. We submit that the principles of international law of most direct and obvious relevance to the legality of nuclear weapons are the general principles of humanitarian law. The existence of "fundamental general principles of humanitarian law", against which the conduct of States can be judged under customary international law, was recognized by this Court in the *Military and Paramilitary Activities* case.[15] These "principles of humanitarian law"[16] were also recognized in the *Corfu Channel* case, in which the Court referred to "certain general and well-recognized principles, namely: elementary considerations of humanity".[17]
8. The major conventions on humanitarian law in armed conflicts, such as the 1899 and 1907 Hague Conventions, and the 1949 Geneva Conventions and 1977 Additional Protocols, are in some respects a reflection of these fundamental principles. However, the general principles of humanity recognized under customary international law, and the specific treaty obligations under humanitarian conventions, are not identical. Some conduct which is prohibited by a provision of one of these treaties may not be prohibited by customary international law.[18] But equally, the fact that particular conduct is not proscribed by any

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15 *Military and Paramilitary Activities* case, ICJ Reports 1986, p 113, para 218.

16 *Ibid*, p 112, para 215. Also para 216 ("international humanitarian law").

17 *Corfu Channel* case, ICJ Reports 1949, p 22; quoted in the *Military and Paramilitary Activities* case, ICJ Reports 1986, p 112, para 215.

18 See the *Military and Paramilitary Activities* case, in which the Court acknowledged that while the 1949 Geneva Conventions were in some respects no more than the expression of the fundamental general principles of humanitarian law, they were also in some respects a development of such principles: ICJ Reports 1986, p 113, para 218.

international treaty does not of itself enable the conclusion to be drawn that such conduct is consistent with general principles of humanitarian law. The general principles may in some respects be broader than any existing treaty provision, and may apply in situations in which there is no applicable treaty provision at all.

9. This is specifically recognized in the so-called "Martens clauses" in some of the humanitarian conventions. These provide that even in cases not covered by 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".[19] Furthermore, while the conventions are directed to conduct in times of armed conflict, the Court made clear in the *Corfu Channel* case that the general humanitarian principles apply also in times of peace. Indeed, the Court said that they are "even more exacting in peace than in war".[20] General principles of humanity pervade the whole of international law, not just the law of armed conflict.

10. Of course, neither the concept of humanity, nor the "dictates of public conscience" are static. Conduct which might have been considered acceptable by the international community earlier this century might be condemned as inhumane by the international community today.

11. Furthermore, even where the content of a particular principle of humanitarian law has been established, the practical application of that principle at any given time will depend on the circumstances of that time. For instance, one of the most fundamental and longest-standing humanitarian principles is the prohibition on employing weapons or methods of warfare of a nature to cause unnecessary losses or suffering.[21] Yet while this principle has remained constant, its practical

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19 1977 Additional Protocol I, Article 1(2); Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 April 1981, UNTS vol. 1342, p 137 (1981 Conventional Weapons Convention), preamble, paragraph 5. See also 1949 Geneva Convention I, Article 63; 1949 Geneva Convention II, Article 62; 1949 Geneva Convention III, Article 142; 1949 Geneva Convention IV, Article 158 ("principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience"); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Geneva, 12 December 1977, UNTS vol 1125, p 609 (1977 Additional Protocol II), preamble, paragraph 4 ("in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience").

20 *Corfu Channel* case, ICJ Reports 1949, p 22; quoted in the *Military and Paramilitary Activities* case, ICJ Reports 1986, p 112, para 215.

21 See Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, Annex ("Regulations Respecting the Laws and Customs of War on Land"), Article 23; 1977 Additional Protocol I, Article 35(1); 1981 Conventional Weapons Convention, preamble, paragraphs 3 and 4, and Protocols I, II, III. This principle was reflected already in the 1868 St Petersburg Declaration: St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, 11 December 1868.

application has not and will not. The suffering inflicted by a particular type of weapon may be accepted as "necessary" in one age, but condemned as unnecessary in another. Such changes in the dictates of public conscience may have a number of causes. Advances in technology or changes in methods of warfare may provide alternatives to the use of weapons of that type. Or it may be that in a later age the level of suffering in warfare which the international community is prepared to tolerate is lower than the level which it tolerated previously.

12. In line with such changes in the attitude of the world community, over time the permissible uses of one particular type of weapon may be progressively restricted, until finally prohibited altogether. In the case of chemical weapons, for instance, the 1899 Hague Declaration 2[22] only prohibited the use of projectiles the sole object of which was the diffusion of asphyxiating or deleterious gases. A general prohibition on the use of asphyxiating and poisonous gases, as well as on the use of bacteriological methods of warfare, was later embodied in the 1925 Geneva Protocol,[23] which stated that the use in war of asphyxiating or poisonous gases "has been justly condemned by the general opinion of the civilized world". Subsequently, the mere possession of such weapons was made illegal under the terms of the 1972 Biological Weapons Convention[24] and 1992 Chemical Weapons Convention.[25]

13. Such an evolution would also be possible in the case of nuclear weapons, under general principles of humanitarian law. It is not part of our argument that the use or threat of nuclear weapons was *per se* contrary to international law at the end of the Second World War, or for some period thereafter. The practice of the nuclear-weapon States during the decades following the end of the Second World War, in acquiring, testing and deploying large numbers of nuclear weapons, and the acquiescence in this by their allies and other non-nuclear-weapon States, makes it difficult to argue that there was any rule of *per se* illegality dating back to the time of construction of the world's first nuclear weapon. But the question whether the use or threat of nuclear weapons was illegal in the 1940s, or even in the 1980s, is not of particular significance for present purposes. Even if the use or threat of nuclear weapons was not *per se* inconsistent with elementary considerations of humanity and the dictates of public conscience in the past, this does not determine whether it is *per se* inconsistent with those principles today.

14. The issue before the Court is thus whether the point has now been reached at which it is possible to conclude that, whatever the position

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22 Declaration Concerning Asphyxiating Gases, 29 July 1899.

23 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, 17 June 1925, LNTS vol. 94, p 65, preambular paragraph 1.

24 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, opened for signature at London, Moscow and Washington on 10 April 1972, UNTS vol 1015, p 163 (Biological Weapons Convention).

25 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Paris, 13 January 1993, 32 ILM 800 (1993) (Chemical Weapons Convention).

may have been in the past, the use or threat of nuclear weapons would now be contrary to fundamental principles of humanity, and, hence, contrary to customary international law. If the answer to that question is yes, Australia considers that it is not necessary for the Court to attempt to fix the precise time at which customary international law reached this point, and this would probably not be possible in any event. Both questions on which advisory opinions have been requested are framed in the present tense. They are forward looking, and are not concerned with any conduct which has occurred in the past. They are concerned only with what the law is today, and what consequences it will have for States today and tomorrow.

Developments Establishing the *Per Se* Illegality of Nuclear Weapons

Mr President, Members of the Court,

15. In order to answer the question whether nuclear weapons are now contrary to fundamental principles of humanity, it is necessary to look at a variety of developments which have occurred since 1945, including political, technological and social developments, as well as developments in the law.

16. **Evolving nuclear technology.** There have been continuous and profound developments since 1945. The immense suffering caused by nuclear weapons was apparent already from their use that year in Hiroshima and Nagasaki. However, at that time, the single nuclear power had a limited nuclear arsenal, and its delivery systems by today's standards were primitive. In subsequent years and decades, things changed quite rapidly. Vastly more powerful nuclear weapons were developed. New technologies also emerged to make weapons and their delivery systems ever more efficient and deadly. Huge arsenals of awesome destructive power were amassed in a seemingly never ending search for security based on the threat of mass devastation. At the peak of the Cold War, there were almost 80,000 nuclear warheads in existence. The point was reached early in the Cold War where all the nuclear weapons in the world had sufficient destructive power to destroy all life on the planet many times over.

17. There was also a progressive proliferation of nuclear technology. Within twenty years of the first atom bomb, the number of nuclear-weapon States grew from one to five. Since then, nuclear science and technology has spread to the point at which the acquisition of nuclear weapons would be a practical possibility for not only a large number of other States, but possibly in the future also for non-State entities and even criminal organisations.

18. The international community has been intensely concerned by these developments. Numerous General Assembly resolutions have expressed alarm at

> the threat to the survival of mankind and to the life sustaining-system posed by nuclear weapons.[26]

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26 See eg resolution 33/71B of 14 December 1978 ("Review of the Implementation of the Recommendations and Decisions adopted by the General Assembly at its Tenth

In 1981, the General Assembly recognized that

> all the horrors of past wars and all other calamities that have befallen people would pale in comparison with what is inherent in the use of nuclear weapons capable of destroying civilisation on earth.[27]

19. In terms of general principles of humanity, it was thus the collective existence of all such weapons, and the possibility of a global nuclear conflagration which they engendered, which became of foremost concern. It is not to the point that it may be possible to conceive of theoretical situations in which a nuclear weapon may cause no more damage than certain conventional weapons. The fact remains that the existence of nuclear weapons as a class of weapons threatens the whole of civilisation. This is not the case with respect to any class or classes of conventional weapons. It cannot be consistent with humanity to permit the existence of a weapon which threatens the very survival of humanity. The threat of global annihilation engendered by the existence of such weapons, and the fear that this has engendered amongst the entire post-War generation, is itself an evil, as much as nuclear war itself. If not always at the forefront of our everyday thinking, the shadow of the mushroom cloud remains in all our minds. It has pervaded our thoughts about the future, about our children, about human nature. And it has pervaded the thoughts of our children themselves, who are deeply anxious about their future in a world where nuclear weapons remain.

20. It is in any event today unlikely in practice that one nuclear weapon would be used in isolation: it would be academic and unreal for any analysis to seek to demonstrate that the use of a single nuclear weapon in particular circumstances could be consistent with principles of humanity. The reality is that if nuclear weapons ever were used, this would be overwhelmingly likely to trigger a nuclear war.

Mr President, Members of the Court,

21. **Evolving restrictions on nuclear activity.** In response to these realities, and to the dangers posed by nuclear weapons, there has been in fact intense international activity. In 1945, nuclear weapons were under no specific international controls at all, other than those applying to weapons generally. Since then, progressive restrictions on the manufacture, acquisition, deployment, testing and military use of nuclear weapons have now been imposed by a series of universal conventions. Major milestones have been the establishment in 1957 of the International Atomic Energy Agency and the beginnings of international safeguards; the 1959 Antarctic Treaty;[28] the 1963 Partial Test Ban Treaty;[29] the 1967 Outer Space Treaty;[30] the 1968 Nuclear Non-

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Special Session"), preambular paragraph 1; resolution 35/152B of 12 December 1980 ("Review of the Implementation of the Recommendations and Decisions adopted by the General Assembly at its Tenth Special Session"), preambular paragraph 1.

27 Resolution 36/100 of 9 December 1981 ("Declaration on the Prevention of Nuclear Catastrophe"), preambular paragraph 2.

28 Washington, 1 December 1959, UNTS vol. 402, p 71.

29 Treaty banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Moscow, 5 August 1963, UNTS vol. 480, p 43.

Proliferation Treaty (NPT);[31] the 1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof;[32] and the 1967 Treaty of Tlatelolco[33] and 1985 Treaty of Rarotonga[34] establishing nuclear-free zones in Latin America and the South Pacific respectively.

22. However, it is the eventual complete elimination of nuclear weapons that has become established as the primary goal of the international community. Article VI of the Nuclear Non-Proliferation Treaty made unequivocally clear the obligation of the nuclear weapons States to disarm:

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

Commitment to the goal of elimination was reaffirmed, for instance, by the General Assembly in 1978 at its tenth special session on disarmament, in a resolution adopted without a vote which declared that:

> Nuclear weapons pose the greatest danger to mankind and to the survival of civilisation. It is essential to halt and reverse the nuclear arms race in all its aspects in order to avert the danger of war involving nuclear weapons. The ultimate goal in this context is the complete elimination of nuclear weapons.[35]

And that commitment was reaffirmed again, to take a more recent example, by the 1995 Non-Proliferation Treaty Review Conference, at which the States Parties reiterated their belief in the "ultimate goal of complete elimination of nuclear weapons.

23. To date, international efforts have not culminated in an international convention banning the threat or use of nuclear weapons in all circumstances. However, this does not mean that the international community does not regard nuclear weapons as fundamentally inhumane or inconsistent with the dictates of public conscience. On the contrary,

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30 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, London, Moscow and Washington, 27 January 1967, UNTS vol. 610, p 205.

31 Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature at London, Moscow and Washington on 1 July 1968 , UNTS vol. 729, p 161.

32 London, Moscow and Washington on 11 February 1971, UNTS vol. 955, p 115.

33 Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco) and Additional Protocols I and II, Mexico, 14 February 1967, UNTS vol. 634, p 281.

34 South Pacific Nuclear Free Zone Treaty (SPNFZ), Rarotonga, 6 August 1985, 24 ILM 1440 (1986); Australian Treaty Series 1986, No. 32. See also Protocols 1, 2 and 3 to that Treaty, Suva, 8 August 1986. For proposals for other nuclear free zones, see eg General Assembly resolutions 49/138 of 19 December 1994 ("Establishment of an African nuclear-weapon-free zone"); 49/72 of 15 December 1994 ("Establishment of a nuclear-weapon-free zone in South Asia").

35 Resolution S-10/2 of 30 June 1978 ("Final Document of the Tenth Special Session of the General Assembly"), para 47.

all the international efforts taken so far with the aim of ultimately eliminating nuclear weapons altogether suggest exactly the opposite. If nuclear weapons were perfectly compatible with general principles of humanity, there would seem little justification for such intense international effort aimed at their elimination.

24. Further evidence of the attitude of the international community can be found in a series of General Assembly resolutions dating back to 1961. In the first of these, resolution 1653, the Assembly declared that:

> The use of nuclear and thermo-nuclear weapons is contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations.

The resolution declared further, in quite express terms, that:

> The use of nuclear and thermo-nuclear weapons would exceed even the scope of war and cause indiscriminate suffering and destruction to mankind and civilization and, as such, is contrary to international law and to the laws of humanity.

This conclusion, that the use of nuclear weapons would be contrary to international law, has been expressed in a string of subsequent General Assembly resolutions, the last of which was resolution 49/75K requesting one of the present advisory opinions.[36] In 1983, in a resolution entitled "Condemnation of nuclear war", the General Assembly "[r]esolutely, unconditionally and for all time" condemned nuclear wars, being contrary to human conscience and reason, as the most monstrous crime against peoples.[37]

Some of the General Assembly resolutions refer specifically to the prohibition of the "threat" of nuclear weapons, in addition to their "use".[38]

25. The view has been expressed by at least one eminent scholar that resolution 1653 is an example of a "law-making" resolution of the

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36 Resolution 1653 (XVI) of 24 November 1961 ("Declaration on the Prohibition of the Use of Nuclear and Thermo-nuclear Weapons"); resolution 2936 (XXVII) of 29 November 1972 ("Non-Use of Force in International Relations and Permanent Prohibition of the Use of Nuclear Weapons"); resolution 33/71B of 14 December 1978 ("Non-Use of Nuclear Weapons and Prevention of Nuclear War"); resolution 34/83G of 11 December 1979 ("Non-Use of Nuclear Weapons and Prevention of Nuclear War"); resolution 35/152D of 12 December 1980 ("Non-Use of Nuclear Weapons and Prevention of Nuclear War"); resolution 36/92I of 9 December 1981 ("Non-Use of Nuclear Weapons and Prevention of Nuclear War"); resolution 44/117C of 15 December 1989 ("Convention on the Prohibition of the Use of Nuclear Weapons"); resolution 45/59B of 4 December 1990 ("Convention on the Prohibition of the Use of Nuclear Weapons"); resolution 46/37D of 6 December 1991 ("Convention on the Prohibition of the Use of Nuclear Weapons"). See also eg resolution 36/100 of 9 December 1981 ("Declaration on the Prevention of Nuclear Catastrophe"), paragraph 1 ("States and statesmen that resort first to the use of nuclear weapons will be committing the gravest crime against humanity").

37 General Assembly resolution 38/75 of 15 December 1983 ("Condemnation of Nuclear War"), operative paragraph 1.

38 Resolution 2936 (XXVII) of 29 November 1972 ("Non-Use of Force in International Relations and Permanent Prohibition of the Use of Nuclear Weapons"), preambular paragraph 10.

25. The view has been expressed by at least one eminent scholar that resolution 1653 is an example of a "law-making" resolution of the General Assembly.[39] It may well be that at the time it was adopted in 1961 it did not reflect established customary international law. Nevertheless, in view of the considerations to which I have referred—in particular the threat to the whole of civilisation posed by nuclear weapons, the international commitment to the elimination of nuclear weapons and practical steps taken towards that end, and General Assembly resolutions declaring the illegality of nuclear weapons—it must be the case that at the very least, the illegality of nuclear weapons has been emerging as a principle *de lege ferenda* for some time. The question is whether it has yet finally established itself as *lex lata*. Australia submits that there have been a number of recent developments which justify the conclusion that this stage has now been reached.

Mr President, Members of the Court,

26. **International law of war and human rights.** A further development which merits attention in this respect is the significant change in the international community's attitude to war generally and to human rights. This of itself may have little direct bearing on the question of the legality or illegality of specific types of weapons, but is nonetheless important. A society which abhors war and condemns the use of force will have higher standards in assessing the humanity of weapons of warfare than a society which considers the use of force to be a permissible means of international dispute settlement. The preamble to the United Nations Charter expresses the determination "to save succeeding generations from the scourge of war". The prohibition on the use of force, enshrined in Article 2, paragraph 4, of the Charter, has since been continuously reaffirmed, and progressively more clearly articulated and defined in a series of authoritative General Assembly Declarations.[40]

27. International standards of human rights must shape conceptions of humanity and have an impact on the dictates of public conscience. International concern for human rights has been one of the most characteristic features of this era of international law. The commitment to human rights in Charter provisions such as Articles 1, 55, 62 and 76, has been developed and reinforced by instruments such as the 1948 Universal Declaration of Human Rights and the 1966 Covenant on Civil and Political Rights and Covenant on Economic, Social and Cultural

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39 Brownlie, I *Principles of Public International Law* (4th edn 1990), p 14.

40 Resolution 290 (IV) of 1 December 1949 ("Essentials of Peace"); resolution 2131 (XX) of 21 December 1965 ("Declaration on Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty"); resolution 2625 (XXXV) of 24 October 1970 ("Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Amongst States in Accordance with the Charter of the United Nations 1970"); resolution 2734 (XXV) of 16 December 1970 ("Declaration of the Strengthening of International Security"); resolution 36/103 of 9 December 1981 ("Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States"); resolution 42/22 of 18 November 1987 ("Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations").

Rights, as well as specific conventions on acts such as torture. It is now accepted that the most fundamental human rights are now part of customary international law. The General Assembly, in a resolution adopted in 1983, drew the connection between international human rights and nuclear weapons, when it condemned nuclear war "as a violation of the foremost human right—the right to life".[41]

28. **International civilian protection law.** Another area of the law in which there have been significant recent developments is that of the protection of the civilian population in times of armed conflict. A significant step further was taken as recently as 1977, with the adoption of 1977 Additional Protocol I to the Geneva Conventions.[42] Australia, together with the bulk of the international community, believes that the essential terms of the Protocol should be regarded as reflecting customary international law. Article 51, paragraph 4, of this Protocol prohibits "indiscriminate attacks", defined to include

> an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.[43]

Article 54, paragraph 2, provides that a Party may not

> attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party.

Further, Article 57, paragraph 2(b), prohibits attacks where it is apparent

> that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Mr President, Members of the Court,

29. **International environmental law.** Yet another development relates to the growing appreciation since 1945 of the health and environmental effects of nuclear weapons, and of the development of international law in these areas. Not only have scientific and medical advances increased our understanding of the effects of such weapons, but since 1945 the gravity of potential damage to the world environment and the health of its population has grown with the growth of the world's nuclear arsenals. In 1987, the World Commission on the Environment and Development reported that

> The likely consequences of nuclear war make other threats to the environment pale into insignificance. Nuclear weapons represent a

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41 General Assembly resolution 38/75 of 15 December 1983 ("Condemnation of Nuclear War"), operative paragraph 1.

42 Articles 50–51.

43 Article 51(5)(b).

> qualitatively new step in the development of warfare. One thermonuclear bomb can have an explosive power greater than all the explosives used in wars since the invention of gunpowder. In addition to the destructive effects of blast and heat, immensely magnified by these weapons, they introduce a new lethal agent—ionising radiation—that extends lethal effects over both space and time.[44]

30. The development of environmental protection as a discrete field of international law has been quite recent, dating back only so far as the United Nations Conference on the Human Environment in Stockholm in 1972. The United Nations Environment Programme, UNEP, was established only in 1973. It was only a few years later, in 1976, that the International Law Commission, in its consideration of State responsibility, expressed the view that conduct gravely endangering the preservation of the human environment violated principles

> which are now so deeply rooted in the conscience of mankind that they have become particularly essential rules of international law.[45]

Its draft Article 19(3)(d) on State Responsibility, adopted the same year, classifies massive pollution of the atmosphere or of the seas as an international crime.[46] The significance of the developments in environmental law since then has been such that in 1993 this Court decided to establish a Chamber for Environmental Matters pursuant to Article 26, paragraph 1, of the Statute.[47]

31. More specifically, in recent times the issue of the protection of the environment in armed conflict has been a particular international concern. In 1976, the General Assembly adopted[48] the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques.[49] This Convention prohibits

> military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State party.[50]

The 1977 Additional Protocol I to the Geneva Conventions prohibits, in Article 35, paragraph 3,

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44 World Commission on Environment and Development ("the Brundtland Commission"), *Our Common Future* (1987), p 295.

45 Report of the International Law Commission on the work of its twenty-eighth session, *Yearbook of the International Law Commission 1976*, vol. II (part ii), p 109, para (33).

46 *Ibid*, p 75.

47 *International Court of Justice Yearbook* 1992–1993, No. 47 (The Hague 1993), p 17.

48 Resolution 31/72 of 10 December 1976 ("Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques") (adopted by a vote of 96 in favour, 8 against and with 30 abstentions).

49 Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, Geneva on 18 May 1977, UNTS vol.1108, p 151. The Convention entered into force on 5 October 1978.

50 Article 1.

> methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

Article 55 prohibits more specifically

> the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

The preamble to the 1981 Conventional Weapons Convention recalls

> that it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

International concern for the protection of the environment against damage from warfare was expressed also in the General Assembly's 1982 "World Charter for Nature",[51] and the 1992 Rio Declaration on Environment and Development.[52]

32. Indeed, consideration of lethal effects of radiation over time provides a link between the principle which provides for the protection of civilian populations and the principle which provides for protection of the environment. The development of the principle of intergenerational equity has been gathering pace over the last several decades, but as long ago as 1972 found expression in the Stockholm Declaration on Human Environment. The first principle of that Declaration speaks of a "solemn responsibility to protect and improve the environment for present and future generations". Future generations of humanity, innocent in the conflict which may give rise to the use of nuclear weapons, must be afforded protection on the basis of this principle of intergenerational equity. There is opportunity for this Court, as guardian of the legal interests of succeeding generations, to recognize and apply this newly emerging principle.

33. All these recent developments in the law point to an international rejection of the use of nuclear weapons. It is not to the point whether or not any of these specific conventions or instruments specifically applies to nuclear weapons, or purports to make the threat or use of nuclear weapons *per se* illegal. The question is not whether the threat or use of

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51 General Assembly resolution 37/7 of 9 November 1982 ("World Charter for Nature"), Annex, paragraphs 5 ("Nature shall be secured against degradation caused by warfare or other hostile activities") and 20 ("Military activities damaging to nature shall be avoided"). (The resolution was adopted by a vote of 111 in favour to 1 against, with 18 abstentions.)

52 United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992, (A/CONF.151/5/Rev.1), Principle 24 stated that: "Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and co-operate in its future development, as necessary".

Also, in a consensus resolution adopted in 1992, the General Assembly stated that "the destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law" (resolution 47/37 of 25 November 1992 ("Protection of the Environment in Times of Armed Conflict"), preambular paragraph 5).

nuclear weapons is inconsistent with any of these instruments, but whether the threat or use of nuclear weapons is *per se* inconsistent with general principles of humanity. All these instruments, whether they themselves apply to nuclear weapons or not, provide cumulative evidence that weapons having such potentially disastrous effects on the environment, and on civilians and civilian targets, are no longer compatible with the dictates of public conscience.

34. **The illegality of nuclear weapon possession.** However Mr President, Members of the Court, developments since 1945 also point to much more than this: the illegality not merely of the use or threat of use of nuclear weapons, but the illegality of their possession. The mere existence of such weapons, and their possession by States as part of their military arsenals, gives rise to the ever present threat of the outbreak of nuclear war.

35. The proponents of theories of limited nuclear war, and deterrence based on such theories, ask all of us to make assumptions about control over the use of weapons and human reliability in crisis management that cannot, in fact, be supported. Mistakes, accidents, loss of control are commonplace in human experience. Such events have occurred in the past when conventional weapons were being used. The costs have been high in terms of human lives, both armed and civilian. Such costs if nuclear weapons were involved would be vastly higher.

36. More critically, it has been utterly fundamental in debate about nuclear war fighting that proponents have insisted they could maintain escalation control. This is without credibility. An attempt to stop preponderant conventional force by use of tactical or battlefield nuclear weapons—so called "flexible response"—would, it is now widely recognized, involve crossing a nuclear threshold and thus attract a response with nuclear weapons, almost certainly more powerful. General Colin Powell, recording his reaction in 1986 to the question of a possible Soviet attack upon Germany with conventional weapons, wrote in his recent autobiography about his scepticism that major civilian casualties, and subsequent escalation, could be avoided:

> No matter how small these nuclear payloads were, we would be crossing a threshold. Using nukes at this point would mark one of the most significant political and military decisions since Hiroshima. The Russians would certainly retaliate, maybe escalate. At that moment, the world's heart was going to skip a beat. From that day on, I began rethinking the practicality of these small nuclear weapons.[53]

37. If "small" nuclear weapons lack "practicality", what can be said of the others? In 1979, Lord Louis Mountbatten, former United Kingdom Chief of Staff said: "As a military man I can see no use for any nuclear weapons".[54] In 1982, another UK Chief of Staff, Field Marshall Lord

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53 Powell, A *Soldiers Way* (1995), p 324.

54 Quoted in McNamara, *In Retrospect, The Tragedy and Lessons of Vietnam* (1995), Appendix, pp 344–345.

Carver, wrote that he was totally opposed to NATO ever initiating the use of nuclear weapons.[55] In 1979, Dr Henry Kissinger said in Brussels:

> Our European allies should not keep asking us to multiply strategic assurances that we cannot possibly mean or, if we do mean, we should not execute, because if we execute we risk the destruction of civilization.[56]

In 1987, Helmut Schmidt said: "Flexible response is nonsense. Not out of date, but nonsense". In 1982, Melvin Laird said: "These weapons ... are useless for military purposes". With nuclear weapons, the avoidance of "the destruction of civilization" rests upon an assumption of escalation control which cannot be made, not least because on at least one side it would involve—as again Dr Kissinger put it—what "we cannot possibly mean, or if we do mean, we should not execute".[57]

38. Given this ever-present threat of destruction that is inherently associated with nuclear weapons, and the way in which that threat is now so universally understood, Australia submits that the attitude of the international community is that there are some weapons the very existence of which is inconsistent with fundamental general principles of humanity. In the case of weapons of this type, international law does not merely prohibit their threat or use. It prohibits even their acquisition or manufacture, and by extension their possession.

39. Such an attitude has been manifested in the case of other types of weapons of mass destruction. Both the 1972 Biological Weapons Convention and the 1992 Chemical Weapons Convention do not merely prohibit the use of biological and chemical weapons of mass destruction, but prevent their very existence. Under these conventions, States Parties are obliged never in any circumstances to acquire, retain, transfer or use such weapons,[58] and are required to destroy all such weapons that they already possess. They are further prohibited from assisting other States from acquiring such weapons.[59] Both conventions have widespread adherence. The Biological Weapons Convention has 131 States Parties. The very recent Chemical Weapons Convention has 159 signatories and already 40 ratifications or acceptances.[60]

40. The final preambular paragraph to the Biological Weapons Convention expresses the conviction of the States Parties that the use of biological weapons

> would be repugnant to the conscience of mankind and that no effort should be spared to minimize this risk.

Clearly, this is a strong international statement that the use of such weapons would be contrary to fundamental general principles of humanity. The approach of both conventions indicates a further

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55 Quoted, *ibid.*
56 Quoted, *ibid.*
57 All quoted, *ibid.*
58 Article I of each Convention.
59 Chemical Weapons Convention, Article 1(1)(d); Biological Weapons Convention, Article III.
60 The Convention will enter into force 180 days after the 65th ratification, accession, acceptance or succession.

conviction that the threats posed by certain types of weapons are so grave that they should be eliminated altogether, with their mere possession by a State made unlawful.

41. Although neither of these conventions applies to nuclear weapons, they are indicative. Nuclear weapons are the last of the trilogy of weapons of mass destruction, and overwhelmingly the most destructive of the three. They can be no more consistent with fundamental principles of humanity than the other two.

42. The international community has already clearly begun to go down the path of elimination of nuclear weapons in formal treaty law. The centrepiece of international efforts to combat the proliferation of nuclear weapons and to advance the cause of nuclear disarmament is the 1968 Nuclear Non-Proliferation Treaty, Article VI of which commits every State to general and complete nuclear disarmament. This treaty is of enormous practical significance in a number of respects, including the international safeguards mechanisms it provides to prevent diversion of nuclear material from peaceful uses to nuclear weapons or other nuclear explosive devices.

43. Insofar as the question of the present legality of nuclear weapons is concerned, it is Articles I and II of the Non-Proliferation Treaty which are of particular importance. Article II prohibits non-nuclear-weapon States from receiving the transfer of nuclear weapons or of control over such weapons, directly or indirectly, from any transferor whatsoever. It further prohibits non-nuclear-weapon States from manufacturing or otherwise acquiring nuclear weapons, or from seeking or receiving any assistance in the manufacture of nuclear weapons. The Article applies not only to nuclear weapons, but also to any other nuclear explosive devices. Article I of the Treaty imposes a corresponding obligation on the nuclear-weapon States not to transfer nuclear weapons to non-nuclear-weapon States, or to assist non-nuclear-weapon States to manufacture or acquire them.

44. Obligations under the Nuclear Non-Proliferation Treaty may have been no more than treaty obligations at the time it was concluded. However, over the years, the number of States Parties to the Treaty has steadily risen. By 1992, when China and France acceded to it, all five acknowledged nuclear-weapon States were Parties to it. It now has 180 States Parties, the vast majority of all States in the world. At the Nuclear Non-Proliferation Treaty Review and Extension Conference held in May this year, the Treaty was extended indefinitely by unanimous decision of the Conference of States Parties. In view of this widespread, indeed near universal, adherence to the Treaty; in view of the indefinite duration now of its provisions; and in view of all the other international activities and evidence (not least in the context of the hostile reaction world-wide to the continued weapons testing by France and China) manifesting the clearest conviction that nuclear weapons must ultimately be eradicated, Australia submits that Articles I and II of the Nuclear Non-Proliferation Treaty must now be regarded as reflective of customary international law.

45. Those two provisions, to adopt the terminology used by this Court, are provisions which have

> constituted the foundation of, or [have] generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio iuris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention.[61]

For those States who are parties to the Non-Proliferation Treaty the conventional obligations and the corresponding obligations under customary international law, exist side by side.[62]

46. If non-nuclear-weapons States cannot legally acquire such weapons, they cannot legally possess them. The possession of such weapons following their illegal manufacture or acquisition would be a continuing illegality. And if such States cannot lawfully manufacture or acquire such weapons, they cannot test them. Testing is in any event a step in the manufacture or acquisition of such weapons, or a use of them, both of which we have argued to be illegal. It is therefore illegal to acquire, develop, test, possess, or otherwise use or threaten to use nuclear weapons.

47. The right of States to self-defence cannot be invoked to justify such actions. The right to self-defence is not unlimited. It is subject to fundamental principles of humanity. Self-defence is not a justification for genocide, for ordering that there shall be no enemy survivors in combat or for indiscriminate attacks on the civilian population. Nor is it a justification for the use of nuclear weapons.

48. This prohibition under customary international law must apply equally to nuclear-weapon States and non-nuclear-weapon States. It is in the nature of rules of customary international law that they apply to all States alike. If humanity and the dictates of conscience demand the prohibition of such weapons for some States, it must demand the same prohibition for all States. And following the end of the Cold War, there can no longer be, if there ever was, any practical imperative for treating nuclear-weapon States and non-nuclear-weapon States differently. True, the Nuclear Non-Proliferation Treaty does not state that it is illegal for the nuclear-weapon States to continue to acquire, possess, test, threaten or use nuclear weapons. Indeed, it seems to assume they will do some or all of these things, at least for a period. However, it is also true that the Non-Proliferation Treaty confers no positive right on the nuclear-weapon States to continue to possess such weapons. Furthermore, the Treaty points to the ultimate aim of the complete elimination of nuclear weapons through general and complete nuclear disarmament. That Treaty cannot be seen as a bar to the emergence of a rule of customary international law which would fill the gap, making the threat or use of nuclear weapons illegal for nuclear-weapon States in the same way as for non-nuclear-weapon States.

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61 *North Sea Continental Shelf* cases, ICJ Reports 1969, p 41, para 71.
62 *Military and Paramilitary Activities* case, ICJ Reports 1986, pp 93–95.

The Obligation to Eliminate and the Principle of Stable Deterrence

Mr President, Members of the Court,

49. Having reached this conclusion that the acquisition, development, testing, possession, use or threat of use of nuclear weapons is contrary to international law, it follows that all States are under an obligation to take positive action to eliminate completely nuclear weapons from the world. To implement this obligation, States which do not possess such weapons cannot lawfully acquire them, and States which do possess nuclear weapons cannot add to, improve or test them. States which possess nuclear weapons must be subject to an obligation to eliminate their existing weapons. They must within a reasonable timeframe take systematic action to eliminate completely all nuclear weapons in a manner which is safe, and does not damage the environment.

50. International law must nonetheless deal with the reality of the present existence of large stocks of nuclear weapons. It is accordingly necessary and appropriate that during the course of the elimination process the principle of stable deterrence be maintained: this would enable for that period the possession or threat of use of nuclear weapons for the sole purpose of ensuring that nuclear weapons are never used by others. Given the inherently illegal nature of nuclear weapons, such deterrence can only be a temporary necessity, and can never make lawful the indefinite possession or threat of use of nuclear weapons.

51. At the time that the nuclear-weapon States acquired nuclear weapons, their possession and deployment, threat or even use, may not yet have been illegal *per se*. But, having acquired them, international law then changed. It must be accepted that this gives rise to practical difficulties. The nuclear-weapon States have structured their defence policies on the basis of the existence of their own nuclear arsenals, and those of the other nuclear-weapon States. The defence policies of the nuclear-weapon States are based on the principle of stable deterrence. That is, the simultaneous possession of nuclear weapons by the nuclear-weapons States, and the mutually assured destruction which would result from any use of such weapons, deters their use at all. In these circumstances, one nuclear-weapon State cannot be expected unilaterally to undertake a complete nuclear disarmament. This would undermine the basis of the policy of deterrence, and if anything would make the actual use of nuclear weapons more, rather than less likely. We cannot foresee the future, and should never assume the projection into the indefinite future of present conditions. If the prospect of any nuclear-weapon State initiating a nuclear attack on a nuclear disarmed State looks far-fetched now, it might not be so at some time in the future.

52. Consistently with this conclusion, Australia, together with many other governments, supports the principle of stable nuclear deterrence pending complete nuclear disarmament. However, we state again that stable deterrence can only be accepted as an interim or transitional condition—ie. until the complete elimination of nuclear weapons accompanied by substantial verification provisions is achieved.

53. On the question of verification, it is perhaps worth making the point that, on the evidence of the now successfully concluded Chemical Weapons

> Convention, a comprehensive and effective verification regime is both practical and achievable. The nature of the technology and associated commercial industry involved makes the detection of chemical weapons manufacture and possession very much harder than would be the case for nuclear weapons. If verification is possible for chemical weapons, making it possible in due course to rid the world of this whole class of weapons of mass destruction, then there is no reason why it should not be possible for nuclear weapons.[63]

54. During this transitional phase of negotiated nuclear disarmament, the nuclear-weapon States remain under a legal obligation to continue to negotiate in good faith with other States, and otherwise to make every possible effort to achieve complete nuclear disarmament within a reasonable timeframe. Such a "duty to negotiate" under customary international law is not unprecedented. An analogous duty exists in customary international law relating to continental shelf delimitations between neighbouring or opposite coastal States. In that context, this Court has referred to the existence of a "duty to negotiate with a view to reaching agreement, and to do so in good faith, with a genuine intention to achieve a positive result".[64]

55. State practice is consistent with, and confirms these conclusions. As has been seen, Article VI of the Nuclear Non-Proliferation Treaty imposes an obligation on the nuclear-weapon States, and on all other Parties to the Treaty, to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control. At the 1995 Non-Proliferation Treaty Review and Extension Conference, the nuclear-weapon States reaffirmed

> their commitment, as stated in article VI, to pursue in good faith negotiations on effective measures relating to nuclear disarmament.[65]

The ultimate goal of eliminating those weapons was also reaffirmed.

Mr President, Members of the Court,

56. During this transitional phase, all States, including the nuclear-weapon States are prohibited by customary international law from engaging in any action inconsistent with this commitment. They cannot introduce new nuclear weapons. They cannot refine their existing stockpiles. They cannot engage in action intended to ensure maintenance of their nuclear arsenals indefinitely into the future.

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63 See generally Taylor, "Technological Problems of Verification", in Rotblat et al, *A Nuclear-weapon-Free World: Desirable? Feasible?* (1993), pp 63–82.

64 *Gulf of Maine case*, ICJ Reports 1984, p 292, para 87. See *also North Sea Continental Shelf cases*, ICJ Reports 1969, p 47, para 85.

65 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Decision 2, "Principles and objectives for nuclear non-proliferation and disarmament", NPT/CONF.1995/32/DEC.2, 11 May 1995, operative paragraph 3.

57. In particular, the testing of nuclear weapons under any circumstances must now be prohibited. Not only is testing a "use" of nuclear weapons, and therefore subject to the primary obligation, but testing for the purpose of developing new nuclear weapons or for refining existing weapons would clearly be illegal, as they are directed to enhancing nuclear armaments, rather than eliminating them. However, even testing for the purpose of maintaining existing stockpiles would be inconsistent with the obligation, since such conduct is aimed at extending the period in which the status quo can be maintained. The argument that some testing of existing stocks may continue to be necessary during the transition period in order to ensure the basic physical safety of those weapons legitimately retained for balanced deterrence purposes, is belied by the acceptance in principle by all nuclear-weapon States of the conclusion, as early as next year, of a genuinely comprehensive Comprehensive Test Ban Treaty (CTBT) which would allow no such tests. France has argued that it needs to conduct tests now to ensure the safety of its stockpile after the CTBT is concluded. But this argument has manifestly failed to win wider international acceptance—no doubt because it is well-known that safety can be maintained through computer simulation, and widely believed that France has, or could have if it chose, access to all relevant data.

58. It follows that continued nuclear testing by France and China runs directly counter to the obligations that I am talking about. It also runs counter to the express undertakings of France and China, and the other nuclear-weapon States, at the recent NPT Review and Extension Conference, when they undertook to exercise "utmost restraint" in nuclear testing pending the entry into force of a comprehensive test ban treaty. The actions of France and China have been regarded by the overwhelming majority of the international community as a clear betrayal of this undertaking, accepted in good faith by the international community.

59. Yet testing goes on. Only three days ago France exploded a third nuclear device in the South Pacific. The device tested was over four times the size of the Hiroshima bomb. France's testing is an affront to the peoples of the South Pacific, whose desire, clearly established in the Treaty of Rarotonga, is to live in a nuclear free region. It is also an affront to the commitment of the South Pacific to nuclear non-proliferation and nuclear disarmament, and a betrayal of their strong support for the indefinite extension of the NPT. And it is an affront to the entire international community, as Australia has consistently and forcefully maintained since the test series was announced.

60. As I indicated at the outset, specific uses of nuclear weapons in particular cases may also violate rules of international law other than those to which I have referred in this part of our argument. For instance, the Court will recall that earlier this year Australia and four other States applied for permission to intervene in proceedings brought by New Zealand against France. Had we been permitted to intervene, Australia proposed to argue that the current French nuclear tests in the Pacific are a violation by France of *erga omnes* obligations relating to the protection of the marine environment. That case was concerned with the

environmental effects of the French nuclear tests, and Australia, as an applicant for permission to intervene, did not seek to broaden the scope of the proceedings because we could not in the context of that particular case. However, for the reasons I have given, irrespective of the environmental effects, Australia's position is that the testing of nuclear weapons is now *per se* illegal under customary international law.[66]

Achieving Elimination in Practice

Mr President, Members of the Court,

61. Consistent with the obligation to negotiate to which I have referred, substantial political efforts to further the process of nuclear disarmament are now under way, which Australia fully supports. The main challenge for the international community over the coming years will be to ensure that the recent achievements in nuclear disarmament are locked in and that the downward trend in nuclear arsenals, reversing the forty years of the nuclear arms race, is continued and broadened, until complete elimination of nuclear weapons has been achieved.

62. We should be under no illusions about the size of the task of nuclear disarmament which confronts the international community. More than 40,000 nuclear warheads exist in the world today, with a total destructive power around a million times greater than that of the bomb that flattened Hiroshima. Under START I, the United States and Russia have agreed to nuclear reductions which are seeing each country dismantle some 2,000 warheads annually. But Russia's stockpile is much greater: around 25,000 warheads, compared with some 15,000 for the United States. A further 1,000 are possessed by the other three nuclear-weapon States, the United Kingdom, France and China. If the reductions envisaged under START I are achieved, this will still leave some 20,000 nuclear warheads. At their present rate, the United States and Russia will have reached their START I targets in about ten years. Under START II, both parties have agreed to further deep cuts. But even if the dismantlement schedules can be maintained, the five nuclear-weapon States by 2003 would still have around 12,000 warheads. As agreed by Presidents Bush and Yeltsin, the United States would then have a maximum of 3,500 strategic warheads each: the balance would be made up of the approximately 1,000 strategic warheads held by the United Kingdom, France and China, which I have just mentioned, and the tactical warheads held by all nuclear-weapon States.

63. The task of these reductions requires a major commitment from the nuclear weapon States. The task does not end with the dismantlement of weapons. There are further processes that will have to be pursued. The

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66 In the event, the Court by its Order of 22 September 1995 dismissed New Zealand's Request for an examination of the situation in accordance with paragraph 63 of the Judgment of the Court of 20 December 1974 in the *Nuclear Tests Case (New Zealand v. France)*, so that it was unnecessary for the Court to determine the merits either of the New Zealand request or of the applications for permission to intervene filed by Australia and four other States. In that Order, the Court stated that its decision was without prejudice to the obligations of States to respect and protect the natural environment, obligations to which France has reaffirmed its commitment (at paragraph 64).

components need to be destroyed. The weapons grade nuclear material needs to be burnt in reactors, or diluted for peaceful nuclear use. At the stage of dismantlement, the nuclear-weapon States have a special responsibility for accounting for and protecting the components and weapons grade material.

64. The START agreements undoubtedly represent a major leap forward in reducing the threat of nuclear conflagration. But they clearly do not remove that threat. The world still needs, if we are to achieve the complete elimination of nuclear weapons within a reasonable timeframe, a practical program of nuclear reductions to which all five nuclear-weapon States are committed, and which they will pursue in good faith and with renewed vigour.

65. Much work clearly needs to be done to identify what that reasonable timeframe would in practice be. We do not ask that the Court itself attempt to tackle that task: it is enough that the basic principle be articulated. But I can advise the Court that Australia is prepared to do everything it can to advance knowledge of what is both desirable and possible in this respect. Prime Minister Paul Keating announced last week that we would establish a group of knowledgeable, imaginative and distinguished individuals from around the world to produce a report on how to achieve a nuclear weapons free world as soon as possible, outlining the practical steps that would need to be taken to achieve that goal.

66. The first multilateral step towards the elimination of nuclear weapons will clearly be the CTBT, which we hope and expect will be concluded next year. The CTBT will be a major impediment to the development of new generations of nuclear weapons by the nuclear-weapon States. Without nuclear testing, the nuclear-weapon States ability to modernise their arsenals—by developing new weapons designs, and modifying existing designs—will be seriously constrained. A CTBT will thus break the spiral of qualitative competition between the nuclear-weapon States and open the way for further nuclear weapons reductions. Cessation of nuclear testing will furthermore mean that the nuclear-weapon States will find it difficult to maintain the expertise and facilities to develop more sophisticated nuclear warheads.

67. The next multilateral step after a CTBT will be persuading those countries which have produced fissile material for weapons to cease doing so permanently and accept international supervision of their sensitive nuclear material production facilities so that there is no future increase in the supply of such material for use in nuclear arsenals.

68. This will be achieved by the negotiation of a "cut-off" Convention banning the production of fissile material for weapons. The enrichment and reprocessing facilities in nuclear-weapon and nuclear threshold States would be either placed under international inspection or dismantled. This would be a major step forward towards the application of international safeguards to all nuclear activities in these States.

69. Further nuclear arms reductions treaties will need to be progressively negotiated by the United States and Russia, with moves made as early as possible to involve the five nuclear-weapon States. This process of

negotiation and implementation of nuclear arms reduction treaties adds an essential element of confidence between the States concerned and prepares the ground for further reductions. Through transparency and mutual, as well as international, inspection will come confidence, experience and the development of control measures which will provide the essential framework for the safe, secure total elimination of nuclear weapons. Added transparency would also come from the development of a regime requiring all States to declare and account for their present stocks of fissile material. The universal acceptance of non-proliferation obligations through membership of the NPT will also be essential for this process.

70. When the world is approaching the total elimination of nuclear weapons, there will be a need to address the legal obligations of nuclear-weapon States under the NPT and the nature of the application of international safeguards on their peaceful nuclear activities. Clearly safeguards measures will have to take into account the fact that the States concerned have detailed knowledge about the design and production of nuclear weapons.

Conclusion

Mr President, Members of the Court,

71. So long as nuclear weapons exist, humanity faces the risk they might be used. The prevailing military doctrines justifying the acquisition of nuclear weapons have rested upon the notion of their utility as deterrents—that the possibility they might be used will ensure that an attack with nuclear or, in some cases conventional, weapons, will not occur. This notion itself rests absolutely upon recognition of the unique destructive power of nuclear weapons, on the profound difference between them and conventional weapons.

72. As was hideously demonstrated at Hiroshima, where a relatively minuscule atomic bomb was detonated, and as the release of radiation by the Chernobyl disaster showed to our horror, any use of nuclear weapons, anywhere at any time, would be devastating and in no way comparable to any use, in whatever magnitude, of conventional weapons. The 12,000 warheads that will be left in 2003, assuming START II has been implemented by then, will be enough, it has been credibly estimated,[67] to destroy more than ten times over human society and the planetary environment as we have known it—through a combination of blasts, shock-waves, ionising radiation and impact upon the ionosphere and climate.

73. Australia submits that the answer to these concerns that is demanded by law, by rationality, by morality and by humanity is verifiable and effective nuclear disarmament, pursued without delay and under conditions of stable deterrence. This Court's unique ability to advise on the law in this context is of the deepest historic importance because, if you are minded to address the substantive issues raised in the questions

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67 Turco, Toon, Ackerman, Pollack & Sagan, *Nuclear Winter: Global Consequences of Multiple Nuclear Explosions*, 222 Sci, Dec 23, 1983, at 1283.

before you, your advice can and will materially effect the achievement of that nuclear disarmament.

I thank you, Mr President and Members of the Court, for your kind attention.