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and
SOLOMON ISLANDS

For: Preparatory Committee
on the Establishment of an International Criminal Court

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Laws of War:
Why We Prefer Option II of Draft Paragraph B (o) Concerning Methods of Warfare That Cause Unnecessary Suffering or Are Inherently Indiscriminate

Samoa, Marshall Islands and Solomon Islands are three small island states located in the Pacific Ocean. We have taken a particular interest since independence in issues relating to the laws of armed conflict, in particular to matters relating to weapons that kill and maim civilians and to weapons of mass destruction. Two of our territories were occupied and became venues for bloody battles during the Second World War. Much debris from that conflict is still with us. We all live in an area which was used by three of the nuclear weapons states for testing their material. The Marshall Islands was itself the scene of one series of those tests. All three peoples live daily with the resultant environmental degradation. We are strongly in favour of Option II of draft paragraph B(o) which reads:

> Employing weapons, projectiles and material methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate.

We accept the statement by the International Committee of the Red Cross ("ICRC") that this is an appropriate translation of the relevant language of the Hague Conventions of 1899 and 1907.[1]

The laws of armed conflict concerning weapons that, for the sake of simplicity, we shall describe as causing unnecessary suffering or which are inherently indiscriminate, have developed at two levels of abstraction, what one might call the level of "principles" on the one hand and of "rules" on the other. Since at least the Declaration of St Petersburg in 1868, states have accepted that the means of killing the enemy are not unlimited and that there are general principles establishing limitations on broad categories of weapons and methods. In tandem with these

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[1] ICRC, Comments on Informal Working Paper on War Crimes of 31 October 1997 (New York, 2 December 1997) at 3. The language appears, with only slight variations, in many subsequent instruments, including most recently, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (December 1997).

principles, states have from time to time agreed to rules to the effect that certain named weapons are forbidden per se. Thus, in St Petersburg, the parties banned any projectile of less than 400 grammes which was explosive or charged with fulminating or inflammable substances.[2] At the Hague in 1899 and 1907, it was agreed that poison or poisoned weapons and dum-dum bullets were forbidden. In the 1925 Geneva Protocol,[3] asphyxiating gases were banned (although many thought they were already illegal) and biological weapons were added to the list. There have, of course, been later additions to the list of absolutely forbidden items. The Ottawa Land Mines Convention,[4] signed on behalf of our three states last week, is the most recent example.

Now, the most important point about those weapons banned per se is that it is never lawful to use them. Never, under any circumstances. No considerations of military necessity can ever authorize their use. None of the justifications or excuses of self-defence, necessity and duress over which we agonized so long last week[5] can ever apply. An absolute rule is just that: absolute. Absolute, per se, prohibitions are good examples of the point made by a United States Military Tribunal at Nuremberg in 1948 in convicting a German General, General List: "[T]he rules of international law must be followed even if this results in the loss of a battle or even a war. Expediency or necessity cannot warrant their violation."[6]

But of course, the existence of the particular absolute rules does not exhaust the meaning of the general principle. All those rules do is create cases where there is no room for argument about whether the general rule applies to the particular instance.

Marshall Islands, Samoa and Solomon Islands combined our resources on a previous occasion and sought to apply this understanding of humanitarian law to nuclear weapons in a joint presentation we made to the International Court of Justice in the recent advisory proceedings

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2 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (Dec. 11, 1868). The general language spoke of the "employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable".

3 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare (June 17, 1925).

4 Supra, note 1.

5 See Chairman's Text, Grounds for Excluding Criminal Responsibility, 3 December 1997.

6 U.S. v. List (Feb. 19, 1948), in 11 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, 1946-1949, at 1230, 1272.

concerning the use, or threat of use, of such weapons.[7] It was our view that the laws of armed conflict, the law of human rights, and the law on the environment, point inexorably, both separately and in combination, towards a per se rule that bans the use of nuclear weapons in all instances. We contended before the Court that, at the very least, any use of nuclear weapons must be only so far as it is compatible with provisions of the law of the Hague, such as those reiterated in Option II. The four nuclear powers and their allies who participated in the proceedings conceded the point.

The Court, unanimously as we read its Opinion, endorsed the position adopted by the Nuremberg Tribunal, that while some of the norms in the law of the Hague might have been only conventional in origin, all of them have since passed into the body of international customary law.[8] Three of the fourteen judges accepted our position about a per se rule on nuclear weapons having emerged by now. Seven of the judges (who with the casting vote of the President constituted a majority) came within a hairsbreadth of this position. They went so far as to say that "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law."[9] They added that they were unable to conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."[10] Fourteen of the judges -- all who sat -- held, as we had contended and the nuclear powers conceded, that "a threat or use of nuclear weapons should also be compatible with the requirements of international law applicable in armed conflict, particularly those of the principles and rules of humanitarian law, as well as with specific obligations under treaties and other undertakings which deal specifically with nuclear

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7 The Court's decision is reported as Legality of the Threat or Use of Nuclear Weapons 1996 I.C.J. ("Nuclear Weapons Advisory Opinion"). The oral and written pleadings of the three Pacific Island States are contained in The Case Against the Bomb: Marshall Islands, Samoa and Solomon Islands Before the International Court of Justice in Proceedings on the Legality of the Threat or Use of Nuclear Weapons (Roger S. Clark and Madeleine Sann eds, 1996). Other helpful discussions are contained in International Review of the Red Cross, No. 316, Special Issue, January-February 1997; John Burroughs, The Legality of the Threat or Use of Nuclear Weapons: A Guide to the Historic Opinion of the International Court of Justice (1997).

8 Nuclear Weapons Advisory Opinion, paras 79-82.

9 Nuclear Weapons Advisory Opinion, dispositive paragraph, 105 (2) E.

10 Id. The views of the seven covered a spectrum on this issue. See The Case Against the Bomb, supra note 7, at 24.

weapons."[11] We do not know how to read the Court's unanimous opinion on this point as other than an emphatic endorsement of the application of the general principles contained in Option II to nuclear weapons, and by obvious implication, to other weapons that are not somewhere proscribed by name.

There are then, in settled existing law, both general principles and specialized rules in the area in question. What does Option I do to this structure? It says that the list of proscribed weapons therein represents the whole content of the general principle. The general principle has been sent down the memory hole. All we are left with is a list of proscribed weapons, and a limited list at that. Let me give an example of what this means. The list, we are pleased to note, includes chemical and bacteriological weapons. It also includes dum-dum bullets and poison arrows. It does not include nuclear weapons. Think about it: it is absolutely forbidden to kill someone with a poisoned arrow, and the ICC could have jurisdiction. If, however, one were to incinerate a hundred thousand people with an atomic weapon, the ICC would have no jurisdiction. A nuclear weapon is not one of the "following" means of which the provision speaks! And there is no point in appealing to the general principle established by 1899; it has been emasculated except to the extent it applies to the particular cases on the list in Option I. And the same is true of other weapons of mass destruction and other weapons that cause excessive suffering. If it is not on the list, there is no case. That is to stand the law of armed conflict on its head. It ought to be feasible to state a case in most such circumstances pursuant to the general principles.

Now, it may be possible for a creative prosecutor to re-package the atomic example (and other cases not expressly mentioned) under some other provisions in other articles of the draft text. But is there not something intellectually unsatisfying to professional lawyers like ourselves to have a law which speaks to poisoned arrows but not to the most terrible weapons of mass destruction in our century, which does not address them even in terms of general principle? Before you do that, dear colleagues, slip out the back of this Committee Room; take the escalator to the first floor; walk sixty feet north; tarry a while before the Hiroshima exhibit you will find there. Ask yourself the question attributed to Honore de Balzac which is roughly this: "is The Law like a spider's web which catches the little flies but lets the big ones break through?" Are we really prepared to accept that the supposedly noble preparatory drafting exercise in which we are engaged is one which deals with the small flies but not the big ones? In the words of Judge Weeramantry in the Nuclear Weapons Case:

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[11] Nuclear Weapons Advisory Opinion, dispositive paragraph 105 (2) D.

> At least, it would seem passing strange that the expansion within a single soldier of a single bullet is an excessive cruelty which international law has been unable to tolerate since 1899, and that the incineration of a hundred thousand civilians is not. This astonishment would be compounded when that weapon has the capability, through multiple use, of endangering the entire human species and all civilization with it.[12]

"Passing strange", indeed! Fortunately, the existing general law is not so strange. It contains the general statement in Option II, a statement that is appropriate to deal with the real cases. The Statute of the International Criminal Court should do no worse than to re-state the existing law.

In the best of all worlds, re-stating the existing law would mean re-stating both the general principle and, in a separate article, a list of the specific per se items. The problem with that, in the present setting, is that we might never agree on what to include on the list. For our part, we would want to include such items as anti-personnel mines, and, like the ICRC,[13] weapons that primarily injure by non-detectable fragments,[14] as well as blinding laser weapons.[15] Others might argue that the conventional prohibitions of these particular engines of inhumanity are too recent and not widely enough ratified to have found their way into the general law. For our part, we could also be tempted into insisting that we should accept in these negotiations the advice of the three judges in the International Court who believe that there is a per se rule against nuclear weapons.[16]

We have concluded, however, that those are battles to be fought another day. The General Assembly will, we understand, be calling again on the 9th of December for the commencement of negotiations for a convention that will result in the banishment of nuclear

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12 Nuclear Weapons Advisory Opinion, dissent of Judge Weeramantry at 8 (mimeo edition).

13 Comments on Informal Working Paper, supra note 1.

14 Protocol I to the Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or Have Indiscriminate Effects (Oct. 10, 1980) ("Convention on Conventional Weapons").

15 Protocol IV to the Convention on Conventional Weapons of 1980.

16 That is how we interpreted the reference to nuclear weapons in para. B 4. (k) (v) at p. 11 of U.N. Doc. A/AC.249/1997/L.5 from our February 1997 Session. We could even live with the kind of inclusive, rather than exclusive, list which was where we thought L.5 was headed. See also the (undated) NGO document "Proposal of the Weapons System Caucus" which uses the helpful words "including, but not limited to." We prefer, however, to avoid the unedifying battle on what to include on the list for whatever purpose.

weapons for all time. [17] We are also mindful of the admonition by the International Court of Justice that there is an obligation under treaty and customary law to "pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control." [18]

We can, in all the circumstances, agree not to insist in this forum on naming the unspeakable. Today, let us re-state the general language of the Hague. Marshall Islands, Solomon Islands and Samoa will rest content with that.

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17 U.N. Doc. A/C.1/52/L.37 (draft resolution).

18 Nuclear Weapons Advisory Opinion, dispositive paragraph 105 (2) F.