

Letter dated 15 June 1995 from counsel appointed by Nauru,
together with Written Comments of the
Government of Nauru (in two parts)

Legality of the Use by
a State of Nuclear
Weapons in Armed Conflict

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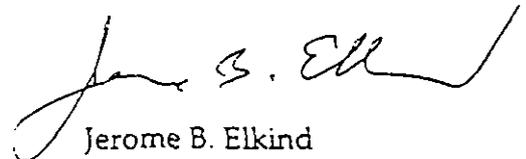
Registrar
International Court of Justice
Peace Palace
2517 KJ The Hague
The Netherlands

Dear Registrar,

Enclosed please find two Responses to Submissions of Other States by the Republic of Nauru in the case concerning *The Legality of the Use of Nuclear Weapons by States in Armed Conflict* and one Memorial in the case concerning the *Legality of the Use and Threat of Use of Nuclear Weapons*.

I understand that the Court has set the date of 30 October as the date for the beginning of oral hearings in the two cases. I would like permission to use a number of witnesses. In the case concerning *The Legality of the Use of Nuclear Weapons by a State in Armed Conflict* I would like to put on the stand a Dr. Frank Barnaby who is a nuclear physicist of repute. I would also like to put on the stand the Mayors of Hiroshima and Nagasaki. In the case concerning the *Legality of the Use and Threat of Use of Nuclear Weapons* I would like to place on the stand Ms. Hilda Lini, former Minister of Health of Vanuatu, Ms. Ligon Ekrilang who has experienced the effects of U. S. nuclear tests during Operation Bravo or some other woman from the Pacific who has experienced those effects and Ms. Claudia Peterson who has experienced the effects of nuclear tests in the United States.

Sincerely,



Jerome B. Elkind

REPUBLIC OF NAURU RESPONSE TO SUBMISSIONS OF OTHER STATES

Very few of the submissions presented by States in the case concerning the *Use of Nuclear Weapons by a State in Armed Conflict* address the legal arguments that we have offered to show that the use of nuclear weapons is unlawful but the submissions make other points. One point made about the legality of the use of nuclear weapons is that the issue is abstract and theoretical. It is difficult to see how the question can be considered abstract. It is really quite simple. The General Assembly has asked the question "is the use or threat of use of nuclear weapons in any circumstances unlawful"? The World Health Assembly has asked "is the use of nuclear weapons by a State in armed conflict unlawful"? Even assuming that the question is abstract, in the Reply of the Court to the Request for an Advisory Opinion in the *Status of Eastern Carelia* Case,¹ the Permanent Court of International Justice said:

The question put to the Court is not one of abstract law, but concerns directly the main point of the controversy between Finland and Russia,....

As a result the Court refused to give an advisory opinion in that case. Clearly if the Court refused to give an advisory opinion because the question was not sufficiently abstract, then it is appropriate to give advisory opinions when an abstract question of law is asked. Perhaps one reason for feeling that the question is abstract is the difficulty of determining who has standing to request the opinion. But this is a request for an advisory opinion and questions of standing are irrelevant. Perhaps the argument can best be

¹ [[1923] P.C.I.J. Rep. Ser. B, No.5, p.7 at pp. 28-29.

understood by looking at the written statement of the Government of Finland:²

...the legality of the use of nuclear weapons can only be determined in respect of the circumstances of the case,...it follows that in the absence of a concrete factual situation, the court would itself be required to entertain various hypotheses about situations in which nuclear arms might conceivably be used. That is to say, the Court would be required to speculate with a very large number of potential situations, including, for example, situations of first use and counter-use, various types of limited use and practices of targeting, the Court would be required to analyze different types of nuclear weapons and entertain hypotheses about the factual consequences of their use. All this would require analyzing extremely complex and controversial pieces of technical, strategic and scientific information.

It should be pointed out that the difficulty foreseen by the Government of Finland can arise only if the Court decides that not all uses of nuclear weapons are unlawful. We submit that *all* uses and threats of use are unlawful and that the Court is not required to distinguish among them.

Secondly, the nuclear weapons owning States imagine that the majority of States have consented to the legality of the use of nuclear weapons because of their participation in such treaties as the Non-Proliferation Treaty³. It should be pointed out that the Non-Proliferation Treaty is not really relevant to this case. The Non-Proliferation Treaty appears to validate the possession of nuclear weapons. Even though we believe that the possession of nuclear weapons is a relevant issue, it is not a relevant issue in this case. This case is about the legality of the *use* of such weapons. Secondly it is wrong to imagine that the majority of states support the legality of the use and threat of use of

² Page 4.

³ 729 U.N.T.S. 161 (1968).

nuclear weapons. States are aware that the existence of nuclear weapons is a fact of life. Given that they are a fact of life, whether they are lawful or not, it is essential that their use, manufacture, possession and testing be regulated and controlled. Therefore States have participated in negotiations and agreements to regulate and control their use, manufacture, possession and testing. But the position of most States can be gleaned by the fact that a majority of States have voted in the United Nations General Assembly and the World Health Assembly to request these advisory opinions and a review of the submissions made to this Court in this case will show that the majority of States oppose the legality of the use of nuclear weapons.

A number of States have expressed a fear that a decision in this case will somehow hinder negotiations on the extension of the Non-Proliferation Treaty, on disarmament and on a test ban treaty. It is difficult to see how negotiations will be hindered if this Court decides that the use and threat of use of nuclear weapons is unlawful. Negotiations can only be enhanced if they are carried out in the knowledge that the use and threat of use of these weapons is unlawful. It is a short logical step from a finding that the use and threat of use of these weapons is unlawful to a belief that possession, manufacture and testing of these weapons is therefore pointless.

The only argument that we made that has been addressed is the argument that the use of nuclear weapons contravenes customary and treaty prohibitions against the use of poisonous weapons. The argument seems to be that nuclear weapons are not specifically poisonous weapons. They kill by other means as well. In the view of the United States: ⁴

This prohibition was established with specific reference to projectiles that carry poison into the body of the victim. It was

⁴ Written Statement of the Government of the United States of America, p. 27.

not intended to apply, and has not been applied, to weapons that are designed to injure or cause destruction by other means, even though they may also create toxic byproducts. For example, the prohibition on poison weapons does not prohibit conventional explosives or incendiaries, even though they may produce dangerous fumes. By the same token, it does not prohibit nuclear weapons, which are designed to injure or cause destruction by means other than poisoning of the victim, even though nuclear explosions may also create toxic radioactive byproducts.

The fundamental flaw in this reasoning is that it equates radiation with the purely incidental toxic fumes of incendiaries and explosives. Nuclear weapons kill in three ways, blast, heat and radiation⁵. Of these three ways, radiation is the most persistent killer. Victims of blast and heat are usually killed in the first seconds of the explosion. Victims of radiation may take days, months, years, even decades to die. The radiation effects of nuclear weapons which consist of the transmission of gamma rays, neutrons, beta particles and some alpha particles, are very similar to the effects produced by chemical weapons as opposed to conventional high explosive weapons. In 1979-80, thirty-five years after the bombing, 2,279 names were added to the list of deaths *officially* attributed to the delayed radiation effects on victims of the "little boy" bomb that was dropped on Hiroshima. In 1983 the list of deaths from radiation in Hiroshima totalled 97,964.

A study prepared by the United States Department of Defense and the United States Department of Energy had this to say about nuclear weapons:

...there are several basic differences between nuclear and high explosive weapons. ... Fourth, the nuclear explosion is accompanied by highly penetrating and

⁵ Rumble, *The Politics of Nuclear Defence* (1985) pp. 130-7; *Effects of Nuclear Weapons on Health and Health Services* (World Health Organisation 2d ed. 1987) pp. 9, 15; Tone (ed.), *The Effects of Nuclear Weapons* (3d ed. Prepared and published by the United States Defence Department 1977).

harmful invisible rays called the "initial nuclear radiation." Finally, the substances remaining after a nuclear explosion are radioactive, emitting similar radiation over an extended period of time. This is known as the "residual nuclear radiation" or "residual radioactivity".

Figure 1.02 is labelled "Effects of a nuclear explosion". The effects listed are "blast and shock", "thermal radiation", "initial nuclear radiation" and "residual nuclear radiation".⁶

Concerning the harmful effects of radiation, the book says :⁷

The harmful effects of nuclear radiation appear to be caused by the ionization (and excitation) produced in the cells composing living tissue. As a result of ionization, some of the constituents, which are essential to the normal functioning of the cells, are altered or destroyed. In addition, the products formed *may act as poisons*.. Among the observed consequences of the action of ionizing radiations on cells are breaking of the chromosomes, swelling of the nucleus and of the entire cell, increase in viscosity of the cell fluid, increased permeability of the cell membrane, and destruction of cells. (Emphasis added)

In total the book devotes 136 pages to "initial nuclear radiation" and "residual radiation and fallout", evidence that at least two Departments of the United States Government consider the radiation effects of nuclear explosions to be more than incidental effects.

⁶ Glasstone and Dolan (eds.), *The Effects of Nuclear Weapons* (3d ed. United States Department of Defense and the United States Department of Energy 1977) pp.1-3.

⁷ Ibid. at p. 575.

The fact is that most nuclear weapons are deployed in part to utilise the destructive effects of radiation and fallout.⁸ The neutron bomb is a weapon specifically designed to kill by radiation so that human beings are killed while buildings and other structures are left standing.

There are five main arguments supporting the legality of the use of nuclear weapons. The submissions do not make all those arguments. But they may be made subsequently. The arguments are:

- (a) There is no specific treaty making the use of nuclear weapons unlawful.
- (b) Nuclear weapons are justified by military necessity.
- (c) Nuclear weapons may lawfully be used in retaliation.
- (d) Nuclear weapons may lawfully be used in self-defence.
- (e) It is possible to invent a scenario where the use of nuclear weapons would be lawful.

We will consider these arguments one at a time.

(a) There is no treaty specifically banning the use of nuclear weapons

The answer to the argument that there is no specific treaty banning the use of nuclear weapons and that therefore they must be legal is found in the

⁸ Brownlie, "Some Legal Aspects of the Use of Nuclear Weapons" (1965) 14 ICLQ 437, 445.

Martens clause of the Preamble to the IVth Hague Convention of 1907 Concerning the Laws and Customs of War on Land. Martens was a leading member of the Russian delegation to the Hague Peace conference. The clause says:

Until a more suitable code of the laws of war can be drawn up, the high contracting parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the general principles of the law of nations, derived from the usages established among civilised peoples, from the laws of humanity, and from the dictates of the public conscience.

This tells us that a complete answer to the legality of nuclear weapons cannot be had by a study of treaty law alone. A specific treaty rule is not required. If a weapon or its use violates the dictates of the public conscience and the laws of humanity, then it is certainly a violation of the Hague Convention.

We might say that the United Nations General Assembly Resolution is redundant when it asks the Court to consider whether the use and threat to use nuclear weapons is unlawful. Threatening is an active and destructive use of nuclear weapons. If I hold a gun to someone's head and say "if you don't give me all your money I will blow your brains out", is there any doubt that I am using that gun even if I do not actually pull the trigger?

There is a more sophisticated version of the argument that there is no specific treaty banning nuclear weapons and that version is that there is neither a specific treaty nor a specific rule of customary international law. International law recognises that legal effect stems from more than treaties. Article 38 (1) of the Statute of the International Court of Justice is frequently

recognised as an authoritative statement of the sources of international law. It says:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognised by civilised nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The Article contains three specific sources of law as outlined in (a)-(c). It also mentions in (d) two "subsidiary" law determining agencies. The three prime sources of law are treaty, custom and general principles of law. Therefore if we can say that there are rules emanating from any of those sources which outlaw nuclear weapons, then we can say that the use of nuclear weapons is unlawful.

Let us look at the first source, treaties. In the first place we do not need a specific treaty outlawing nuclear weapons to make these weapons unlawful. If we find that they violate the terms of any existing treaty, then we may say that they are unlawful under that treaty. At the outset I think it is necessary to reject the notion that nuclear weapons are banned by implication. If these weapons are the type of weapons that do what the treaties do not allow weapons to do, then we must say that the weapons are outlawed by the treaty. If the use of such weapons amounts to conduct that is prohibited by a

treaty then we must say that the use of those weapons directly contravenes the treaty. In the course of our argument we have cited many existing international treaties that outlaw the use of certain weapons in warfare. If nuclear weapons are the sort of weapon that offends the terms of the treaty then we may say that nuclear weapons are outlawed by that treaty. In the first place the use of nuclear weapons violates the United Nations Charter. It violates the International Covenant on Civil and Political Rights and it violates the International Covenant on Economic, Social and Cultural Rights. Nuclear weapons are also offensive to the Declaration of St. Petersburg of 1868, The Hague Declaration on Asphyxiating Gases of July 29, 1899, the Geneva Gas Protocol of 1925,⁹ the Hague Regulations on Land Warfare of 1907,¹⁰ the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 (the First Geneva convention), the Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1940 (the second Geneva Convention), the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (the third Geneva Convention), the Geneva Convention Relative to the Protection of Civilian Persons in Times of War of August 12, 1949 (the fourth Geneva Convention) and Geneva Protocol I (1977).¹¹ Arguably the use of nuclear weapons is criminal. Article 6 of the Agreement for the Prosecution and

⁹ Cmnd. 3604 (1930); 94 LNTS 65 (1927),

¹⁰ *Supra* note 11.

¹¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the protection of Victims of International Armed Conflicts adopted at Geneva, June 8, 1977, U.N. Doc. A/32/144 August 12, 1977; 16 ILM 1391 (1977); Misc, No. 19;(Cmnd. 6927) p.23.

Punishment of the Major War Criminals of the European Axis ¹² (The Nuremberg Charter) provides:

...The following acts, or any of them, are crimes coming within the jurisdiction of the [Nuremberg] Tribunal for which there shall be individual responsibility:

(b) War crimes. Namely, violation of the laws and customs of war. Such violations shall include, but not be limited to, murder, ill treatment...wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

(c) Crimes against humanity. Namely murder, extermination...and other inhumane acts committed against any civilian population...whether or not in violation of the domestic law of the country where perpetrated.

On May 25, 1993, the United Nations Security Council established an international tribunal to punish persons responsible for violation of international law in the former Yugoslavia. Article 3 establishes jurisdiction over the violation of the "laws and customs of war" which the article describes as including "but not limited to":

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) wanton destruction of cities, towns or villages or devastation not justified by military necessity;

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings;

* * *

Nuclear weapons are poisonous and they are capable of causing unnecessary suffering. They are capable of destroying cities, towns and

¹² Signed August 8, 1945. 39 A.J.I.L. Supp. 259 (1945).

villages including undefended towns, villages, dwellings or buildings. So we can see that the use of nuclear weapons violates many principles of treaty law and may be not only a war crime but also a crime against humanity.

As to customary international law, again we may say that there is no specific rule of customary law banning nuclear weapons as such. But this does not mean that nuclear weapons do not offend principles of customary international law. We have already demonstrated the inconsistency of the use of nuclear weapons with the Universal Declaration of Human Rights. If we accept the idea that the Universal Declaration has found its way into the corpus of customary international law then here is one important set of customs that the use of nuclear weapons violates. But we have shown that there are other rules of customary law which the use of nuclear weapons offends. Clearly it is a violation of customary international law to use poisons or other analogous substances. Thus even where a State is not a party to the Geneva Gas Protocol it is nonetheless bound under customary international law to refrain from using poisonous weapons and this would seem to include weapons that emit radiation. It is also a violation of customary international law to use weapons that cause unnecessary suffering and to use weapons that cause severe damage to the environment. Furthermore it is probably a violation of customary international law to use weapons that cause injury to neutral territory.

Secondly, although Resolutions of the United Nations General Assembly are not binding, as such, upon the Members of the United Nations, some Resolutions, if they are passed with substantial majorities may be taken to reflect the views of States as to what the law is; in other words they may be taken as reflections of the *opinio juris* of States. Hence they can assist us in ascertaining the nature of customary international law. There are quite a few

Resolutions of the General Assembly which hold that the use of nuclear weapons is unlawful. One example is G.A. Res. 2936 XXVIII, Nov. 29, 1970; G.A. Res. 1653 (XVI), 16 GAOR Supp. (No. 17) (1961) which is also called the Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons of November 24, 1961. See also Resolution on the Non-use of Force in International Relations and Permanent Prohibition of the Use of Nuclear Weapons, G.A. Res. 2936, U.N. GAOR 20th Sess., Supp. No. 31, at 5, U.N. Doc. A/8730 (1972); Resolution on the Non-use of Nuclear Weapons and the Prevention of Nuclear Weapons, G.A. Res. 33/71B, 33 U.N. GAOR, Supp. No. 45, at 48, U.N. Doc. A/33/45 (1978); Resolution on the Non-use of Nuclear Weapons and Prevention of Nuclear War, G.A. Res. 34/83G, 34 U.N. GAOR, Supp. No. 46, at 56, U.N. Doc. A/34/46 (1979); Resolution on the Non-use of Nuclear Weapons and Prevention of Nuclear War, G.A. Res. 35/152D, 35 U.N. GAOR, Supp. No. 48, at 69, U.N. Doc. A/35/48 (1980); Resolution on the Non-use of Nuclear Weapons and Prevention of Nuclear War, G.A. Res. 36/921, 36 U.N. GAOR, Supp. No. 51, at 64, U.N. Doc. A/36/51 (1981); Resolution 37/100C Convention on the Prohibition of the Use of Nuclear Weapons, U.N. GAOR Supp. No. 51 at 83 (1982); Resolution 38/75, Condemnation of Nuclear War, U.N. GAOR, Supp. No. 47 at 69 (1983); Resolution 39/63H, Convention on the Prohibition of the Use of Nuclear Weapons, U.N. GAOR, Supp. 57 at 70 (1984); Resolution 40/51F, Convention on the Prohibition of the Use of Nuclear Weapons, U.N. GAOR, 40th Sess., Supp. 53 at 90 (1985); Resolution 41/60F, Convention on the Prohibition of the Use of Nuclear Weapons, U.N. GAOR, 41st Sess., Supp. 53 at 85 (1986); Resolution 42/39C, Convention on the Prohibition of the Use of Nuclear Weapons, U.N. GAOR, 42nd Sess., Supp. No. 49 at 81 (1987); Resolution 43/76E, Convention on the Prohibition of the Use of Nuclear Weapons, U.N. GAOR, 43rd Sess., Supp. No. 49 at 90 (1988); Resolution 44/117C, Convention of the Prohibition of the Use of Nuclear Weapons, U.N. GAOR 44th Sess., Supp. No. 49 at 80 (1989); Resolution

45/59B, Convention on the Prohibition of the Use of Nuclear Weapons, U.N. GAOR 45th Sess., Supp. No. 49 at 71 (1990); Resolution 46/37D, Convention on the Prohibition of the Use of Nuclear Weapons (1991), U.N. Doc. GA/8307 at 217; Resolution 47/53C, Convention on the Prohibition of the Use of Nuclear Weapons (1992) U.N. Doc. GA/8470 at 112 (1993); Resolution 48/76B, Convention on the prohibition of the Use of Nuclear Weapons (1993), U.N. Doc. GA/8637 at 124 (1994). See Appendix B of Memorial 1.

The Martens clause seems to require the application of general principles of law. It speaks of the laws of humanity and the dictates of public conscience. General principles of law recognised by civilised nations would therefore seem to embody the principles of humanity and the public conscience. Inhumane weapons and weapons which offend the public conscience are therefore prohibited.

Now we come to the two law-determining agencies. As for judicial decisions, there are certainly no international decisions yet that are relevant to our discussion. There is one important municipal case that requires discussion. That case is the *Shimoda* case. The case was begun in May of 1955 when five individuals instituted legal action against the Japanese Government to recover damages for injuries allegedly sustained as a consequence of the atomic bombings of Hiroshima and Nagasaki. On December 7, 1963 the District Court of Tokyo delivered a lengthy decision.¹³ The case is important both for its third party decision-making genre, and for the fact that it appears to be the only attempt by any court of law anywhere to wrestle with the legal implications of nuclear warfare. The Court accepted the plaintiffs' argument that the dropping of atomic bombs on Hiroshima and Nagasaki constituted a

¹³ The decision has been translated into English and printed in the Japanese annual; of International Law for 1964. It is digested in 58 A.J.I.L. 1016 (1964).

violation of international law on the ground that the dropping of said bombs not only constituted an indiscriminate bombardment of undefended cities far beyond the requirements of destroying military objectives within those cities, but also violated the general principle of international law (which it derived from the specific treaty limitations on the use of poisonous gas) that weapons which give rise to "unnecessary ailments" to enemy personnel must not be used. However the Court recognised that individuals have no standing under international law. Consequently, there was no liability to the plaintiffs on the part of the Government of Japan.

With regard to publicists-There are many publicists who would argue that the use of nuclear weapons is unlawful for the reasons cited above and in Nauru's Memorials nos. 1 and 3. The attitude of publicists is summarised by Meyrowitz in his article "The Opinions of Legal Scholars on the Legal Status of Nuclear Weapons" ¹⁴ Many legal scholars take the view that the use of nuclear weapons is unlawful. A fairly complete list of them appears in Memorial 1 at p. 66. Others are seduced by the argument that nuclear weapons must be lawful in the absence of any treaty banning them specifically. We have already demonstrated why we believe this argument to be fallacious.

(b) Nuclear weapons are justified by military necessity

When we speak of military necessity we must ask two questions. The first question is what is military necessity? The second question is, what is justified by it? The object of war is to hurt the enemy, to kill as many enemy soldiers as possible and to convince the enemy that it is not worthwhile to continue their campaign. But international humanitarian law tells us that the

¹⁴ 24 Stanford J.I.L. 111 (1987-88).

means of hurting the enemy are not unrestricted. Article 22 of the Hague Rules says:

The right of belligerents to adopt means of injuring the enemy is not unlimited.

In a trial before a United States Military Tribunal called the *Hostages Trial*, the Tribunal said:

Military necessity or expediency do not justify a violation of positive rules. International Law is prohibitive law. ¹⁵

The right to adopt measures to injure the enemy is subject to very definite limitations and these limitations are spelled out by the principles of international humanitarian law. Said a former President of the International Court of Justice:

...it is submitted that if the mere fact of defeat were accepted as a legal justification for ignoring the rules of warfare, the entire *raison d'être* of the laws of war would disappear, since the object of every war is the achievement of victory or success. Thus, if, for the attainment of that objective, no rules whether customary or conventional can be accepted, all wars would degenerate into wild savagery and cruelty and the society of nations would revert to the law of the jungle. Such a concept of the doctrine of success would wipe out the achievements of humanity as enshrined in the Hague and Geneva Conventions and usher in the worst experiences of the Middle Ages. ¹⁶

One thing which the military is not permitted to do is to attempt to convince the enemy to surrender by terrorising the civilian population. Article 22 of the Hague rules provides that:

¹⁵ *Law Reports of Trials of War Criminals*, vol. 8, p. 34 at p. 66.

¹⁶ Singh, N., *Nuclear Weapons and International Law* (1959) p. 82.

Aerial bombardment for the purpose of terrorising the civilian population, of destroying or damaging private property not of a military character, or of injuring non-combatants is prohibited.

Strategic nuclear weapons are instruments of terror against the civilian population. So we can say that military necessity does not permit this use of nuclear weapons.

The 1863 Lieber Code ¹⁷ spells out the restrictions on the principle of military necessity:

Article 14. Military necessity, as understood by modern civilized nations, consists of the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war.

Article 15. Military necessity admits of all direct destruction of life or limb of armed enemies, and other persons whose destruction is incidentally unavoidable.

Article 16. Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to exact confessions. It does not admit of the use of poison in any way, ¹⁸ nor of the wanton devastation of a district...and, in general military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

¹⁷ For the text see Friedman, L., THE LAW OF WAR: A DOCUMENTARY HISTORY (1971) p.158.

¹⁸ Note that this prohibition predates the 1925 Geneva Gas Protocol.

Military necessity consists in all measures immediately indispensable and proportionate to military objectives when taken on the decision of a responsible commander.

A weapon, any weapon must be justified according to four basic limitations regarding the purpose, nature and scope of permissible violence. The first limitation concerns the *purpose* of permissible violence. Inflicting injury on the enemy as an end in itself is not permitted. Violence must have a legitimate purpose if it is to be described as violence having "military necessity". The second limitation is concerned with the *nature* of permissible violence, and is particularly though not exclusively addressed to the weapons of warfare. Use of weapons which cause cruel suffering or unavoidable death may or may not be helpful to the party who would use them for the achievement of an otherwise legitimate military end. Their use is, however, forbidden under any circumstances. The third limitation relates to the scope of permissible violence. The rule here is that of proportionality. Only such amount of violence is permissible as is reasonably proportionate to the legitimate military objective sought to be achieved in the given military operation. The fourth limitation concerns the *objectives* of permissible violence. This limitation is particularly though not exclusively concerned with the protection of civilian lives and property.

The measures taken must not be contrary to the laws of war. There are certain weapons and conduct which are prohibited even though they may lead to military advantage. Among the weapons which are prohibited are those which cause unnecessary or aggravated suffering, those which are poisonous and those which are harmful to the environment. Resort to such weapons is not permitted by military necessity. Prohibited conduct includes the use of such weapons. It has been the thrust of our argument that nuclear

weapons cause unnecessary and aggravated suffering, create radiation which can be seen to have poisonous effects and are devastating to the environment. Therefore the use of such weapons cannot be justified by military necessity.

(c) Nuclear weapons may lawfully be used in retaliation

There is a heavy emotional content to this argument. It is the argument that was most strongly used to justify the use of atomic weapons against Japan. Because the Japanese military was contemptuous of the laws of war, the argument goes, the use of the atomic bomb was a justified punishment. A string of Japanese atrocities, including the rape of Nanking, the treatment of allied prisoners of war and even the treachery of the attack on Pearl Harbour are cited as justification for the use of the atomic bomb. But the fact is that hundreds of thousands of people; men, women and children were killed by the atomic bomb and most of the victims had nothing to do with the treacherous and brutal actions of their government. Why did they deserve to die because of the actions of someone else? The fact is that the Emperor Hirohito and the Prime Minister Tojo were not even in Hiroshima and Nagasaki when the Atomic bomb was dropped. They survived. Perhaps their punishment was the defeat of Japan. But they did not suffer the gruesome injuries and deaths that thousands of ordinary, innocent people suffered.

Secondly, it is a fundamental principle of international humanitarian law that a violation does not justify a counterviolation. Article 46 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 (the First Geneva convention) says:

Reprisals against the wounded, sick, personnel, buildings

or equipment protected by the Convention are prohibited.

The same prohibition of reprisals appears in Article 47 of the Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949 (the second Geneva Convention), Article 13 and Article 33 of the Geneva Convention Relative to the Protection of Civilian Persons in Times of War of August 12, 1949 (the fourth Geneva Convention). The prohibition against reprisals also appears in Article 20 of Protocol I to the Geneva Conventions. Articles 51-56 of that Protocol also have provisions prohibiting reprisals. So it is clear that retaliation or reprisal with nuclear weapons is prohibited by the laws of war.

(d) Nuclear weapons may lawfully be used in self-defence

Article 51 of the United Nations Charter says:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations...

Given this approval of self-defence expressed in the Charter many States will attempt to claim that the use of nuclear weapons is lawful if they are used in self-defence. But a slightly more careful reading is required. It says "nothing in the present Charter". This means that the Charter prohibitions against the use of force do not apply where the Member is exercising the right of self-defence. It does not and cannot mean that no rules of international law shall apply. Defensive military action is subject to the laws of war to the same extent as offensive military action. None of the rules which we have cited in our submission make any exception for a 'defensive' use of nuclear weapons. Therefore where we have rules of international law that prohibit (a) the use of poisonous weapons or (b) weapons that cause unnecessary or aggravated

suffering or (c) harm the environment or (d) destroy medical facilities or (e) damage or pollute neutral territory or (f) cannot distinguish between civilian objects and military objectives, then their use is unlawful.

In fact it is hard to see how one might use nuclear weapons in self-defence. If one has been attacked with nuclear weapons, then the use of nuclear weapons against the attacker will do nothing to defend the attacked State. It has already been hit. Its cities have been devastated. There is no way for it to defend itself against a result which has already occurred. So its use of nuclear weapons in that situation will, of necessity, be retaliation and we have already shown why it is not lawful to use nuclear weapons in retaliation. One might argue that a State may threaten to use nuclear weapons in self-defence. But this is acceptable only if one accepts the validity of the deterrence theory of international affairs. There are serious flaws in deterrence theory.

(e) It is possible to invent a scenario where the use of Nuclear Weapons would be Lawful

Some state representatives will attempt to argue that nuclear weapons are lawful in certain circumstances. In attempting to so argue they will present scenarios in which the use of nuclear weapons are free of the legal defects which the use of nuclear weapons possess. On the general question of scenarios Ian Brownlie has commented ¹⁹ :

It is rather ridiculous to allow refined examples of putatively lawful use to dominate the legal regime [thus ignoring] the general context of conflict and the risk of escalation.

¹⁹ Brownlie, *supra* note 2 at 450.

Certainly, the risk of escalation must not be ignored, but as we will show, it is doubtful that any scenarios invented can meet the test of lawfulness.

It is submitted that, in any scenario designed to meet the criterion of lawfulness, six conditions would have to be met:

1. The nuclear weapons would have to be radiation free. We submit that there is no such thing as a nuclear weapon which is entirely radiation free. We venture to predict that all scenarios will talk about "substantially" radiation free nuclear weapons. But just a little probing will reveal that none of the so-called "clean" weapons are entirely free of radiation.

2. The nuclear weapons for which the status of legality is claimed should not cause unnecessary or aggravated suffering.

3. The nuclear weapons for which the status of legality is claimed should not be harmful to the environment.

4. The nuclear weapons for which the status of legality is claimed should not be likely to destroy medical facilities.

5. Nuclear weapons for which the status of legality is claimed should not damage or pollute neutral territory. (This was not dealt with in Nauru's submissions. But the point was made quite effectively in other submissions.)

5. The nuclear weapons for which the status of legality is claimed should be capable of distinguishing between military objectives and civilian objects.

6. At any rate it must be unlikely that conventional weapons could accomplish the desired military result.

The scenario most commonly invented is the use of low yield tactical nuclear weapons on a military base isolated in the desert. The scenario attempts to eliminate some of the illegal consequences of the use of nuclear weapons. By calling the weapons low-yield the argument theoretically eliminates the poison argument because the weapons would not contain as much radiation. It is my intention to call to the stand a nuclear scientist who will testify that there is no such thing as a completely clean nuclear weapon. So we can see that it is not possible to completely do away with radiation and the harmful effects of radiation.

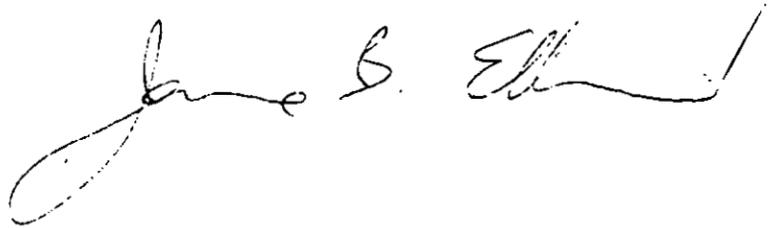
Another matter which this scenario is intended to deal with is the desirability of eliminating the failure to distinguish between civilian and military targets. This may be true. But even in this case.

1. A nuclear weapon would still cause unnecessary and aggravated suffering.
2. As I have shown it would still be poisonous.
3. It would still damage the environment, and
4. It would still destroy any medical facility that might exist on the base. So it would still be unlawful.

Conclusion

We have shown that the use of nuclear weapons violates a number of important rules of international law. There may be no specific treaty barring the use of nuclear weapons but we have shown that these are weapons which

do things which many rules of treaty and customary law prohibit weapons from doing. We have also shown that international humanitarian law does not cease to have effect just to satisfy claims of military necessity. Furthermore the rules of international humanitarian law apply whatever the nature of the conflict. They apply when a State is acting in self-defence and when a State is acting in retaliation.

A handwritten signature in black ink, appearing to read "Jane B. Elliott". The signature is written in a cursive style with a large, looping initial "J" and a long horizontal stroke extending to the right.