

**INTERNATIONAL PEOPLES TRIBUNAL ON THE  
NUCLEAR POWERS AND THE DESTRUCTION  
OF HUMAN CIVILISATION**

**HELD AT THE UNIVERSITY OF SYDNEY, AUSTRALIA**

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**CHAIRS OF THE TRIBUNAL:**

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<b>THE INDICTMENT: .....</b>	<b>1</b>
<b>ORIGINS OF THE TRIBUNAL.....</b>	<b>1</b>
<b>METHODOLOGY OF THE TRIBUNAL.....</b>	<b>3</b>
<b>TRIBUTE TO PETER KING .....</b>	<b>4</b>
<b>THE CASE OF THE PROSECUTION .....</b>	<b>4</b>
<b>REMEDIES .....</b>	<b>5</b>
<b>THE DEFENCE.....</b>	<b>6</b>
<b>THE FACTS OF THE PROSECUTION CASE .....</b>	<b>7</b>
<b>STOCKPILES .....</b>	<b>7</b>
<b>PLANS TO USE .....</b>	<b>7</b>
<b>THREATS TO USE .....</b>	<b>7</b>
<b>FIRST USE.....</b>	<b>7</b>
<b>AIDING AND ABETTING.....</b>	<b>8</b>
<b>INTERNATIONAL LAW AND THE ICJ ADVISORY OPINION .....</b>	<b>9</b>
<b>THE AFFECT ON POPULATIONS.....</b>	<b>9</b>
<b>DETERRENCE AS A SAFEGUARD.....</b>	<b>10</b>
<b>INTERNATIONAL LAW AND THE ILLEGALITY OF NUCLEAR WEAPONS .....</b>	<b>11</b>
<b>RULES OF IHL .....</b>	<b>11</b>
<b>THE LEGALITY OF NUCLEAR WEAPONS AS A WEAPON OF MASS DESTRUCTION? .....</b>	<b>12</b>
<b>GENOCIDE.....</b>	<b>12</b>
<b>ECOCIDE.....</b>	<b>13</b>
<b>OMNICIDE.....</b>	<b>13</b>
<b>ADVISORY OPINION ON USE OF NUCLEAR WEAPONS.....</b>	<b>14</b>
<b>FURTHER DEVELOPMENTS IN INTERNATIONAL LAW PROHIBITING USE .....</b>	<b>16</b>
<b>HUMAN RIGHTS LAW.....</b>	<b>16</b>
<b>ENVIRONMENTAL LAW .....</b>	<b>17</b>
<b>INTER-GENERATIONAL JUSTICE .....</b>	<b>19</b>

THE DEFENCE ARGUMENT .....	20
BEYOND REASONABLE DOUBT .....	20
THE LOTUS PRINCIPLE - THE PROHIBITIVE THEORY .....	22
INTERNATIONAL TREATIES ON WEAPONS DO NOT SPECIFICALLY BAN NUCLEAR WEAPONS .....	23
THE ICJ ADVISORY OPINION DID NOT DECLARE NUCLEAR WEAPONS OR THEIR USE TO BE ILLEGAL.....	24
THE ICJ CAN ONLY OFFER PURELY ADVISORY OPINIONS AND NOT DETERMINE LAW .....	24
THE SECURITY COUNCIL WITH THE FIVE MOST POWERFUL COUNTRIES OF THE WORLD DECIDE WHAT LAW IS .....	25
EVIDENCE OF DEFENCE WITNESS PROFESSOR BOB HOWARD .....	26
BERLIN .....	27
KOREA.....	28
CUBA.....	28
WISDOM OF INDICTING THE NUCLEAR POWERS .....	29
CONCLUSION OF THE TRIBUNAL.....	30
FINDINGS.....	31
THE DEVELOPMENT OF INTERNATIONAL LAW AND INTERNATIONAL HUMANITARIAN LAW .....	32
<b>PRINCIPLE VII .....</b>	<b>33</b>
POST 1996 .....	35
INTERNATIONAL CONFERENCES ON INTERNATIONAL HUMANITARIAN LAW .....	36
FINDINGS OF THE TRIBUNAL.....	40
<b>PRINCIPLE VI: .....</b>	<b>41</b>
REMEDIES .....	42

# THE INDICTMENT:

## ORIGINS OF THE TRIBUNAL

1. The Tribunal , in which the 9 political leaders of countries possessing nuclear weapons were indicted for crimes against humanity and the Prime Minister of Australia for aiding and abetting them in those crimes, took place on the 20th Anniversary of the Advisory Opinion of the International Court of Justice on the:

**Legality of the Threat or Use of Nuclear Weapons (hereinafter the “Advisory Opinion”).**

2. It was also 71 years after the only ever use of nuclear weapons in war, the bombings of Hiroshima and Nagasaki.
3. Those bombings awakened the world to the enormous destruction of this new weapon and the staggering loss of life.
4. It would be sometime before there was the further realisation that the death and injury would continue to affect those who survived and future unborn generations.
5. The impact of subsequent nuclear tests in the Pacific, USA, Soviet Union, North Africa, and China led the International Court of Justice to determine that the devastating impact of nuclear weapons cannot be contained in time or space, and indeed that their existence threatens the very survival of human civilisation and the global ecosystem.
6. Recent evidence on the catastrophic climatic impact of the use of just a small number of nuclear weapons on flammable targets, such as cities, reinforces the view that even a limited use of nuclear weapons, used in the extreme circumstance of self-defence, would violate international humanitarian law and other emerging law protecting the environment and future generations.
7. The scale of destruction, loss of human life and damage to future generations from the use of nuclear weapons is such that international humanitarian law and the laws of war in general require either a finding that this new weapon is illegal per se, or the legal limits on its use are such that its use can not be sanctioned in any circumstances.

8. It is fitting for a Tribunal set in Sydney that the words of a renowned Australian journalist, Wilfred Burchett, who was the first foreign correspondent into Hiroshima are reproduced to remind us of the horror caused by a nuclear attack:

**It was soon clear that there was nothing left above ground between the railway stations and the buildings. The impression was of having been transplanted to some death-stricken alien planet. Devastation and desolation, nothing else. Lead-grey clouds hung low over the city that had been home to a quarter of a million people. Vapours drifted from fissures in the soil and there was an acrid, sulphurous smell. The few people to be seen hurried past each other without pausing or speaking, white masks covering mouths and nostrils. Buildings had dissolved into grey and reddish dust, solidified into ridges and banks by the frequent rains and heavy winds, as was explained later. If the evidence of the material destruction of the city had been horrifying, the effects on humans as I saw them inside the hospital wards was a thousand times more so. The doctor in charge told me he was completely at a loss how to treat the victims:**

***“At first we treated burns as we would any others, but patients just wasted away and died. Then people without a mark on them, including some not even here when the Bomb exploded, fell sick and died. For no apparent reason their health began to fail. They lost their appetite, their hair began to fall out, bluish spots appeared on their bodies and bleeding started from the nose, mouth and eyes. The symptoms were of extreme general debility and vitamin deficiency. We started giving vitamin injections, but the flesh rotted away from the puncture caused by the injection of the needle. We know that something is killing off the white corpuscles and there is nothing we can do about it. Every person carried in here as a patient is carried out a corpse<sup>1</sup>.”***

9. For telling the stark truth about the consequences of the use of nuclear weapons and for continuing to oppose the received wisdom of other wars, Wilfred Burchett was persecuted by his own government and stripped of his citizenship. This situation lasted until Prime Minister Gough Whitlam restored it on election in 1972.

10. Professor Gavan McCormack who gave expert testimony to this Tribunal said of him in a dedication in the book:

***“No Australian had such extraordinary engagement in the events that shaped the world...He followed what he took to be the right path even when it was a lonely one.”***

11. This Tribunal hopes also to speak in that tradition of truth-telling on this issue of the very survival of human civilisation.

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<sup>1</sup> Wilfred Burchett, *Memoirs of a Rebel Journalist*, UNSW Press, 2005. Pp 236-239

## **METHODOLOGY OF THE TRIBUNAL**

12. All participants gave of their time without financial recompense.
13. The Tribunal did not have the powers to compel those indicted to appear, although they were asked to defend themselves, and did not have large financial resources.
14. Prosecution and Defence and witnesses gave freely of their time.
15. The charges were criminal ones, which usually requires attendance of the accused at the hearings. However, as the defendants did not respond to the indictment, the Tribunal followed procedures for trial in absentia. This included:
  - a. ensuring that the charges were sent to agents of the defendants;
  - b. the charges were also made public;
  - c. the defendants had opportunity to choose their legal representation;
  - d. when the defendants declined to appoint legal representation, such representation was appointed for them;
  - e. the hearings were made public
16. It proceeded, as most Tribunals do, to take all testimonies and then these were evaluated on the weight that should be afforded to them.
17. The Tribunal Chairs put questions to Prosecution and Defence and to witnesses. The Friends of the Court were also allowed to intervene with appropriate statements and questions of witnesses.
18. Natural justice was observed and both the Prosecution and the Defence presented their cases vigorously and examined and cross-examined witnesses.
19. The evidence presented by witnesses was of a high level and greatly assisted the Tribunal in preparing this Judgment.

20. The Tribunal website contains all witness statements and Prosecution and Defence submissions and that saves lengthy reproduction of that documentation in the Judgment itself while allowing readers to go to the actual evidence.
21. The Judgement will lay out the case of the Prosecution, and that of the Defence.
22. Their submissions are included in full on the website.

### **TRIBUTE TO PETER KING**

23. While this Judgment was being prepared one of the key organisers of the Tribunal, Mr Peter King, sadly died.
24. Peter was a scholar and peace activist and was widely admired.
25. The Tribunal would not have happened without his dedication to it, despite his illness at the time.
26. Tributes to him are on the Tribunal website

### **THE CASE OF THE PROSECUTION**

27. The Prosecution laid charges against the political leaders of the 9 countries (“the 9”) that possess nuclear weapons.
28. Those charges were:
  - 28.1 Planning and preparing the use of nuclear weapons, which would constitute a crime:
    - a) As a weapon of mass destruction (multiple use);
    - b) In or affecting populated areas;
    - c) In other unspecified circumstances.
  - 28.2 Making illegal threats to use nuclear weapons:

- a) As a weapon of mass destruction (multiple use);
- b) In or affecting populated areas;
- c) In other unspecified circumstances.

28.3 The prosecution also laid charges against the Prime Minister of Australia.

28.4 These charges were :

- a) Adding and abetting the planning and preparation for the use of nuclear weapons, which would constitute a crime, and
- b) Making illegal threats to facilitate, support, aid and abet the use of nuclear weapons.

29. The Prosecution made it clear that these charges were laid against the individuals concerned in relation to their official responsibilities, as leaders, for nuclear weapons policies and practices.

30. Consequently, as David Cameron resigned as Prime Minister of Great Britain during these proceedings and was succeeded by Theresa May, the Prosecution made application for Theresa May to be named in the indictment.

31. This application succeeded and the reasons are set out in Minute of the Tribunal which is on the website.

## **REMEDIES**

32. The following remedies were sought by the Prosecution:

- a) Find the defendants guilty of war crimes, crimes against humanity, crimes against peace, and crimes of threatening, planning and preparing acts which would constitute genocide, ecocide and omnicide;
- b) Instruct the defendants to immediately cease all such acts by:
  - i) Declaring that they would never authorise the use of nuclear weapons;
  - ii) Decommissioning all nuclear weapons in preparation for their dismantlement and destruction;
  - iii) Initiate, or engage in, multilateral negotiations in good faith for the complete prohibition and elimination of nuclear weapons under strict and effective international control.



## THE DEFENCE

33. The Defence case was ably led by Professor David Tait.
34. Defence Counsel accepted that a nuclear war would cause untold damage and misery and as stated in its Final Address:

***“Could destroy human civilisation and threaten the survival of fauna and flora on the planet.”***
35. On this the Defence was at one with the Prosecution, the witnesses (including chief defence witness, Professor Bob Howard) and the documentary evidence.
36. But the Defence argued that Section 66 of the Statutes of the International Criminal Court (ICC) required a standard of Proof that the Prosecution did not reach:
  - 36.1 Everyone should be presumed innocent until proven guilty before the Court, in accordance with the applicable law.
  - 36.2 The onus is on the prosecutor to prove the guilt of the accused.
  - 36.3 In order to convict, the Court must be convinced of the guilt of the accused *“beyond reasonable doubt”*.
37. The Defence also claimed that each defendant needed to be treated separately and that this had not been done and thus there was *“guilt by association.”*
38. The Prosecution was accused of *“prosecutorial over-reach.”*
39. Finally, the Defence argued that it did not have to bring evidence that the defendants were not guilty but it was the role of the Prosecution to prove beyond *“all reasonable doubt”* that each individual leader, separately, was.
40. We will now turn to the detail of the Prosecution case.

## **THE FACTS OF THE PROSECUTION CASE**

### **STOCKPILES**

41. The Prosecution set out the number of nuclear warheads maintained by the 9 with the Russian Federation and the USA possessing the great majority.
42. However, the other states all have warheads far exceeding the explosive power of the nuclear bombs dropped on Japan.

### **PLANS TO USE**

43. All, except Israel, have public policies that make it clear that they have operational plans to use their nuclear weapons if they deem it necessary.
44. Israel has made it clear it has the same position because it neither confirms nor denies that it has nuclear weapons.
45. Both present operational plans and historical documents evidence that cities as well as military targets and the vital infrastructure of enemy countries were and are targeted.

### **THREATS TO USE**

46. Each country, by possessing nuclear weapons and claiming they are for deterrence is therefore threatening to use them.
47. Furthermore, by maintaining the weapons in a “*ready to use*” capacity, exercising with them and by public statements that nuclear weapons are an essential part of defence capacity the 9 are threatening to use.

### **FIRST USE**

48. The majority of the 9 have also refused to have no first use policies.

49. Policies of being on high alert are declarations that the nuclear capacity can be used.

#### **AIDING AND ABETTING**

50. Australia accepts the nuclear umbrella of the United States.
51. It provides facilities for military aircraft and naval vessels which are capable of carrying nuclear weapons.
52. The Pine Gap Military facility outside of Alice Springs *“provides ground-satellite signals information and communications to the United States”*.
53. As recently as this year in its Defence White Paper the Australian government , led by its Prime Minister, confirmed its agreement and involvement in an extended nuclear deterrence relationship with the United States:
- “Australia’s security is underpinned by the ANZUS treaty, United States extended deterrence and access to advanced United States technology and information. Only the nuclear and conventional military capabilities of the United States can offer effective deterrence against the possibility of nuclear threats against Australia.”***
54. These policies and activities, say the Prosecution is clear evidence of aiding and abetting the threatened use of nuclear weapons.
55. Furthermore, additional proof is provided in that the Australian Future Fund has holdings in fifteen companies involved in the production and maintenance of nuclear weapons.
56. In contrast, the governments of Norway and New Zealand have withdrawn all funds invested in such companies in order to be compliant with their laws and policies prohibiting nuclear weapons.

## INTERNATIONAL LAW AND THE ICJ ADVISORY OPINION

57. The Advisory Opinion of 1996 drew on a wide range of expert opinion in terms of law and science.
58. Under Article 92 of the United Nations Charter the ICJ is *“the principal judicial organ of the United Nations.”*
59. The Prosecution, appropriately, drew attention to this evidence and the preeminent role of the ICJ in both the proclamation and development of international law.
60. While divided on the question of whether nuclear weapons per se are illegal, the Court at para 35 was unanimous that the evidence is indisputable that nuclear weapons could destroy human civilisation:  
  

***“The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilisation and the entire ecosystem of the planet. The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystems, and to cause genetic defects and illness in future generations.”***
61. The Prosecution’ expert witness, Steven Starr confirmed that the multiple use of nuclear weapons would produce the nightmare scenario outlined by the ICJ.
62. Localised nuclear wars, if such were possible, could not contain this widespread calamity for the human race.

## THE AFFECT ON POPULATIONS

63. The awful case studies provided by Hiroshima and Nagasaki with their immediate and long-term affects, damage to the environment and future generations, and total destruction of infrastructure and emergency services will be multiplied a thousand fold with the greater destructive capacity of present generation nuclear weapons.

64. The evidence of the damage to the populations and the next generations from the test zone sites provides further proof of the disaster awaiting humankind.
65. The Prosecution laid this out:
- Indeed multiple detonations could cripple or destroy nearly all infrastructure vital to 21<sup>st</sup> century humanity – financial, agricultural, industrial, health, transport, cultural and educational and more, along with the internet. Multiple detonations could also severely damage, or even destroy, ecological systems upon which all life is based. Casualties could run into billions and civilization as we know it could cease, with a definite risk of human extinction to follow.*
66. The Prosecution pointed out that a single use of a nuclear weapon, devastating enough, was unlikely as it would trigger, most likely, counter- use.
67. The steps leading to the First World War of action and retaliation leading to widespread conflict, are proof of the likelihood of that occurring.

#### **DETERRENCE AS A SAFEGUARD**

68. The Prosecution submitted that nuclear deterrence was based on the promise that nuclear weapons would be used against an enemy.
69. In terms of the likelihood of use because the weapon exists, the Prosecution cited a recent study in support:

***“Various bodies of nuclear risk analysis concur with the view that nuclear deterrence either has to be rescinded or nuclear weapons will be used at some point in time. A recent study ... explores risks of nuclear weapon use, (and) concludes that the risks are much higher than assumed by military and policy planners, and notes that one indication of such risk is that nuclear weapons have nearly been used at least 13 times since 1945.”<sup>2</sup>***

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<sup>2</sup> Too Close for Comfort: Cases of Near Nuclear Use and Options for Policy, Chatham House London 2014.

## INTERNATIONAL LAW AND THE ILLEGALITY OF NUCLEAR WEAPONS

70. The Prosecution was unequivocal in stating that the law as developed clearly outlaws both the threat and use of nuclear weapons.
71. To come to this opinion it pointed to the Rules of International Humanitarian Law (“IHL”), the Geneva Protocols, the Nuremberg Tribunal, the statutes of the ICC, the Advisory Opinion, UN General Assembly Resolutions and international conferences reflecting majority opinion on the illegality of the threat or use of nuclear weapons.
72. The Defence, in contradistinction, based its case on the LOTUS case principles (a case decided by the League of Nations Permanent Court of International Justice in 1927) of the supremacy of state sovereignty and that that which is not specifically prohibited is allowed in international law.
73. The Tribunal will deal with the Prosecution Case first.

## RULES OF IHL

74. The Prosecution helpfully set out the key principles of *jus in bello*- the IHL Rules applicable in warfare:
  - 74.1 **It is prohibited to use weapons or methods of warfare which:**
    - a) **Would be disproportionate i.e. excessive in relation to the concrete and direct military advantage anticipated;**
    - b) **Target civilians or cause indiscriminate harm to civilians;**
    - c) **Cause unnecessary suffering to combatants;**
    - d) **Violate neutral territory;**
    - e) **Cause widespread damage to the environment.**
75. The Prosecution then buttressed its view that IHL must prevail, in any consideration of legality in relation to threat or use, by citing the final document of the 2010 NPT Review Conference agreed to by all state parties (and thus necessarily an authoritative source of international law) at the NPT:

***“The Conference expresses its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons, and reaffirms the need for all states***

***at all times to comply with applicable international; law, including international humanitarian law.”***

#### **THE LEGALITY OF NUCLEAR WEAPONS AS A WEAPON OF MASS DESTRUCTION?**

76. Nuclear weapons with their enormous destructive power could not be contained.
77. Even if states claimed not to be targeting civilians, the Rules of IHL would be violated as the impact of blasts, firestorms and radiation destroyed infrastructure, ruined the environment and removed all possibility of essential services operating even at a minimal level.
78. Thus, all laws of proportionality, illegality of reprisals against civilian and indiscriminate harm to them would be massively breached.
79. The widespread radiation affects would mean the violation of the territory of neutral states and *“indiscriminate harm”* to their civilians.
80. Thus IHL would be breached and would be a crime under Article 8(b) iv of the ICC Statutes which forbids:

***“Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would clearly be excessive in relation to the concrete and direct overall military advantage anticipated.”***

#### **GENOCIDE**

81. It was also part of the Prosecution case that use of nuclear weapons with the proven uncontrollable effects to destroy whole segments of populations of both warring and neutral states would constitute genocide.
82. The Prosecution did not directly cite the UN Genocide Convention but the definition of genocide in the Convention was clearly being invoked:

***“The killing or causing of serious bodily or mental harm to members of a national, ethnic, racial or religious group in whole or in part.”***

83. The Prosecution cited Judge Weeramantry on this at page 280 ff of his dissenting judgement:

***“In discussions on the definition of genocide in the Genocide Convention, much play is made upon the words “as such”. The argument offered is that there must be an intention to target a particular national, ethnical, racial or religious group qua such a group, and not incidentally to some other act. However, having regard to the ability of nuclear weapons to wipe out blocks of population ranging from hundreds of thousands to millions, there can be no doubt that the weapon targets, in whole or in part, the national group of the State at which it is directed.”***

#### **ECOCIDE**

84. Nuclear weapon use is clearly capable of breaching the IHL principle that it is a crime to *“cause widespread damage to the environment”*.

85. The Prosecution advised that ecocide is now defined in a number of jurisdictions as the crime of:

***“Mass destruction of flora or fauna, poisoning the environment, the soils or water resources, as well as implementation of other actions causing an ecological catastrophe.”***

86. The Tribunal had no evidence before it to suggest that this crime could be avoided with the use of nuclear weapons.

#### **OMNICIDE**

87. To wipe out the human race in a nuclear war, and of course many other species, would be the crime of crimes.

88. And of course there would be no surviving prosecutors or perpetrators.

89. The Tribunal did not need any evidence to be able to determine that this would indeed, be a crime against humanity.



90. And it accepts that planning and preparing such a crime, and aiding and abetting, would be a breach of Article 6 of the Charter for the Nuremberg Trials that there was a definite crime of:

***“Planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”***

91. These and the other principles of the Nuremberg Tribunal were adopted unanimously by the General Assembly of the UN by unanimous resolution in 1950.

92. Accordingly this definition is now a Rule of Customary International Law.

### **USE AGAINST OR NEAR POPULATED AREAS**

93. The Tribunal accepts that there is overwhelming evidence to prove that a nuclear weapon exploded near a populated area would cause indiscriminate harm on a massive scale to civilians and would also be a crime, logically, against future generations.

94. The Prosecution quite rightly outlined what the damage, and therefore the crime, would be:

94.1 While the populated area might escape the blast effect of the detonation, it would not escape the impact of the high levels of radiation created by the detonation – which would travel through the air, waterways and food supply chains for multiple generations.

94.2 In addition, the impact of ionizing radiation on human and animal genes is transgenerational - causing congenital abnormalities and damaging the health of offspring for generations into the future. Exposing humans and animal life to ionizing radiation is not only criminal with regard to the impact on those exposed, but it is a crime against future generations who will be impacted.

94.3 ... an electro-magnetic pulse ... could destroy electrical grids and communication systems over a wide area. Many life support systems could be impacted. This could cause mega-disasters, in transport systems, water supply systems, nuclear power plants, hospitals etc adding to the indiscriminate harm caused by the nuclear detonation.

### **ADVISORY OPINION ON USE OF NUCLEAR WEAPONS**

95. The Prosecution cited the majority conclusion on the use of nuclear weapons 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.”***

96. The Prosecution, while considering that this was an important enunciation of the principle that IHL must be adhered to by States at all times, then went on to lay out developments in international law, particularly in customary law that support the finding of Judge Weeramantry that<sup>3</sup>:

***“... the use of nuclear weapons is absolutely prohibited by existing law-in all circumstances and without reservation.”***

97. This Opinion will be discussed in further detail, in light of the evidence before the Tribunal, in the conclusion of the Tribunal.

98. But to buttress its position the Prosecution submitted to the Tribunal a number of the developments in international law since 1996.

94.1 It cited the finding of the International Federation of Red Cross and Red Crescent that any threat or use of nuclear weapons would be illegal because of:

a) ***“... the incalculable human suffering that can be expected to result from any use of nuclear weapons, the lack of any adequate humanitarian response capacity and the absolute imperative to prevent such use.”***

b) ***“ ... the incalculable human suffering that can be expected to result from any use of nuclear weapons, the lack of any adequate humanitarian response capacity and the absolute imperative to prevent such use.”***

c) ***“... (The) difficult (y) to envisage how any use of nuclear weapons could be compatible with the rules of international humanitarian law, in particular the rules of distinction, precaution and proportionality.”***

94.2 It further cited the numerous UN General Assembly Resolutions that have declared the use and even existence of nuclear weapons to be illegal.

99. The latest such resolution was on 07 December 2015 , with an overwhelming majority of States voting which held that<sup>4</sup>:

***“... any use of nuclear weapons would be a violation of the Charter of the United Nations and a crime against humanity.”***

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<sup>3</sup> IX Conclusion of Dissenting Opinion of Judge Weeramantry in the ICJ Advisory Opinion.

<sup>4</sup> UNGA A/RES/70/62

100. The Prosecution supported the argument that as nuclear weapons have not been used in war since 1945 that this has led to a growing acceptance under customary law that their use is prohibited.

#### **FURTHER DEVELOPMENTS IN INTERNATIONAL LAW PROHIBITING USE**

101. To strengthen its submission that both customary and treaty law prohibit the threat and use of nuclear weapons, the Prosecution drew the attention of the Tribunal to the prohibitions in: **Human Rights Law, Environmental Law, the Precautionary Principle applied to Inter-Generational Justice.**
102. The prosecution noted that these sources of law had been cited in the dissenting opinion of Judge Weeramantry in the ICJ Advisory Opinion to support his opinion that the threat or use of nuclear weapons was illegal in all circumstances, and that there was not question of doubt even in the 'extreme circumstance of self-defence when the very survival of a state is at stake'.
103. The prosecution argued that developments in these areas of law since the 1996 ICJ opinion have supported Judge Weeramantry's position to such a degree that it is now irrefutable that any threat or use of nuclear weapons is illegal.

#### **HUMAN RIGHTS LAW**

104. Article 3 of the Universal Declaration of Human Rights, a declaration on which there is no quibble of its centrality in international law, does not leave much wriggle room, if any, for nuclear weapons use:

***"Everyone has the right to life, liberty and the security of person."***

105. In the Advisory Opinion at para 25 it was held that this principle incorporated in Article 6 (1) of the ICCPR:

***" .does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in times of national emergency."***

106. Judge Weeramantry in his dissenting opinion goes further and proclaimed that any use of nuclear weapons in any circumstances would violate this principle:

***“Any endorsement of the legality of the use, in any circumstances whatsoever, of a weapon which can snuff out life by the millions would tear out the foundations beneath this elaborate structure which represents one of the greatest juristic achievements of this century. That structure cannot theoretically be maintained if international law allows this right to any state.”***

## **ENVIRONMENTAL LAW**

107. In the Advisory Opinion and in the dissenting opinions, the devastation to the environment by nuclear weapons was recognised.
108. The Prosecution expert witness Steven Starr, Director of the Clinical Laboratory Science Program at the University of Missouri, demonstrated to the satisfaction of the Tribunal that scientific study has confirmed the nuclear winter theory and the protection of the environment under international law.
109. In his contribution to the Tribunal he submitted a number of scholarly studies that have been accepted as proof of the destruction of the protected environment by nuclear weapons.
110. In summarising the scientific findings he advised the Tribunal as follows of the effect of using nuclear weapons in even a regional conflict let alone full scale world war:

***“The studies conclude that a “regional” nuclear conflict between India and Pakistan, in which 100 Hiroshima-size weapons were exploded in the cities of those nations, could produce as many fatalities as World War II and would significantly disrupt the global climate for at least a decade. Up to 5 million tons of smoke would rise above cloud level and within days form a global stratospheric smoke layer. There the smoke would remain for many years to block 7% to 10% of sunlight from reaching Earth’s surface. Following such a “regional” nuclear conflict, average surface temperatures beneath the smoke would become colder than they have been in the last 1000 years, significantly shortening growing seasons and reducing average global precipitation.***

***The combined explosive power of 100 Hiroshima-size weapons represents less than 1% of the explosive power contained within the currently deployed and operational US - Russian nuclear arsenals ... but the US and Russia remained on alert and ready to launch with only a few minutes warning. The new research predicts that immense firestorms, produced by nuclear war fought with these weapons could lift 150 million tons of smoke into the stratosphere. There it rapidly would block the 70% of sunlight from reaching the Northern Hemisphere and 35% of sunlight from reaching the Southern Hemisphere.***

***Under such conditions, it would only require a matter of days or weeks for daily minimum temperatures to fall below freezing in the largest agricultural areas of the Northern Hemisphere. Average surface temperatures would become colder than those experienced 18,000 years ago at the height of the last Ice Age. Growing seasons would be completely eliminated for more than a decade and cause most humans and large animal populations to die of starvation.”***

111. The evidence from the Prosecution was clearly that this level of destruction violated the key principles of international law and those of the environment.

112. The Prosecution, in its memorandum, pointed to the breach of the precautionary principle that is central to the **World Charter for Nature and was adopted by the UN General Assembly in 1982:**

***“Activities which are likely to pose a significant risk to nature shall be preceded by an exhaustive examination; their proponents shall demonstrate that expected benefits outweigh potential damage to nature , and where potential adverse effects are not fully understood, the activities should not proceed.”***

113. This principle is also included in the key international documents on the environment:

**The Montreal Protocol, the Rio Declaration and the Kyoto Protocol.**

114. Consequently, the Prosecution submitted, in effect, that the acceptance of the Precautionary Principle in international law and the evidence of the overwhelming environmental devastation that would be caused by even a so-called regional nuclear war, that the Advisory Opinion at 2 E that it could not *“conclude definitively whether the treat or use of nuclear weapons would be lawful or unlawful in extreme circumstances of self-defence, in which the very survival of a State would be at stake”* has been superseded.

115. The Prosecution contended that:

***“The application of the precautionary principle would affirm that those threatening to use nuclear weapons even in this extreme scenario (i.e. when the very survival of the State was at stake) would be illegal unless those threatening to use nuclear weapons could prove that such use would not violate applicable law.”***

116. Clearly the Prosecution did not think that international law would provide that sanction.

## INTER-GENERATIONAL JUSTICE

117. The Prosecution expert witness on this topic was Professor Emilie Gaillard, International Law Professor at the University of Caen who gave evidence by Skype.

118. Her evidence confirmed the Advisory Opinion on this at para 35:

***“The use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystems, and to cause genetic defects and illness in future generations.”***

119. Judge Weeramantry made an even stronger case that nuclear weapons breached the legal protection of future generations:

***“... the rights of future generations have passed the stage when they were merely an embryonic right struggling for recognition. They have woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognised by civilised nations.”<sup>5</sup>***

120. Professor Gaillard cited the Preamble of the UN Charter as the foundation in law for the protection of intergenerational rights:

***“We, the people of the United Nations, determined to save succeeding generations from the scourge of war.”***

121. She submitted that the words of the Preamble UNCHR of “... recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” were particularly important as they:

***“...opened the way to a concept of recognition of dignity for future generations in ... human rights law.”***

122. From that premise Professor Gaillard submitted to the Tribunal that:

122.1 **The legal imperative to protect the environment is now inscribed in many constitutions around the world.**

122.2 **The very concept of peace at the international level shall then be analysed through a transgenerational perspective.**

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<sup>5</sup> ICJ Advisory Opinion, pg 233.

- 122.3 **There is a strong convergence of change of way of thinking in international law which tends to protect future generations too in international, environmental and human rights law.**
- 122.4 **Even for those states who are reluctant to adopt national law protecting future generations, it is impossible to deny the existence of international customary law which protects the environment and future generations.**
123. Professor Galliard went on to outline two essential principles of IHL that she held were breached by the threat or use of nuclear weapons:
- 123.1 **Principle of Distinction is infringed (as) ... does not make any difference between humans living and future humans. It is all the more infringed in that it could contaminate ... common goods such as the oceans and the atmosphere.**
- 123.2 **Principle of Non-Discrimination is infringed because of (the destruction) ... of goods essential to the survival of the population. This includes: foodstuffs, agricultural areas, crops, livestock, drinking water, installations and supplies.**

#### **THE DEFENCE ARGUMENT**

124. The Defence provided the Tribunal with a set of arguments to contend that:
- 124.1 **The Prosecution had not brought evidence to show that the accused were guilty as charged "*beyond reasonable doubt*" as required by Article 66 (3).**
- 124.2 **The *Lotus* principle that what is not prohibited in international law is permitted.**
- 124.3 **The international treaties on weapons do not specifically ban nuclear weapons.**
- 124.4 **The ICJ Advisory Opinion did not declare nuclear weapons or their use to be illegal.**
- 124.5 **The ICJ can only offer purely advisory opinions and not determine law.**
- 124.6 **The Security Council with the five most powerful countries of the world decide what is law.**
125. These arguments played a key role in testing the arguments of the Prosecution and the Tribunal will now evaluate them.

#### **BEYOND REASONABLE DOUBT**

126. The defendants chose not to appear before the Tribunal.

127. There was no ability of the Tribunal to force them to do so.
128. The Tribunal relied on the publicly available evidence as to the position of the leaders in regard to both possession and possible use of nuclear weapons.
129. The criminal standard of "*beyond reasonable doubt*" adopted by the ICC is a high standard.
130. The Prosecution provided convincing evidence demonstrating that all of the leaders are in charge of their governments and of the military policy and practice in relation to nuclear weapons. The Tribunal agrees with this assessment.
131. Those policies include threats to use nuclear weapons, planning and preparation for their use and a readiness to use them.
132. Each country has declared that they would only be used in the defence of their country.
133. In the case of the United States, France, Russia, Pakistan and the United Kingdom that includes refusing to rule out first use of nuclear weapons.
134. But all indicted leaders have military plans and exercises that demonstrate that they are ready to use nuclear weapons if they deem it necessary.
135. There are no exceptions.
136. And the position of the Australian government, headed by the indicted Prime Minister, is that it would accept the use of nuclear weapons by the United States in its defence and that it will continue to host those nuclear weapons and participate fully in the military exercises where nuclear weapons are an essential part of the weaponry to be used.
137. The Defence made a special plea for the President of France, François Hollande.
138. It contended that his public statements and policies include:



***“Strong support for nuclear non-proliferation, transparency (allowing other countries to inspect French nuclear facilities and encouraging others to do the same), halt to production of fissile material for use in nuclear weapons, compensation for damage inflicted on Polynesian islands by French nuclear testing in the 1980s, inclusion of France’s nuclear capacity within a pan-European defence framework, and a commitment not to use nuclear weapons against non-nuclear states.”***

139. It is the opinion of the Tribunal that even though many of these polices (such as the halt to production of fissile materials) are positive steps to decreasing the threat of use of nuclear weapons and could be steps to disarmament as envisaged under the NPT, France is still a state that has nuclear weapons in a state of readiness to use, including as a first strike, and stands with the other indicted leaders as a State that has nuclear weapons and is ready to use those weapons.
140. That does not conclude the issue as to whether possession and possible use constitutes illegality, which is addressed below, but the Tribunal is of the opinion that the Prosecution provided ample proof from the policy documents and the public record to show *“beyond reasonable doubt”* that each indicted leader headed countries with a stockpile of nuclear weapons which were in readiness to use if they deem it necessary.

#### **THE LOTUS PRINCIPLE - THE PROHIBITIVE THEORY**

141. This Principle is derived from the 1927 case before the Permanent International Court of Justice, the judicial arm of the League of Nations.
142. In essence the Principle is one that permits a State to carry out any action unless it is expressly prohibited from doing so.
143. The Tribunal notes that, with respect to nuclear weapons, the International Court of Justice held that the general principles of IHL over-ride the Lotus principle, and that the threat or use of nuclear weapons is generally illegal. Any exception to this provision of general illegality would have to be proven by those planning such use. The Tribunal has found no convincing evidence to overturn the ICJ’s general determination of illegality in any circumstance. In addition, the application of the precautionary principle to nuclear weapons re-affirms that the conclusion of illegality applies to all threats and uses of nuclear weapons.
144. The Tribunal accepts that the law is as stated by international law expert, Professor Boyle before the London Tribunal on Nuclear Weapons in 1985:

**Professor Boyle pointed out in a well-constructed argument that the *Lotus* Rationale was never intended to have any applicability to the international law of humanitarian conflict operable during warfare. It was intended to be used during peacetime ... any attempt to apply the *Lotus* Rationale runs up against the de Martens clause." ... that the burden of proof lies upon the State wishing to use the weapon to justify the use of the new weapon under the existing norms for the international laws of humanitarian conflict.<sup>6</sup>"**

#### **INTERNATIONAL TREATIES ON WEAPONS DO NOT SPECIFICALLY BAN NUCLEAR WEAPONS**

145. The Tribunal accepts that there is no specific Treaty declaring the possession of nuclear weapons to be illegal.
146. However, the charges laid against the defendants are not about possession. They are about the threat or use of nuclear weapons, and the planning and preparation for such use.
147. On the other hand, the injunctive relief sought by the prosecution clearly calls for the defendants to embark on a course of action that would lead to the elimination of nuclear weapons, not merely the rescinding of policies and practices for their threat and use.
148. In this respect, the Tribunal, in line with the ICJ, the Statute of the UN Charter and most authoritative commentators on this topic, accepts that international law principles are derived not from treaty alone but from both customary and treaty law.
149. The Tribunal also follows the decision of the International Court of Justice that affirmed an unconditional, customary obligation to pursue in good faith and bring to a conclusion negotiations on nuclear disarmament in all its aspects under strict and effective international law.
150. Furthermore, it is clear that the striving of humanity to make all war illegal and the means of war illegal has left room for prohibiting the development, threat and use of future weapons of mass destruction.

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<sup>6</sup> Nuclear Weapons and International Law ed by Geoffrey Darnton, Peace Analytics 2015, pg 80.

## THE ICJ ADVISORY OPINION DID NOT DECLARE NUCLEAR WEAPONS OR THEIR USE TO BE ILLEGAL

151. The Defence has rightly pointed out that the majority opinion did not declare nuclear weapons to be illegal in 1996.
152. What it did do was to place severe limits on the circumstances where it could even be conceived that nuclear weapons could ever be used.
153. It also covered, extensively, the customary law principles which so circumscribed the ability to use this horrific weapon that the court unanimously found, at 2 D, that :

***“A threat or use of nuclear weapons should also be compatible with the requirements of the international law, applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons.”***

154. Then in majority at 2 E the Court found that:

***“It follows from the above-mentioned requirements 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.”***

155. Some of the judges dissenting did so because they were of the opinion that the word *“generally”* should be omitted so that there would be a clear finding of the illegality of the use of nuclear weapons in any circumstances. Others dissented because they believed that there would be legal uses of nuclear weapons, and so they did not agree with the determination that the threat or use is generally illegal.
156. It is the role of this Tribunal, on the evidence before it, to find out whether the law since 1996 has upheld the position in favour of the complete illegality of the possession, threat or use of nuclear weapons in any circumstance.

## THE ICJ CAN ONLY OFFER PURELY ADVISORY OPINIONS AND NOT DETERMINE LAW

157. In suggesting that an advisory opinion does not determine law, the Defence is in error.

158. A request for an advisory opinion from an authoritative judicial body is a request to state the law.
159. The ICJ is such an authoritative body.
160. Article 92 of the UNC makes that clear:
- “The International Court of Justice shall be the principle judicial organ of the United Nations.”***
161. The Prosecution in its rebuttal of this argument has quite rightly drawn the attention of the Tribunal to Article 38 of the Statutes of the ICJ which is accepted as the authority of the ICJ to use the following sources not just to interpret the law but to determine what it is:
- 161.1 **International conventions whether general or particular, establishing rules expressly recognised by the contesting states;**
- 161.2 **International custom, as evidence of a general practice accepted as law;**
- 161.3 **The general principle of law recognised by civilised nations;**
- 1601.4 **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 SECURITY COUNCIL WITH THE FIVE MOST POWERFUL COUNTRIES OF THE WORLD DECIDE WHAT LAW IS**

162. This is not only a bold claim but an erroneous one.
163. All members of the UN, including the 5 permanent members of the Security Council have subscribed to Article 92 of the UN Charter which declares the ICJ to be the principal judicial organ of the United Nations.
164. All members of the United Nations have eschewed the rule of might (which is essentially what this proposition is) for the rule of law, by accepting Article 2 (4) of the UN Charter which reads:
- “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. “***

165. Those Purposes are set out as follows:
- 165.1 To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
  - 165.2 To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
  - 165.3 To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
  - 165.4 To be a centre for harmonising the actions of nations in the attainment of these common ends.
166. There is no provision in the UN Charter or any other source of international law that supports this proposition of the Defence

#### **EVIDENCE OF DEFENCE WITNESS PROFESSOR BOB HOWARD**

167. Professor Howard was a key expert witness led by the Defence.
168. He is currently an Associate in the Department of Government and International Relations at the University of Sydney and a Visiting Professorial Fellow at the Australian National Centre for Ocean Resources and Security at the University of Wollongong.
169. Professor Howard contended that the deterrent effect of nuclear weapons had contributed to the peace between the major powers since 1945.
170. He did not suggest that there have not been many wars causing death, injury and misery to millions in that period.
171. But with no war between major powers he believes that there has been a deterrence because of nuclear weapons.

172. He cited the fact that after three wars with conventional weapons, on obtaining nuclear weapons India and Pakistan have not had full-scale war.
173. He is also of the opinion that when the genie is out of the bottle it is too late to eliminate nuclear weapons.
174. In regard to both the genie out of the bottle argument and nuclear weapons as a deterrence to war it is helpful, the Tribunal believes, to draw attention to the work of the Scholar Ward Wilson in his recent book: **Five Myths About Nuclear Weapons**<sup>7</sup>.
175. He states that:
- “The genie argument is no more than a clever debaters’ trick. It uses a true but irrelevant statement to distract from the real issue. The real question is whether nuclear weapons are useful - not whether they are like evil spirits in some age-old myth. If they are useful then we keep them. It’s as simple as that. If they provide real security that cannot be had any other way, and if the security they provide outweighs the danger they create, then we must accustom ourselves to having them around. But if they are not very useful, if they are simply large, dangerous, clumsy explosives that spread poison downwind and have very few real applications, then we need to undertake an entirely new discussion.”***<sup>8</sup>
176. Ward uses the example of the Penny Farthing bike which was replaced by a better and useful bicycle to explain his hypothesis that:
- “Technology doesn’t go away because it’s disinvested. It goes away because other technology replaces it. Or it simply falls out of use because it was bad technology.”***<sup>9</sup>
177. In regard to the deterrence argument he uses a number of historical examples to show that possession of nuclear weapons did not deter war which might have escalated into a nuclear weapons exchange.

## BERLIN

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<sup>7</sup> Ward Wilson, Five Myths About Nuclear Weapons Boston 2013.

<sup>8</sup> Ward op cit, pg 107.

<sup>9</sup> WARD op cit, pg 105.

178. In 1948 the Soviet Union blockaded Berlin for many months.

179. International tension ran high and war was a distinct possibility.

180. The United States had the nuclear bomb monopoly.

181. That did not deter the Soviet Union from its action.

## **KOREA**

182. In 1950 the United States was at war on the Korean peninsula.

183. They threatened both North Korea and China with use of nuclear bombs.

184. China still sent a massive armed force to fight against the United States and its allies.

185. China was not deterred by nuclear weapons.

## **CUBA**

186. This has often been cited as showing how effective the nuclear deterrent is.

187. The usual argument is that the Soviet Union blinked because of the threat of a nuclear strike from President Kennedy, President of the United States.

188. Ward turns this on its head. He argues that the Soviet Union went ahead and placed nuclear missiles on Cuba knowing that the United States had a massive nuclear armoury.

189. Its Premier, Nikita Khrushchev did not blink.

190. He still sent the weapons to Cuba and then prepared to send more.

191. He then, in a bargaining game, offered withdrawal of the missiles if Kennedy would give a pledge not to invade Cuba.
192. Kennedy at first refused.
193. Rather than be deterred by nuclear armed America, Khrushchev upped the ante and demanded not only a non-invasion pledge but withdrawal of American nuclear missiles from its neighbour Turkey as a quid pro quo of withdrawal of the same by the Russians from Cuba.
194. Kennedy blinked and the crisis was resolved.
195. The lesson, says Ward is that both powers were willing to risk nuclear war despite the deterrence both had.

#### WISDOM OF INDICTING THE NUCLEAR POWERS

196. Professor Howard also proposed that:
- “The best way to eliminate nuclear weapons is to create the international security arrangements that will render their possession unnecessary.”***
197. He was of the opinion that:
- “An indictment of the sort being discussed here would not do this. It labels governments and populations as criminals - hardly a way of encouraging international cooperation.”***
198. But whether seeking a finding from the Tribunal, as the Prosecution has, that the indicted leaders are acting illegally by **planning and preparing for the use of nuclear weapons** and **making illegal threats to use nuclear weapons**, is the best way to obtain nuclear weapon disarmament, it is the Tribunal’s role, as it was for the Advisory Opinion of the ICJ to make that finding.
199. The Tribunal accepts that the witness Professor Howard would like nothing more than to see universal nuclear disarmament achieved, his arguments do not go to the issue of legality of the possible use of those weapons and the threat of use.



200. The Tribunal will now turn to those pivotal questions in its Conclusion.

## CONCLUSION OF THE TRIBUNAL

201. The Hon Michael Kirby submitted an amicus brief to the Tribunal.

202. In that brief he outlined the many serious challenges facing humanity.

203. But he submitted , after listing those challenges, the elimination of nuclear weapons was foremost:

***“... finding solutions to the foregoing challenges, urgent though they are, cannot compare in importance and to the challenge presented by the production, proliferation, storage, transport and use of nuclear weapons. Already the destructive power of these weapons constitutes many times more than the destructive force necessary to obliterate forever human and other life forms on Planet Earth ... responding to the dangers of nuclear weapons is of the highest priority ... the danger must be squarely faced that by accident, mistake, misinterpretation, folly or malevolence, Planet Earth, that has nurtured human civilisation, will be destroyed ... who will then preserve the history of, or even remember, the human species, with its precious gifts of consciousness, curiosity and moral reasoning.”***

204. Of the Tribunal he said:

***“It has no power to compel witnesses. Nor can it enforce its orders. Its only power derives from the force of international public opinion; the persuasiveness of human reason; and the powerful sense of self-preservation.”***

205. The Tribunal recognises its lack of enforcement powers.

206. But it is firmly of the belief that from the expertise of the witnesses, and the quality of the documentary evidence before it that it can present a judgment that will make a contribution to the challenge of eliminating nuclear weapons and the threat that the Hon Michael Kirby has so eloquently outlined.

207. The Tribunal has placed all of the witness briefs and documents submitted to the Tribunal on the website.

## FINDINGS

208. The 1996 ICJ Advisory Opinion has been criticised by those who consider nuclear weapons and their use to be legal and those who consider that the Court had sufficient legal evidence to pronounce the use or threat of use of nuclear weapons to be illegal under any circumstances.

209. It is the considered opinion of this Tribunal after weighing all the evidence at its disposal that in the 20 years that have passed since the Advisory Opinion that international law now supports the dissenting opinion of Judge Weeramantry that:

***“The question asked of the Court relates to the use of nuclear weapons in any circumstances. The Court has observed that it is making no observation on this point. It is my view that the use of the weapon is prohibited in all circumstances.***

***The rules of humanity which prohibit the use of the weapon in external wars do not begin to take effect only when national boundaries are crossed, they must apply internally as well.<sup>10</sup>”***

210. Even in 1996 Judge Weeramantry was convinced that the body of international law, both from Treaty and customary law, meant that the use or threat of use of nuclear weapons was illegal:

***“It is beyond doubt that the preponderant majority of States oppose nuclear weapons and seek their total abandonment.***

***The very first resolution of the General Assembly ... appointed a commission whose terms of reference were, inter alia, to make specific proposals “for the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction.”***

***States appearing before the Court have provided the Court with a list of United Nations resolutions and declarations indicating the attitude towards these weapons of the overwhelming majority of that membership. Several of those resolutions do not merely describe the use of nuclear weapons as a violation of international law, but also assert that they are a crime against humanity.***

***Among the latter are the Resolutions on Non-Use of Nuclear Weapons and Prevention of Nuclear War passed by the General Assembly to this effect in 1978, 1979, 1980 and 1981 with (what) ... can be described as massive majorities....***

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<sup>10</sup> Darnton op cit, pg 229.

*In the face of such a preponderant majority of States' opinions, it is difficult to say there is no opinion juris against the use or threat of use of nuclear weapons. Certainly it is impossible to contend that there is an opinion juris in favour of the legality of such use or threat."*

## THE DEVELOPMENT OF INTERNATIONAL LAW AND INTERNATIONAL HUMANITARIAN LAW

211. When the Advisory judgment was issued in 1996 there was a considerable body of law available then to have found in favour of the opinion of the dissenting judges who had decided that the nuclear weapons were simply illegal.

212. The Fourth Hague Convention of 1907 endorsed what became fundamental principles of customary international law, and thus illegal to breach:

*"The right of a belligerent to adopt means of injury of an enemy is not unlimited."*

213. The following prohibitions also became (and still are) fundamental principles of customary international law<sup>11</sup>:

213.1 **The employment of poisons or poisoned weapons.**

213.2 **The killing or wounding treacherously of individuals belonging to the hostile state or army.**

213.3 **The use of arms, projectiles or material calculated to cause unnecessary suffering.**

213.4 **Attacks on undefended villages and towns.**

214. The Geneva Gas Protocol of 1925 prohibited the use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices including bacteriological warfare.

215. And as an authoritative source of undisputed international law the ICJ had the **Nuremberg Principles** adopted unanimously by the General Assembly of the UN in 1950 and the **Genocide Convention of 1948**.

216. The most pertinent Nuremberg Principles in determining the issue of the legality of nuclear weapons were Principles VI and VII.

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<sup>11</sup> Cited in Darnton op cit, pg 15.

217. Those Principles held that:

*"The crimes hereinafter set out are punishable as crimes under international law:*

a) **Crimes against peace:**

- (i) *Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;*
- (ii) *Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).*

b) **War crimes:**

*Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the Seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.*

c) **Crimes against humanity:**

*Murder, extermination, enslavement, deportation and other inhumane acts done against any civilian population, or persecutions on political, racial, or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime."*

## PRINCIPLE VII

***"Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law."***

218. It is impossible to understand how in 1996, as now, that any judicial body could, with the knowledge of the indiscriminate mass destruction that nuclear weapons, and those who made the preparations to use them, would cause, could not find that any use of nuclear weapons, would be in breach of the Nuremberg Principles above and the accepted rules of warfare.

219. Those Principles of war are known to all, and in particular the leaders of States and their government colleagues and military advisers. There are 6 of them:

- Discrimination
- Proportionality

- Lawfulness
- Necessity
- Humanity
- Neutrality

220. The evidence before the Tribunal showed the impossibility of the use of nuclear weapons, not stopping at neutral borders, wreaking destruction on present and future generations, thus breaching all of the above and therefore being unlawful.

221. Moreover, the Genocide Convention of 1948 set out that Genocide, a crime against humanity and thus a prosecutable offence, entailed the following:

**The killing or causing of serious bodily or mental harm to members of a national, ethnic, racial or religious group in whole or in part.**

222. Under the **Geneva Protocols I and II (1977)** the following articles reinforce the impossibility of nuclear weapon as being anything but unlawful<sup>12</sup>:

**Article 35 (3)** *“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 environment.”*

**Article 48** *“Provides respect and protection for the civilian population and civilian objects, and that parties to a conflict shall distinguish between the civilian population and combatants and civilian objects and military objects and accordingly shall direct their operations only against military objectives.”*

**Article 51** *“Prohibits indiscriminate attacks on civilians which are identified as those:*

- a) Employ a method or means of combat which cannot be directed at a specific military object;*
- b) That attack by bombardment by any means which treats as a single military objective a number of clearly separated and distinct military objectives, located in a city, town, village or their area containing a similar concentration of civilian or civilian objects.”*

**Article 55** *Provides that:*

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<sup>12</sup> Reproduced in Darnton op cit, pg 19 ff.

***“Care shall be taken in warfare to protect the natural environment against widespread long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended and may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.”***

223. These Protocols actually came out of the UN General Assembly Resolutions which had been concerned with protecting civilians from the consequences of nuclear weapons.
224. The Resolutions, overwhelmingly supported by the nations of the world, were clearly intended to make the use of nuclear weapons so restricted that any use would be illegal.

#### **POST 1996**

225. The evidence of the commitment of the international community, meaning the great majority of countries - not a self-appointed group - to eliminate all nuclear weapons and to declare their use or threat of use to be illegal is overwhelming.
226. The first ever UN Resolution in 1946, adopted by consensus against the backdrop of Hiroshima and Nagasaki called for :
- “The Elimination from National Armaments of Atomic Weapons and all Other Major Weapons Adaptable to Mass Destruction.”***
227. In the intervening years, the numerous resolutions in support of disarmament and declaring nuclear weapons illegal have continued to be supported by the great majority of states.
228. At the First Committee of the United Nations General Assembly on 20 October 2014 there were 155 states supporting the ***“Joint Statement on the Humanitarian Consequences of Nuclear Weapons”***.
229. The 155 Nations declared that:
- “The use and testing of nuclear weapons has amply demonstrated the unacceptable humanitarian consequences caused by the immense, uncontrollable destructive capability and indiscriminate nature of these weapons. It is in the interest of the very survival of humanity that nuclear weapons are never used again, under any circumstances.”***

230. The echoing of Judge Weeramantry's words that nuclear weapons were illegal "***under any circumstance***" by 155 of the nations of the world surely supports the proposition of his finding that use or threat of nuclear weapons is illegal, has moved from "***dissent***" to the interpretation of the majority of the international community.
231. Within that support, the argument of the legitimacy of deterrence is put paid to.
232. For nuclear weapon use has been declared, by the majority to be illegal "***under any circumstances.***"
233. Noticeably, none of the 9 Nuclear Weapons States were allowed by their indicted leaders to support this Statement.
234. Furthermore, the Australian government not only did not support the majority position but produced an alternative statement for deterrence with 19 other compromised states, signatories to the NPT but members of the NATO alliance and the policy that allows for a 'First Strike Policy' with nuclear weapons.

#### **INTERNATIONAL CONFERENCES ON INTERNATIONAL HUMANITARIAN LAW**

235. Three international conferences have been held on nuclear weapons and international humanitarian law:
- 235.1 Norway, March 2013,
  - 235.2 Mexico, February 2013, and
  - 235.3 Austria in November 2014.
236. From these conferences came the "***Joint Statement on the Humanitarian Consequences of Nuclear Weapons***" of 161 countries, delivered by the Austrian Minister of Foreign Affairs to the 2015 NPT Review Conference.
237. As this statement reflects the interpretation of 161 countries of the world it can be taken to be authoritative and an extremely important document to assist this Tribunal in determining the questions posed to it.

238. The declarations within the statement give further evidence of the acceptance of Judge Weeramantry's dissent:

*"... Past experience from the use and testing of nuclear weapons has amply demonstrated the unacceptable humanitarian consequences caused by the immense, uncontrollable destructive capability and indiscriminate nature of these weapons...*

*The broad participation at those Conferences, with attendance most recently in Vienna by 158 States, the International Committee of the Red Cross ("ICRC"), a number of UN humanitarian organisations and civil society, reflected the recognition that the catastrophic humanitarian consequences of nuclear weapons are a fundamental and global concern...*

*They have deep implications for human survival; for our environment; for socio-economic development; for our economies; and for the health of future generations. For these reasons, we firmly believe that awareness of the catastrophic consequences of nuclear weapons must underpin all approaches and efforts towards nuclear disarmament, including in the work of the 2015 Review Conference of the Nuclear Non-Proliferation Treaty (NPT). This is not, of course, a new idea. The appalling humanitarian consequences of nuclear weapons became evident from the moment of their first use, and from that moment have motivated humanity's aspirations for a world free from this threat, which have also inspired this statement. The humanitarian consequences of nuclear weapons have been reflected in numerous UN resolutions, including the First Resolution passed by the General Assembly in 1946, and in multilateral instruments including the NPT. The world's most eminent nuclear physicists observed as early as 1955 that nuclear weapons threaten the continued existence of mankind and that a war with these weapons could quite possibly put an end to the human race. The First Special Session of the General Assembly devoted to Disarmament ("SSOD-1") stressed in 1978 that "nuclear weapons pose the greatest danger to mankind and to the survival of civilisation.*

*We are therefore encouraged that the humanitarian focus is now well-established on the global agenda. The 2010 Review Conference of the NPT expressed "deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons".*

*More than three-quarters of all countries supported the Joint Statement on the Humanitarian Consequences of Nuclear Weapons delivered at the 2014 First Committee of the UN General Assembly. Today's statement again demonstrates the growing political support for the humanitarian focus.*

*It is in the interest of the very survival of humanity that nuclear weapons are never used again, under any circumstances. The catastrophic effects of a nuclear weapon detonation, whether by accident, miscalculation or design, cannot be adequately addressed. All efforts must be exerted to eliminate the threat of these weapons of mass destruction.*

*The only way to guarantee that nuclear weapons will never be used again is through their total elimination. All States share the responsibility to prevent the*



***use of nuclear weapons, to prevent their vertical and horizontal proliferation and to achieve nuclear disarmament, including through fulfilling the objectives of the NPT and achieving its universality.”***

239. The Statement recognises the threat of nuclear weapons to the very existence of humankind.
240. It summarises the absolute breach of IHL by the use or threat of these Weapons of Mass Destruction.
241. Instead of the concern of the ICJ in 2E for the ***“very survival of a State”*** as a reason to legitimise the use of nuclear weapons it counterposes that ***“It is in the interest of the very survival of humanity that nuclear weapons are never used again, under any circumstances.”***
242. This is a clear statement that the international community considers that if nuclear weapons are used humanity’s survival is at stake and that situation can only have been reached if the possessors of nuclear weapons act illegally.
243. In its Rebuttal Argument the Prosecution set out as an Appendix the documents that provide evidence of the chain of command for nuclear weapons and their use by the 9 indicted leaders.
244. This evidence was very useful.
245. The Tribunal accepts that responsibility for the nuclear weapons policy lies, ultimately, with those leaders, indicted and the governments that they lead.
246. During the preparation of this Judgment, Defence Counsel referred the Tribunal to a practice note, obtainable on the ICC website of the Chief Prosecutor of the ICC, Luis Moreno-Ocampo, issued on 09 February 2006.
247. Although Defence Counsel had provided this in support of the contention that the standard of beyond reasonable doubt could not be reached by the Prosecution which the Tribunal has not accepted, the Letter on page 5 provided the following important elements of crimes against humanity of relevance to this Tribunal:

***“A crime occurs if there is an intentional attack directed against civilians (principle of distinction) (Article 8(2)(b)(i)) or an attack is launched on a military objective in the knowledge that the incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage (principle of proportionality) (Article 8(2)(b)(iv).”***

248. Article 8(2)(b)(iv) criminalises:

***“Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated”;***

249. Article 8(2)(b)(iv) draws:

***on the principles in Article 51(5)(b) of the 1977 Additional Protocol I to the 1949 Geneva Conventions, but restricts the criminal prohibition to cases that are “clearly” excessive.”***

250. The application of Article 8(2)(b)(iv) requires, *inter alia*, an assessment of:

- a) the anticipated civilian damage or injury;
- b) the anticipated military advantage; and
- c) whether (a) was “clearly excessive” in relation to (b).

251. In addition to satisfying the elements of a crime, information also has to indicate the requisite involvement of a national of a State Party in order for the crime to fall within the jurisdiction of the Court.

252. Several communications expressed concerns about the use of cluster munitions. The Rome Statute contains a list of weapons whose use is prohibited *per se* (Article 8(2)(b)(xvii)-(xx)). Cluster munitions are not included in the list and therefore their use *per se* does not constitute a war crime under the Rome Statute. A war crime could, however, still be established where any weapon is employed in a manner satisfying the elements of other war crimes. Allegations concerning cluster munitions were therefore analysed in accordance with Article 8(2)(b)(i) and (iv) (targeting of civilians or clearly excessive attacks).

253. The use of nuclear weapons could clearly be categorised as a crime against humanity under these definitions.

254. Furthermore, as is pointed out, a weapon, such as cluster munitions, does not have to be on the prohibited list of the ICC but a war crime could, however, still be established where any weapon is employed in a manner satisfying the elements of other war crimes.
255. There is little doubt that using a nuclear weapon is *“excessive”*.
256. The damage of such weapons would satisfy the elements of a war crime above.
257. Even if the Statutes of the ICC do not allow the indicted leaders to be brought before them, as the Defence contends, it does not prevent their indictment before this Tribunal.
258. The Tribunal has also noted that the indicted leader of the United Kingdom, Theresa May has confirmed her adherence to the policies of her predecessor, David Cameron, in a recent vote in the parliament to spend up to 40 billion pounds to replace four submarines that carry nuclear warheads.
259. She is quoted as saying in the House of Commons that she would be willing to authorise a nuclear strike that could kill 100,000 people<sup>13</sup>.
260. The Tribunal takes this to be evidence that the new leader is continue to follow the nuclear weapon policies set out as part of the indictment.

## FINDINGS OF THE TRIBUNAL

261. The Tribunal has found that the Prosecution has established its case.
262. The Tribunal finds the 9 leaders indicted guilty of all 4 charges laid against them.
263. Nuclear weapons, either the use or threat of, violate the following accepted principles of International Humanitarian Law in wartime:
- **Discrimination - they cannot discriminate between military and civilian targets.**

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<sup>13</sup> The Guardian, 18 July 2016

- **Proportionality** – the force of a nuclear weapon is such that the damage must go far beyond any purely military objective.
- **Protection of Non-Combatants** - to be lawful - no weapon can indiscriminately harm civilians.
- **Humanity** - to be lawful - no weapon can cause unnecessary suffering to victims, combatants or non-combatants. Weapons spreading poison, disease or doing genetic damage are illegal as they cannot be contained in “*space or time*”.
- **Environmental and Ecological Protection** - nuclear weapons will cause massive environmental and ecological damage on an unheard of scale in violation of all international protections.
- **Protection of future generations** – the widespread damage by nuclear weapons ... environmental, ecological and genetic would be on such a scale that the fundamental human rights of those future generations and the legal protections afforded to them would be totally breached.
- **Genocide** – the scale of death would be so enormous that it would be impossible not to commit the crime of genocide.
- **Neutrality** - the effect of nuclear weapons would take no heed of neutral borders and massive damage would be inflicted on the populations and the environment of neutral countries.

264. All of the above amount to crimes against humanity.

265. The Tribunal has found that the 9 indicted leaders have committed these crimes under the following provisions of the Nuremberg Principles:

## **PRINCIPLE VI:**

- a. **Crimes against Peace:**
  - i) **Planning, preparation, initiation or waging of a war of aggression in violation of international treaties, agreements or assurances.**
  - ii) **Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).**

266. Principle III of the Nuremberg Principles make it clear that leaders of States do not escape culpability for these crimes by claiming sovereign immunity:

**The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.**

267. The Prime Minister of Australia, Malcolm Turnbull, is found guilty of the following charges laid against him

- **Aiding and abetting the planning and preparation for the use of nuclear weapons.**
- **Making illegal threats to facilitate, support, aid and abet the use of nuclear weapons.**

268. The Statute of the International Criminal Court at Article 25 (3) has incorporated the generally accepted legal principles as to what aiding or abetting the commission or attempted commission of a crime entails:

**...a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court of that person:...**

- (c) **For the purposes of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.**

## **REMEDIES**

269. The Prosecution advised the Tribunal that it did not seek retributive justice against the defendants but rather restorative justice.

270. In this light, the prosecution requested the Tribunal to seek injunctive relief by;

- i) declaring that they would never authorize the use of nuclear weapons;
- ii) decommissioning all nuclear weapons in preparation for their dismantlement and destruction;
- iii) initiating, or engaging in, multilateral negotiations in good faith for the complete prohibition and elimination of nuclear weapons under strict and effective international control.

271. The Tribunal notes that such action would be consistent with the findings of the ICJ, and subsequent law explored by the tribunal, affirming the illegality of the threat or use of nuclear weapons and highlighting that:

**There exists an obligation 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.**

272. To that end the Tribunal, having found the Defendants guilty of :

**War crimes, crimes against humanity, crimes against peace and crimes of threatening, planning and preparing acts which would constitute genocide , ecocide and omnicide;**

accordingly grants the relief sought by ordering the Defendants to immediately, in recognition of the illegality of using or threatening to use nuclear weapons:

- i) **Put urgent legislation before their appropriate legislative body to affirm that the threat or use of nuclear weapons is illegal;**
- ii) **Decommission all of their nuclear weapons as a prelude to their dismantlement and destruction;**
- iii) **Immediately enter or initiate multilateral negotiations in good faith for the complete prohibition and elimination of nuclear weapons under strict and effective international control.**

273. As a further Order to the Defendants the Tribunal requires:

**The Defendants to participate in the deliberations of the Open Ended Working Group set up by the United Nations General Assembly under Resolution 70/33 entitled:**

**Taking forward multilateral nuclear disarmament negotiations.**

274. This authoritative United Nations body, supported by the overwhelming majority of countries, has already drawn up extensive proposals on how to achieve nuclear weapon disarmament and meet the legal obligations under Article VI of the NPT.

**Dated: 16 August 2016**

**SIGNATURES OF THE 2 CO-CHAIRPERSONS OF THE TRIBUNAL**



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**KEITH SUTER**



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**MATTHEW ROBSON**

**NOTE:**

All briefs of Evidence and all documents submitted are on the Tribunal website at: [www.global-directions.com](http://www.global-directions.com)