Prosecution rebuttal and closing statement – Alyn Ware

(Written version. Check against delivery)

Your honours,

The prosecution would like to thank you for considering the charges we have laid against the leaders of the nine nuclear armed States for crimes against peace, crimes against humanity and crimes against future generations arising from their responsibility for policies to use and threaten to use nuclear weapons, and also the charges laid against the leader of Australia for aiding and abetting these crimes and for also making illegal threats to support the commission of such crimes.

We thank also the witnesses who have provided expert testimony to assist in your deliberations on this matter, and we thank the defence for clarifying some of the issues to be addressed. We will respond to these issues now.

Law of power or power of law

The first argument of the defence is that law is derived not from principle, not from international agreement, not from justice, not from common decency, not from precedent legal cases, not from any of the sources that we would generally consider to be the foundation of law. Rather it is derived solely from power.

The defence argues, and I quote '*Law is fundamentally grounded in the power of the sovereign, and in the case of international law, realities established by the powerful states… The five permanent members of the Security Council are the most powerful nations on the world stage and have the power to determine what the law is, or at least which laws are to be enforced. Laws that are on the books but cannot be enforced are not legal mandates. These five nations also have nuclear weapons. They determine, in the last instance, what are the rules of international conduct*.' (Defence brief by David Tait)

The defence argues that this court should throw out the law, and rule instead in favour of the powerful merely because '*might is right*.' This argument is wrong and should immediately be dismissed by the Tribunal.

Not even the most powerful states, referred to by the defence, subscribe to this premise. As members of the United Nations they have all accepted the UN Charter which lays down the authority of the International Court of Justice. They have accepted that:

- *The International Court of Justice shall be the principal judicial organ of the United Nations (*Article 92*);*
- *All members of the United Nations are ipso facto parties to the Statute of the International Court of Justice (*Article 93*);*
- *Each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party (*Article 94*).*

And they have accepted the sources of international law outlined in Article 38 of the Statue of the International Court of Justice and which are used by the court in order to reach their decisions. These are:

- *International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*
- *International custom, as evidence of a general practice accepted as law;*
- *The general principles of law recognized by civilized nations;*
- *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.*

No-where in the UN Charter of the ICJ Statute is there any acknowledgement that law is determined by the power of the nuclear-armed states. None of the nuclear-armed States, indeed no states what-so-ever, attached reservations or declarations to their acceptance of the UN Charter and ICJ Statute, arguing that they were exempt from, or differed in their interpretation of, the sources of international law listed by the ICJ statute.

And with regard to the sources of law relating to nuclear weapons that we have presented to this tribunal, none of the nuclear-armed States argued in the 1996 ICJ Advisory Opinion that they were exempt from this law, or that it did not apply to nuclear weapons. The nuclear-armed States attempted to argue that such law did not render the threat or use of nuclear weapons illegal, not that the law did not apply.

Finally, the defence makes the even more astonishing argument that even if the law does apply, the nuclear-armed States can ignore and violate this law at their will. As such, the defence suggests that it is pointless for this tribunal to make a determination on illegality and criminality of nuclear weapon policies as it will be ineffectual.

This argument is absurd on two counts; Firstly, if we abandon the law just because there is a possibility it might be violated, we provide a recipe for anarchy, a total collapse of law. Secondly it assumes that law has no power to guide, facilitate or compel compliance of powerful states or their leaders. The experience of the ICJ cases against the nuclear-armed States clearly dispels this myth. The 1974 Nuclear Tests Case, for example, was instrumental in moving France to end its atmospheric nuclear testing program in 1975. The 1981 Nicaragua v United States case was instrumental in ending US military support for the rebels and paving the way for the Central America Peace Accords which were accepted by both USA and the Soviet Union (who had been supporting opposing sides in the Central American civil wars).

Criminality of possession, or criminality of threat and use?
The second argument of the defence relates to the charges we have laid, or rather to charges that we have not laid against the defendants. The defence argues that there is no comprehensive prohibition under treaty or customary law against nuclear weapons per se.

But that is not the issue at stake. We have not laid charges against the defendants with regard to the possession of nuclear weapons. We have laid charges on policies and practices to use these weapons and to threaten to use these weapons.

On these charges, we have outlined a considerable body of applicable law, as well as precedent cases and legal principles which render the current policies illegal, and the listed actions of the defendants criminal. We will summarise this and draw conclusions later in our closing statement.

Responsibility of the defendants
The third argument of the defence is that there is no proof that the defendants are personally responsible for the policies and practices we have outlined.

The prosecution would like to draw the attention of the tribunal to the amicus brief and expert testimony of Marianne Hanson, in which she describes the 'nuclear priesthood', a small elite in each of the nuclear-armed States. Hanson explains that decision-making on nuclear policy and practice is developed, adopted and overseen by this priesthood. The Prime Minister or President (Head of government) is the publicly responsible and accountable figure in these elites.

We take this opportunity to submit additional information, as requested by the defence, on the specific authority and responsibility of the defendants as the leaders of the nine nuclear armed States and of Australia. This is attached as Appendix I.

Summary of the facts
The prosecution has presented to the tribunal evidence regarding the policies of the nuclear-armed States and of Australia, which are illegal and for which the defendants bear criminal responsibility.

These include policies and practices of first-use of nuclear weapons, multiple use of nuclear weapons, maintaining nuclear weapons on launch-on-warning and high operational readiness to use, counter value policies (i.e. targeting of cities and civilian infrastructure) and counter-force policies (targeting military assets).

We, the prosecution, also presented evidence that multiple use of nuclear weapons threatens human civilization and ecocide, and could cause human extinction. And we presented evidence that the impact even a single nuclear weapon or a low number of nuclear weapons detonated against military targets would cause indiscriminate harm to non-combatants, to offspring of surviving combatants and to the environment. This evidence reaffirms the conclusion of the International Court of Justice in 1996 that '*The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet.'*

Summary of the law
We presented a body of law, all of which is accepted by the nuclear-armed States, which applies to nuclear weapons and which render their threat or use illegal. This includes international humanitarian law, international law on peace and security, human rights law and environmental law.

We also provided authoritative sources which have applied this law to confirm the illegality of the threat or use of nuclear weapons. They include the United Nations General Assembly, International Court of Justice, International Committee of the Red Cross, Vancouver Declaration of 2011 and domestic cases including the 1963 Shimoda Case in the Tokyo High Court and the Trident Ploughshares case in Scotland.

In addition, we outlined an emerging body of law relating to ecocide, the precautionary principle and inter-generational justice that gives further weight to the law prohibiting the threat and use of nuclear weapons.

Response to defence arguments on the law

With regard to the counter-value policies of nuclear-armed States, the defence agreed with our arguments that these are clearly illegal. In their defence brief, for example, they accepted that '*Nuclear weapons that target civilian areas are clearly illegal.*'

The defence also accepted that targeting of military installations would be illegal if there would be indiscriminate damage to civilians, and that those responsible for such acts would be liable under international law. '*Military commanders of such an exercise could potentially be tried under war crimes legislation if they failed to provide adequate protection for civilians'* (Defense brief).

The defence claims that it would be possible to target military installations with nuclear weapons in ways that would not cause indiscriminate damage to civilians. However, evidence presented to this tribunal, and also to the International Court of Justice, on the impact of nuclear weapons detonations clearly demonstrates that this is not possible.

The defence claims that the ICJ in 1996 did not rule that every threat and use of nuclear weapons would necessarily be illegal, and that this infers that there indeed would be legal threats and uses of nuclear weapons. They cite the Lotus principle, that anything not specifically prohibited under international law is permitted.

However, this is a misreading of the ICJ decision in two key ways. Firstly, the Lotus principle is not absolute. It is balanced by the precautionary principle which holds that if an action or policy has a suspected risk of causing significant harm to the public, or to the environment, a burden of proof that it is not harmful falls on those taking or proposing to take such action. If such proof is not forthcoming, the action should not be taken.

The ICJ clearly rejected Lotus by affirming that the threat or use of nuclear weapons **are generally illegal**, and erred instead towards the precautionary principle. Prior to the decision of the ICJ the Lotus principle most likely was held, and that each threat and use of nuclear weapons might be permitted unless illegality was demonstrated in the specific circumstance. The ICJ turned this on its head, so that the law from 1996 on is that the threat or use of nuclear weapons are illegal in each circumstance unless an exception of legality could be proven in that specific circumstance.

The nuclear weapon states attempted to argue to the ICJ that there were indeed such circumstances of legality – but this was rejected by the Court, which concluded that there was no evidence to support this claim, even though it could not rule out such a possibility (ICJ case, para 94). The President of the ICJ commented that there was no green light given by the court to any use of nuclear weapons. At most it was an orange light, if not red.

Since the 1996 ICJ decision, further developments in international law have removed any possible exceptions to the general illegality of the threat or use of nuclear weapons. These include:

- Further evidence on the severe humanitarian and environmental impact of any use of nuclear weapons;
- Agreement by all States parties to the NPT in 2010 – including the five nuclear-armed States parties – that any use of nuclear weapons would cause '*catastrophic humanitarian consequences'*
- The development of trans-generational rights including the inter-generational application of international humanitarian law.

The further evidence on the severe humanitarian and environmental impact of any use of nuclear weapons, put forward in a series of international conferences on the issue hosted by Norway, Mexico and Austria, affirm the impossibility of using nuclear weapons without causing indiscriminate harm to civilians and therefore violating international humanitarian law.

This is reinforced by the language of the NPT 2010 agreement which used the term 'catastrophic'. This term has a specific meaning in international law, referring to damage that is so severe that it subverts principles of humanity and ecosystem survival and 'sets back time.' Indeed, 'catastrophic' impact infers a threat to life-systems of human civilization.

Finally, if there is any remaining doubt that every use of nuclear weapons is now clearly illegal, the inter-generational application of international humanitarian law closes and locks the door completely. Even if there was some remaining possibility that a nuclear weapon could be used on military installations and personnel in a way that did not spread radiation to civilians, the offspring of surviving military personnel, and their subsequent generations, would be impacted by the radiation – both through long-lasting radionuclides and through inter-generational damage to genes. It is clearly illegal for the weapons to cause this damage to future generations. They may be offspring of military personnel, but they have their own human rights and are protected under international humanitarian law.

Injunctive relief sought

Finally some further comments on the injunctive relief sought. The prosecution has made clear that it seeks a restorative justice approach and not a retributive justice approach.

We are asking the tribunal to find the defendants guilty of war crimes, crimes against humanity, crimes against peace, and crimes of threatening, planning and preparing acts which could constitute genocide, ecocide and omnicide.

However, we are not asking the tribunal to issue arrest warrants for the defendants once they are found guilty of these crimes. We are not asking for any penalties to be imposed. What we are requesting is for the tribunal to issue orders to the defendants on what is required of them to bring their actions in accordance with international law. The tribunal should instruct the defendants to;

i) cease all threats to use nuclear weapons by declaring that they would never authorize such use;
ii) decommission 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 obligation to initiate or engage in multilateral negotiations in good faith for nuclear abolition was affirmed unanimously by the International Court of Justice. The nuclear-armed States have all recognized this obligation by affirming at the 2000 and 2010 NPT review Conferences 'an unequivocal undertaking… to accomplish the total elimination of their nuclear arsenals.' The Tribunal in ordering the defendants to initiate or engage in such negotiations is merely asserting that they must act on obligations they have agreed to but failed to implement.

The defence claims that nuclear weapons have kept the peace, and that to implement this disarmament obligation could threaten security. Regardless of whether or not these claims are true, and there is considerable evidence that both claims are false, they are **political arguments** that do not remove the **legal obligation** to negotiate for nuclear disarmament in good faith. Indeed, if the claims are true, then

the negotiations for nuclear disarmament can address these concerns. They can negotiate alternative measures to keep the peace and security, as nuclear weapons are being reduced, decommissioned, dismantled and finally prohibited and destroyed under effective international verification and control.

Your honours,

In the 1996 ICJ case the United Kingdom tried to undermine international humanitarian law and the law of peace and security by claiming that such law did not exist or did not apply to nuclear weapons. They said that such law was just a phantom - something ghostly, deceased and intangible in the real world.

The defence has tried to do the same in this tribunal. Their spurious arguments should be rejected. We urge you to apply the law fully and properly, to find against any threat or use of nuclear weapons, and to enjoin the defendants to implement their legal obligations to negotiate for nuclear disarmament. By doing this can we prevent a potential catastrophe that could leave the earth inhabited only by phantoms.

The prosecution thanks you again for your time and consideration and we now rest our case.

Appendix I: Nuclear responsibility and chain of command

Responsibility of Leaders

USA: The NCA consists only of the President and the Secretary of Defense or their duly deputized alternates or successors. The chain of command runs from the President to the Secretary of Defense (SecDef) and through the Joint Chiefs of Staff to the Commanders of the Unified and Specified Commands. Only the President can direct the use of nuclear weapons, including the Single Integrated Operational Plan (SIOP). The channel of communication for execution of the Single Integrated Operational Plan (SIOP) and other time-sensitive operations shall be from the NCA through the Chairman of the Joint Chiefs of Staff, representing the Joint Chiefs of Staff, to the executing commanders. — *Section 3.1, Department of Defense Directive Number 5100.30 December 2, 1971*

Nuclear Posture Review:

France:

France:

Use: In France, the president exercises supreme command over all nuclear forces. His autonomy of decision-making is almost completely unlimited. The president's directions to the nuclear forces pass through the Centre de 1'Operation des Forces Aeriennes Strategiques (COFAS) which is located in a hardened command centre at Taverny, near Paris and is also the headquarters of the French Strategic Air Force. The Alternative National Military Command Centre is at Mont Verdun near Lyon. Two launch control centres exercise command over the land-based missiles. In addition, eight primary control centres and two secondary control contres act as back up. The French president can unlock nuclear weapons in situ by transmitting a unique code sequence (similar to PALs). Procedural arrangements such as the two-person rule and other safety and security measures are also in place.

Policy: President Hollande, Speech on Nuclear Deterrence, 19 February 2015**.**
http://www.nuclearfiles.org/menu/key-issues/nuclear-weapons/issues/policies/President-Hollande-Speech-on_a921.pdf

India

Use: Cabinet Committee on Security headed by the Prime Minister

Policy: Prime Minister as head of government, ratified by parliament

Command and Control of Nuclear Weapons in India
http://www.idsa-india.org/an-jan00-5.html

Russia:

December 2014 Russian Federation Military Doctrine. This required the authorization of President Putin.

Pakistan

Use: National Nuclear Command Authority: Prime Minister has authority, but there is also delegated authority to the Chief of the Strategic Force Command.

Policy: Prime Minister and Defence

Pakistan's Nuclear Doctrine and Command and Control System: Dilemmas of Small Nuclear Forces in the Second Atomic Age
Bhumitra Chakma. http://www.regionalsecurity.org.au/Resources/Files/vol2no2Chakma.pdf

United Kingdom:
Use: The British Defence Doctrine states that "Nuclear deterrent forces, as the ultimate guarantee of national security, must be capable of threatening, and hence of delivering, an adequate level of force with a high degree of confidence. They must be highly survivable, with assured command and control."31 In the United Kingdom (UK), the prime minister exercises authority over the nuclear forces. The prime minister can order the use of nuclear weapons only with the assistance of at least one other person, possibly the Chief of Defence Staff (CDS). In fact, this two-person rule is known to operate throughout the nuclear command chain from the prime minster to the serviceman in the field. "Incomplete codes for authorising a nuclear strike are held by both individuals and only when the two sections are brought together can a fully authenticated launch order be transmitted to Britain's nuclear forces."
British Defence Doctrine, Joint Warfare publication (JWP) 0-01, Ministry of Defence, United Kingdom
Policy: October 5, 2015. Prime Minister Cameron confirmed his authority to set policy and to hold responsibility for use of nuclear weapons.
http://www.independent.co.uk/news/uk/politics/david-cameron-says-that-he-would-use-nuclear-weapons-a6679256.html The Independent, David Cameron says that he would use nuclear weapons

China
Federation of Atomic Scientists. http://fas.org/nuke/guide/china/c3i/
It is believed that the authority to launch China's nuclear forces resides with the Chairman of the Central Military Commission, a position held by President Xi Jingping. Chinese policy is also assumed by FAS to reside with the President.

Israel
No official acknowledgement of possession or use policies. However, possession has been confirmed by Seymour Hersch (The Samson Option), Mordechai Vanunu (technician at Dimona) and former speaker of the Knesset, Avraham Burg. Burg and Hersch argue that authority on policy and use rests with the Prime Minister.
See *The truth about Israel's secret nuclear arsenal*
https://www.theguardian.com/world/2014/jan/15/truth-israels-secret-nuclear-arsenal

North Korea
No official information on command and control structure. But U.S State Department assumes that the principal authority rests with the Supreme Leader Kim Jong-UN (see North Korea: How to Approach the Nuclear Threat. U.S. State Dept. April 5, 2016.
http://www.state.gov/p/eap/rls/rm/2016/04/255492.htm

Australia
Submitted by Marianne Hanson:

RE AUTHORITY FOR DEFENCE AND SECURITY POLICY including aiding and the use of nuclear weapons by the U.S.

'There are no legislative provisions concerning declaring war against other countries ... the Constitution does not expressly provide for who declares war.' But because neither the Australian Constitution nor Defence legislation has required the government to gain parliamentary approval for the decision to deploy forces overseas or to declare war, this power has de facto fallen to Executive Government (the Prime Minister and Cabinet). Thus decisions to go to war, and for defence policy in general, are made by Executive Government and do not require parliamentary approval. Section 50C of the Defence Act 1903 endorses this point: that is, decisions to go to war and to deploy force overseas do not require Parliamentary approval.

This does not expressly address the *development* of foreign and security policies, including alliance policy and the implied policy of extended deterrence. It appears that the relevant Minister has responsibility for defence policy, together with the Governor General. The authority of Executive Government (PM and Cabinet) implicitly approves this, and remains the fundamental arbiter of such decisions.

Regarding Pine Gap
The Pine Gap facility is leased from Australia by the US. The Australian Prime Minister is responsible for signing the lease with the US for Pine Gap. This is done *without parliamentary, caucus, cabinet, or public discussion.'*