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## **CAMPAIGN AGAINST DEPLETED URANIUM**

### **STATEMENT OF KAREN PARKER**

This statement is to set out why DU weaponry is already illegal and to provide information regarding the DU initiative at the United Nations.

The DU initiative at the United Nations began in 1996 when my organization, International Educational Development/Humanitarian Law Project, first heard of DU weaponry and I began to incorporate the issue of DU in my speeches and lobbying efforts. From the beginning of our work we have had two main positions: (1) that DU weaponry is already illegal under existing human rights and humanitarian (armed conflict) law; and (2) the United Nations human rights forums are appropriate places to address this illegality. The fact that the UN took up this issue as soon as we presented it supports our positions.<sup>1</sup>

Our first presentations at the UN Commission on Human Rights (the Commission) in Spring 1996 focused on the use of DU weaponry in the Gulf War. We continued this emphasis at the August 1996 session of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, now renamed the United Nations Sub-Commission on Promotion and Protection of Human Rights (the Sub-Commission). At that session, members of the Sub-Commission were highly moved by our presentation on DU weaponry and as a result passed a resolution in which the Sub-Commission found DU weaponry "incompatible" with existing humanitarian and human rights law. The Sub-Commission also set up a procedure to address DU weaponry (and other "bad" weapons) in light of these existing norms. This is exactly what we wanted. In 1997 the Sub-Commission adopted another resolution in which it repeated its finding that DU weaponry is "incompatible" with existing humanitarian and human rights law.

### **WHY IS DU WEAPONRY ALREADY ILLEGAL?**

A full explanation of why DU weaponry is illegal is included in my Memorandum on Weapons and the Laws and Customs of War (1997) that I submitted to the UN Secretary-General as part of the UN initiative. The full Memorandum as well as excerpts published in various UN documents are included in my report DU at the UN, published and available from CADU. I herein provide a brief summary.

A weapon is made illegal two ways: (1) by adoption of a specific treaty banning it; and (2) because it may not be used without violating the existing law and customs of war. A weapon made illegal only because there is a specific treaty banning it is only illegal for countries that ratify such a treaty. A weapon that is illegal by operation of existing law is illegal for all countries. This is true even if there is also a treaty on this weapon and a country has not ratified that treaty.

The laws and customs of war (humanitarian law) includes all treaties governing military operations, weapons and protection of victims of war as well as all customary international law on these subjects.<sup>2</sup> In other words, in evaluating whether a particular weapon is legal or illegal when there is not a specific treaty, the whole of humanitarian law must be consulted.<sup>3</sup>

There are four rules derived from the whole of humanitarian law regarding weapons:

(1) Weapons may only be used in the legal field of battle, defined as legal military targets of the enemy in the war. Weapons may not have an adverse effect off the legal field of battle. (The "territorial" test).

(2) Weapons can only be used for the duration of an armed conflict. A weapon that is used or continues to act after the war is over violates this criterion. (The "temporal" test).

(3) Weapons may not be unduly inhumane. (The "humaneness" test).

(4) Weapons may not have an unduly negative effect on the natural environment. (The "environmental" test).

DU weaponry fails all four tests. (1) It cannot be "contained" to legal fields of battle and thus fails the territorial test. (2) It continues to act after hostilities are over and thus fails the temporal test. (3) It is inhumane and thus fails the humaneness test. DU is inhumane because of how it can kill -- by cancer, kidney disease, etc. long after the hostilities are over. DU is inhumane because it causes birth (genetic) defects thus effecting children (who may never be a military target) and who are born after the war is over. The use of DU weapons may be characterized as genocidal by burdening gene pools of future generations. (4) DU cannot be used without unduly damaging the natural environment and thus fails the environment test.<sup>4</sup>

#### **WHAT CAN THE COMMISSION AND SUB-COMMISSION DO ON THE DU ISSUE (THE "WHY BOTHER" QUESTION)**

We took this issue to the Commission and Sub-Commission because in our view these bodies are the places best suited to advance our position that DU is already illegal and cannot be used in military operations without violating existing humanitarian and human rights law. The fact that the Sub-Commission agrees and has formally taken up these weapons indicates its understanding that weapons may be banned by operation of existing law and that DU is one of those weapons. The Sub-Commission also acknowledges that this is an appropriate subject for the UN human rights bodies.<sup>5</sup> In this sense, we have already won. What remains is to fill in the details.

Existing customary humanitarian law is "found" by a legal test that the United States Supreme Court, as early as the nineteenth century, called long-existing. The statutes of both the Permanent International Court of Justice (League of Nations) and the current International Court of Justice (United Nations) contain the same legal test. According to this legal formula customary law is "found" by consulting similar treaties on the subject (i.e. other weapons-banning treaties); international, regional or local laws (i.e. humanitarian and human rights law); declarations or decisions on the subject (i.e. the Sub-Commission resolution); judicial (court) opinions (i.e. the ICJ's Nuclear decision); fundamental legal principles; and as an auxiliary means, the opinions of "experts" (i.e. the NGOs, governments, Sub-Commission members who address the issue at the UN bodies).

We want others to consult not only all relevant treaties of humanitarian law (many ratified by the US) but also the other sources of humanitarian law when evaluating DU. We are convinced that such a consultation of these sources yields same conclusion reached by the international experts that comprise the Sub-Commission -- DU is already banned.

Besides other useful provisions of treaty-based humanitarian law, there is a particularly relevant one: the "Martens Clause" to the Hague Convention of 1907 that is repeated in subsequent humanitarian law treaties. The Marten's Clause provides that in situations where there is not a specific treaty provision (which is the case with DU), the international

community is nonetheless bound by "the rules of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience."<sup>6</sup> We wanted to invoke "the dictates" in showing the huge anti-DU network. Thus the existence of the anti-DU network is legally relevant to the finding that DU is illegal. The UN forums do not need to have the whole DU community present, but the more the international community is aware of that community, the more evidence we show that DU is banned by the dictates of the public conscience alone

The United Nations forums are ideal places to give the international community opportunities to comment (as "experts") on the illegality of DU, thus making it much more difficult if not impossible to argue to the contrary.<sup>7</sup> Our own statements are accepted as "expert" opinion, so we are advancing our own case to bring it up in the UN forums. We also get other governments, members of the Sub-Commission, members of the Secretariat (including the Secretary-General) and NGOs (other "experts") to support our findings -- as they have done with statements, resolutions, submissions for the Secretary-General's report and at sessions every year. Thus we are reinforcing the law by constant "padding" of the record.

While I wrote the Memorandum to circulate at the UN to further the application of customary international law to DU and to enhance the "dictates" argument, I also wrote it because legal criteria for weapons was not set out in any one place. Circulating my "4-point test" (which of course I derive from existing humanitarian law) also gives the international community an opportunity to verify and validate this test. At this point, there seems to be clear acceptance in the international legal community at the UN that my test is "the test."<sup>8</sup> As that is so, then DU is illegal because it so clearly fails the test -- as is any other weapon that fails.

There is a great value in stressing that DU is already illegal. Of course the first goal is to enhance the likelihood that victims of this illegal weaponry will obtain treatment and compensation. If DU is already illegal (and it is) then it makes possible legal actions in domestic courts for adverse effects of DU weaponry in combat. Further, groups seeking better benefits and programs for veterans can be more effective. A major secondary goal in establishing that DU is already illegal is to prevent its future use and proliferation.

### **WHAT SHOULD THE DU COMMUNITY DO TO FURTHER THE UN WORK?**

Organizations that wish to help this UN initiative can best help us by collecting information (documentation, including new developments in the "science") and continuing the publicity and community organizing they are now doing but with an added dimension of disseminating the UN work -- especially regarding the finding of DU's illegality by the UN Sub-Commission.

There are other useful ways to buttress the Sub-Commission's opinion. For example, the International Committee of the Red Cross (ICRC) recently urged a moratorium on cluster bombs because of their inherent incompatibility with existing humanitarian law norms.<sup>9</sup> Efforts could be made to convince the ICRC to issue a similar statement regarding DU. Geneva-based UN specialized agencies (the World Health Organization, UNICEF, UNHCR) could also be urged to issue statements on the illegality of DU.

### **WHY NOT WORK ON A DU-BANNING TREATY?**

Our organization and an increasing number of other human rights organizations are leery of efforts to have new treaties. Part of this reluctance is the huge financial outlays given the length of time it takes -- the treaty process can take years, the meetings can take place anywhere, any time. Furthermore, only governments ratify treaties and ultimately decide on their contents. Although human rights lawyers (myself included) have drafted substantial

portions of international instruments, it is ultimately governments that decide. Thus, NGOs have far less impact on treaties than we have on UN declarations, resolutions and the like. In many circumstances, NGOs are not part of the process at all.

The new "trick" of the US (and a few other governments) is to use treaty processes to try to weaken existing customary law. The United States tries to assert that if there is a treaty on a subject, then any pre-existing customary international law on the subject is terminated. Thus in terms of DU, even beginning the process to draft a treaty would be used by the US to argue that any ban on DU in light of existing customary law is terminated. This would be devastating in the US because Courts in the US are likely to be persuaded on this point even though the International Court of Justice categorically rejects this line of reasoning in the Nicaragua case. (Note the US also "declined jurisdiction" of the Court in the Nicaragua case although the US is not legally allowed to do so. Neither the US Congress nor its Courts took up this matter.)

The US would almost certainly not ratify a treaty on DU regardless of the language of the treaty -- which for sure the US would control. However, the US would still argue that the existence of the treaty subsumes the customary international law banning DU. We lawyers would be at a tremendous if not fatal disadvantage trying to win compensation claims for DU victims in US (and possible UK) courts. It also would clearly be more difficult for Gulf War veterans to take their issues directly to the Veteran's Administration as the VA would be taking the position that no illegality was involved.

## **REBUTTAL TO THE OTHER PANELIST**

The other panelist began her statement by disagreeing with me on whether DU weapons are weapons of mass destruction. In my statement I never said DU weapons are weapons of mass destruction, but merely set out the four- part test for weapons and showed why DU violates all four elements of the test. The term "weapons of mass destruction" is being widely thrown around these days in the international arena, and I find the term used much more politically than legally. I avoid that term, and keep my focus on the test. If a weapon violates even one element of the four- part test it is illegal, so the added "baggage" of weapon of mass destruction is not needed.

The panelist also disagreed that use of DU weaponry would constitute a war crime or crime against humanity. Although once again I did not raise this point in my presentation (others had in theirs) I would like to respond here. War crimes and crimes against humanity are defined in the Nuremberg Charter, in the "grave breach" articles of the Geneva Conventions and Protocols Additional to the Geneva Conventions, and in other sources as set out in the international treaty on war crimes and crimes against humanity. In my view, use of an illegal weapon would necessarily violate the grave breach provisions of the Geneva Conventions, and hence that use would constitute as war crime or crime against humanity.

The panelist focused on the issue of proportionality - an important principle of humanitarian law. This proportionality analysis (and the related "military necessary" analysis) would only come into play if DU weaponry was legal but was alleged to have been used in a way that violates either proportionality or military necessity. As I agree with the UN Sub-Commission that DU is illegal, then these two doctrines are not invoked regarding military use of DU.

1 It is important to set out that the DU work at the UN has focused on DU weaponry, although other DU issues have been presented. For example, the Commission has an existing procedure on toxics that we have utilized to address DU in general as well as in the context of weaponry.

2. Customary international law, which includes: The Hague law (governing military operations); and Geneva law (governing protected parties in time of war) is binding on all countries. The United States Supreme Court has consistently upheld the binding nature of customary law, including customary humanitarian law. All of international law, including the UN Charter and Statute of the International Court of Justice, reflects the binding nature of customary law.

3. In 1996 the International Court of Justice, in the Nuclear case, finds that all weapons must be evaluated under the criteria of humanitarian law but does not set out what that criteria is. I wrote my Memorandum to describe that criteria.

4. In my view this is the key point of divergence from the other presenter on the topic of DU and the law at the CADU conference. I view that the "science" of DU, as presented by, inter alia, Dr. Horst Gunther and Dr. Rosalie Bertel, is sufficient to show the "illegality" of DU under existing norms. The other presenter does not.

5. The United States tries to argue that weapons may only be discussed in the "disarmament" forums - where, of course there is much less direct NGO participation. Thus the US tries to keep the focus on "treaty-drafting" rather than on confirmation that existing law may condemn a weapon.

6. The Hague Convention of 1907, 8th preamb. para. The "Martens" clause and is repeated in the Geneva Conventions of 1949 and the Protocols Additional to the Geneva Conventions of 1977. The US is a party to the Hague Conventions and the Geneva Conventions of 1949. The United States Supreme Court, in a 1942 case (Ex Parte Quirin), ruled that this clause is US law. This principle only applies to humanitarian (armed conflict) law, not the law of human rights although the law of human rights is evolving in this direction.

7. Note also a feature of customary international law: the doctrine of the "persistent objection". If a provision is not yet customary law but is still evolving into customary law, a State may object to that law. However, the objection must be persistent, which means that at every relevant time that the issue is raised (and UN sessions on the subject are clearly "relevant times") the State MUST SPEAK UP. Silence is presumed to be acquiescence to the norm. Thus, if I make a speech about both the weapons "test" I derived and the inherent illegality of DU, the absence of a counter statement reinforces the view that I am correct. And of course I consider that the issue is jus cogens so it is too late to object. No State, including the US, has taken the floor to challenge either the Sub-Commission or the NGOs on the existing illegality of DU weaponry. Note carefully the language of Sub-Commission resolution 1996/16 and the governments' replies in U.N. Doc. E/CN.4/Sub.2/1997/27 and Add.1. The responding governments clearly support aspects of the four part test as well as the application of that test to the listed weapons. While small in number, these states represent wide geographical and political diversity, thus supporting our view. The more we bring it up, the more chance for other governments to support our view. And more are speaking up in the "oral" debates.

8. The Secretary-General has incorporated much of my Memorandum in his report (U.N. Doc. E/CN.4/Sub.2/1997/27 and Add. 1 & 2) included in these materials. Other parts of my Memorandum are published by the UN as well (for example U.N. Doc. E/CN.4/Sub.2/1997/NGO/19). No one has risen to challenge this test or to propose a different one. Comments by governments, Sub-Commission members, other NGOs and the like can be viewed in conformity with this test. Once again, note the language of the two Resolutions with wording such as "unnecessary suffering" (the "humaneness" test); "consequential and cumulative effects" (the "temporal" and "environmental" tests); "indiscriminate" (the "geographical" test).

9 Note that the Sub-Commission resolution also addresses cluster bombs.

KAREN PARKER, J.D.

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