

The Illegality of DU Weaponry

by

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Background

I found out about DU weaponry in 1996 and immediately began to condemn it at the United Nations human rights forums.² I was convinced that such weaponry could not be used without violating humanitarian (armed conflict) law rules and was, accordingly banned by operation of existing law. As a consequence, their use would necessarily constitute grave breaches of the Geneva Conventions and other violations of humanitarian (armed conflict). The fact that the UN took up this issue as soon as it was presented it supports my opinion.³

The presentations at the 1996 session of UN Commission on Human Rights (the Commission and 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 the Promotion and Protection of Human Rights (the Sub-Commission) focused on the use of DU weaponry in the first Gulf War.⁴ At that session, members of the Sub-

¹ J.D. (honors, Univ. San Francisco, 1983), Diplome (cum laude, Strasbourg, 1982), non-governmental delegate to UN Commission on Human Rights and its Sub-Commission since 1982. This paper is prepared for the International Uranium Weapons Conference, Hamburg, Germany, 16 - 19, 2003.

² I found out about DU weapons from Philippa Winkler, who along with Dr. Horst Gunther, Dr. Beatrice Boctor, and "Bridges to Baghdad, and under the credential of my organization International Educational Development/Humanitarian Law Project (IED/HLP), compiled information about DU weaponry and informed the members of the Commission on Human Rights at its 1996 session about DU. Margarita Papandreou and several other members of her organization "Women for Mutual Security, also attended on behalf of my organization, with a focus mainly on the effects of the sanctions against Iraq. Only UN-credentialed organizations may participate in the UN session, which is why my organization issued credentials for persons representing other NGO's. In 2000 I prepared Depleted Uranium at the United Nations: A Compilation of Documents and an Explanation and Strategy Analysis (CADU report) printed and distributed by CADU (Campaign Against Depleted Uranium)(www.CADU.org.uk). It covers events undertaken at and by the United Nations Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights from the spring 1996 session of the Commission through the summer 1999 session of the Sub-Commission and contains essentially all the written statements, speeches, documents, resolutions and decisions of that period.

³ 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.

⁴ The Sub-Commission is composed of 26 persons nominated by their governments who sit in their individual capacity on the Sub-Commission. Only Sub-Commission members vote. The Commission on Human Rights is composed of governments who vote as governments.

Commission were both highly shocked and moved by the presentations on DU weaponry⁵ and as a result passed a resolution (Sub-Commission resolution 1996/16) sponsored by Claire Palley (UK) in which the Sub-Commission found DU weaponry “incompatible” with existing humanitarian and human rights law. The resolution also began a procedure to address DU weaponry (and other "bad" weapons) in light of these existing norms and asked the Secretary-General to submit a report to the Sub-Commission at its 1997 session on this topic. I prepared Memorandum on Weapons and the Laws and Customs of War (IED/HLP 1997)(in CADU report) to submit to the Secretary-General, who then incorporated much of my basic analysis in his report, issued as U.N. Doc. E/CN.4/Sub.2/1997/27 and Additions. The Secretary-General’s report also contains the views of States, other NGO’s and specialized agencies. In 1997 the Sub-Commission adopted another resolution (Sub-Commission resolution 1997/36) in which it repeated its finding that DU weaponry is “incompatible” with existing humanitarian and human rights law and asked its member Clemencia Forero Ucros to study further this issue.⁶

Mme Forero Ucros did not submit a paper and did not return to the Sub-Commission. At the 1998 session of the Commission on Human Rights, Claire Palley was not nominated by the UK, which instead nominated Francoise Jane Hampson who was elected. Between 1998 and 2001 our efforts turned to reinforcing the legal position with written and oral presentations (years 1998 and 1999 in CADU report), presenting new studies, having round tables and seminars, showing films, and generally trying to keep up the momentum. At the same time, we looked for a replacement for Mme Forero Ucros and kept the issue on the agenda through decisions to carry over the working paper.

At the Sub-Commission 2001 session Sub-Commission member Justice Yeung Sik Yuen agreed to take on the weapons paper and Sub-Commission member Miguel Alfonso Martinez (Cuba) introduced a decision to that effect. The Alfonso Martinez draft surfaced with sufficient signatures to pass and was “tabled” as Sub-Commission Doc. E/CN.4/Sub.2/2001/L.2. (In the UN, “tabled” means “ready for action” rather than “dismissed”. The “L” stands for “limited” documents, which are circulated at the sessions but not published). At that point Ms. Hampson tried to have the Sub-Commission agree to issue a separate resolution on DU weaponry, which would then be taken off the list of weapons that Sik Yuen was to address and assigned to another Member, presumably herself. She submitted amendments to draft L.2, circulated as Doc. E/CN.4/Sub.2/2001/L.36 forwarding this idea. Ms. Hampson appeared to not want that DU weapons be considered automatically “incompatible” with existing norms. The “other” weapons on the list to be studied are fuel air bombs, cluster bombs, chemical, biological, bacteriological and other weapons, some of which are commonly embraced under the term “weapons of mass destruction”. By requiring separate analysis of DU weaponry, the implication would be that DU weapons are not necessarily “incompatible” with existing norms.

⁵ At the 1996 session of the Sub-Commission, Fabio Marcelli (an attorney representing “Bridges to Baghdad) and Dr. Boctor attended. In the course of the 7 years effort at the UN session, I have provided credentials for Fabio Marcelli, Philippa Winkler, Dr. Boctor, Dr. Rosalie Bertell, Dr. Horst Gunther, Damacio Lopez, Dai Williams, Margarita Papandreou and three of her teammates from “Women for Mutual Security” and a number of others. We have held “round-tables” in conjunction with other NGO’s, in which we have shown films and circulated a number of reports and eye-witness accounts of post-DU Iraq.

⁶ That same session, the Sub-Commission also took up our sanctions issue. I presented the view that one possible reason for the adamant United States position to maintain the sanctions against Iraq was because of the DU issue.

During the debates at the 2001 session, I spoke on behalf of IED/HLP and several other NGO's made statements about DU, as did the governments of Iraq and Yugoslavia. Not surprisingly, both the US government and the UK government spoke up strongly against this issue, and their position was widely viewed as responsible for Ms. Hampson's attempt to sever DU from the report.⁷ Ms. Sim, representing the US, questioned the information that there was evidence showing that DU was harmful. And in any case, the US said a study of weapons containing DU would exceed the Sub-Commission's "expertise, scope and mandate." (E/CN.2/Sub.2/2001/SR.24). Mr. Bendall of the UK echoed the US, thereby showing yet again what the UK activists identify as "copy cat", US driven policy. (E/CN.4/Sub.2/2002/SR.24). A number of the members of the Sub-Commission went on record strongly disagreeing with the US/UK views.

When L.2 (the Alfonso Martinez) draft was called up for vote, M. Alfonso Martinez said that he could not accept Ms. Hampson's proposed amendments and recommended a voice vote at that point on L.2. The Chair (an American) however, said that the issue would be taken up later. (See the Summary record at E/CN.4/Sub.2/2001/SR. 25). While there was no explanation for this, the delay was assumed to be so that the US would have time to "lobby" the members to vote for the Hampson amendments. However, when the Sub-Commission did take up the issue, the Sub-Commission as a whole rejected the Hampson amendments (see the Summary Record: E/CN.4/Sub.2/2001/SR.27) and adopted L.2, which became Sub-Commission Decision 2001/36. In brief, the Sub-Commission re-iterated that DU weapons, along with fuel air bombs, cluster bombs, chemical, biological and bacteriological weapons, are "incompatible" with existing law and appointed Justice Sik Yuen to prepare the working paper originally assigned to Mme Forero Ueros.

Throughout 2001 and up to the 2002 session of the Commission on Human Rights Justice Sik Yuen collected documentation, studied all the reports and information sent to him, and worked on the report. However, he was up for re-election to the Sub-Commission in 2002 at the Commission on Human Rights. The United States decided that it had to ensure that Justice Sik Yuen would not be re-elected, hoping that as a person no longer on the Sub-Commission, Justice Sik Yuen would not present a working paper. At the Commission, the US, aided by the UK, carried out an overtly insidious campaign against Justice Sik Yuen. I am certain that large-scale "debt-reduction" agreements and serious arm-twisting augmented this. The result was that Justice Sik Yuen was not re-elected.

To the disappointment of the US and the UK, Justice Sik Yuen presented his paper (U.N. Doc. E/CN.4/Sub.2/2002/38) at the 2002 session even though he had been voted off the Sub-Commission. Predictably, Ms. Hampson (UK) was quite critical of the paper, but the vast majority of the Sub-Commission members were very pleased with it. In fact, the Sub-Commission made a rarely used and highly complimentary decision to ask Justice Sik Yuen to prepare a second "up-dated" working paper to be submitted to the Sub-Commission at its 2003

⁷ The United States was very concerned about this report going forward, and at the hands of Justice Sik Yuen, because any impartial legal analysis was certain to "condemn" DU. The US certainly does not want any of the Sub-Commission resolutions or reports on DU to circulate beyond a few UN NGO representatives. At all junctures in this work, the US has, in the words of several members of the Sub-Commission, "played dirty."

session. In retaliation, the US and UK orchestrated a maneuver at the 2003 session of the Commission on Human Rights to deny the Sub-Commission the authority to ask a former member to continue work on a topic already begun as a “working paper.” In spite of this, it was too late to take away the Sub-Commission’s prior approval of an “updated” report, and Justice Sik Yuen showed that he could not be “embarrassed” away from the work. He prepared and submitted the updated paper to Sub-Commission at its 2003 session. (U.N. Doc. E/CN.4/Sub.2/2003/35).

Predictably, Ms. Hampson of the UK was highly critical of this paper, and in completely unfair ways. For example, she criticized the lack of reference to the International Committee of the Red Cross (ICRC) when the ICRC had not made any statements about DU and there was nothing to report. Further, she questioned his lack of analysis under human rights law, when that issue was addressed in his earlier report. Certain DU activists emailed me comments about the report, which they felt did not have enough about possible radiological weapons use in Afghanistan, but when I replied with my explanation they indicated satisfaction with the report.⁸

Because of the Commission decision to forbid assignments to former members the Sub-Commission could not ask Sik Yuen to do any more. However, we decided that what needed to be said regarding the legal arguments about DU weaponry had already been set out in his two reports, votes and comments of the Sub-Commission members, in my Memorandum and numerous NGO written statements, statements and written statements of other UN NGO’s, and other sources. Ms. Hampson, meanwhile, was trying to be assigned a further DU paper but the other members rejected this -- in part because she was from the UK and would likely try to undermine the legal status of DU weapons, in part because they saw through her unfair critique and in part because she had been assigned other work that she did not do. So the reports stand with Sub-Commission approval, and are, of course, part of the UN record and the work of both the Sub-Commission and the Commission. Governments are considered to be “on notice” of the illegality of DU.

In his first report, Justice Sik Yuen, sets out all the basic instruments of human rights and humanitarian law relevant to analysis of weaponry, sets out his formula for the weapons tests, and evaluates each of the listed weapons. While his analysis of this body of law and his formula of the “test” for weapons is worded a bit differently than mine, it largely parallels mine and leads to the same, obvious conclusion that DU weaponry is illegal. His “updated report” summarizes the first report and the Sub-Commission debate on it and provides new information regarding DU (such as its use in Iraq), some of the other weapons, and introduces “directed energy weapons” or “DEW’s.

⁸ Both Dai Williams and Piotr Bein felt more should have been done about Afghanistan. However, I responded with the information that the UN would not publish a paper longer than 20 pages, and at least the possibility of some type of uranium weaponry use in Afghanistan was mentioned. The 2002 Sik Yuen report was over the 20-page limit, so only the executive summary was printed in all the official UN languages. To ensure that the 2003 report would be published in all the UN languages, he met the page limit, which was very fortunate as reports more than a few pages over the much were not published at all in 2003, or only circulated as a “session” document in the original language. Of course, I used my right to submit a written statement to augment the Afghanistan information and other concerns, and this statement should be read in conjunction with the Sik Yuen paper. My written statement is U.N. Doc. E/CN.4/Sub.2/2003/NGO/16.

Why is DU weaponry already illegal?⁹

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. As there is no specific treaty banning depleted uranium weapons, its illegality must be established the second way.

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.¹⁰ 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.¹¹

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).¹²

(3) Weapons may not be unduly inhumane. (The "humaneness" test). The Hague Conventions of 1899 and 1907 use the terms "unnecessary suffering" and "superfluous injury" for this concept.¹³

⁹ This brief summary draws on my own Memorandum and the Sik Yuen reports. I use my own formulation of the weapons test.

¹⁰ 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.

¹¹ In 1996 the International Court of Justice, in its 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 because the criteria had not yet been fully extracted from humanitarian law.

¹² The first two tests ("territorial" and "temporal") together make up the rule that weapons should not be "indiscriminate." This is how Justice Sik Yuen presents the test. I prefer to separate the concept of indiscriminate into its two parts.

¹³ Article 23 of The Hague Convention of 1907, Regulations. This article also forbids "poison or poisoned weapons." Some might argue that DU weapons are necessarily poisonous, and therefore directly forbidden by

(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. Instead the DU is air-born far a-field of legal targets to illegal (civilian) targets: hospitals, schools, civilian dwellings and even neighboring countries with which the user is not at war. (2) It cannot be "turned off" when the war is over. Instead, DU weaponry continues to act after hostilities are over and thus fail the temporal test. Even with rigorous clean-up of war zones, the air-born particles have a half life of billions of years and have potential to keep killing and injuring former combatants and non-combatants long after the war is over. (3) It is inhumane and thus fails the humaneness test. DU weaponry is inhumane because of how it can kill -- by cancer, kidney disease, etc. -- and long after the hostilities are over when the killing must stop. DU is inhumane because it can cause birth (genetic) defects such as cranial facial anomalies, missing limbs, grossly deformed and non-viable infants and the like, thus effecting children who may never be a military target and who are born after the war is over. The tetragenic nature of DU weapons and the possible burdening of the gene pool of future generations raise the possibility that the use of DU weaponry is genocide. (4) It cannot be used without unduly damaging the natural environment and thus fails the environment test. Damage to the natural environment includes contamination of water and agricultural land necessary for the subsistence of the civilian population far beyond the lifetime of that population. Clean up is an inexact science and, in any case, extremely expensive -- far beyond the ability of a poor country to pay for.

One of the more useful provisions of treaty-based humanitarian law is 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."¹⁴ There is a huge anti-DU international effort from a wide array of groups representing every facet of civil society. The existence of the anti-DU network is legally relevant to the finding that DU is illegal, and buttresses arguments that use of DU weaponry is a war crime or crime against humanity and may play a decisive role in stopping proliferation of these weapons.¹⁵

Article 23.

¹⁴The Hague Convention of 1907, 8th preamb. para. The "Martens" clause (named for the Russian scholar who formulated it) 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. For example, the International Court of Justice, in Corfu Channel found that "elementary considerations of humanity [are] even more exacting in peace than in war." (1949 International Court of Justice Reports, p. 22).

¹⁵ Justice Sik Yuen points out the application of the Martens clause and the role of civil society in relation to DU in both of his papers.

How bad is DU weaponry?

There is a certain amount of controversy among scientists/medical researchers and developers and users of DU weaponry about exactly what DU does and how bad is it. Predictably, the users of DU claim DU weapons have no “bad” effects that would ban them, while scientific/medical researchers present a wide array of consequences that alone and together ban DU weapons from military use.¹⁶ However, “what it does” and “how bad is it” are scientific issues, not legal ones. Even so, the members of the UN Sub-Commission as well as other international law specialists that have looked into what is known about DU consider that even under outdated risk analysis and using the most conservative of possible negative consequences DU weapons are bad enough to be considered banned.

A complete understanding of the effects of DU on the human body or the natural environment will probably never be reached. Even so, efforts by independent and impartial scientists/medical researchers should be made in this area as the more is known about DU weapons and their effects, the better one can treat victims and assess legal “damages.” In any case, the issue of the effects of DU weaponry is an issue for scientists and medical researchers and should be “debated” among them. Their studies and reports can then be used to better fashion medical remedies, environmental clean-up efforts, and, of course, to present in legal proceedings by which victims seek compensation.¹⁷ And while it would be impossible to prove that a particular case of cancer, or a particular birth defect was caused by DU, pre-DU base-line statistics, coupled with the likelihood of DU being a causal factor, can facilitate damage awards.¹⁸

It is not surprising that disagreements about “how bad is bad” (with many “opinions” of persons who are not scientists/medical researchers entering the fray) are used to draw attention from or even seemingly undermine the fact that DU weaponry cannot possibly be legal in light of existing law.¹⁹ The controversies seem to also have affected the dissemination of the United Nations materials on DU weaponry, as a number of prominent “anti-DU” groups do not raise the

¹⁶ Justice Sik Yuen refers to the “cavalier disregard, if not deception” by the users and developers of DU weapons of their effects. U.N. Doc. E/CN.4/Sub.2/2003/35 at para. 52.

¹⁷ There is a similar debate regarding what weapons-delivery mechanisms use DU weapons and where have DU weapons been used. These are also extremely important questions. However, the “controversy” about what systems use DU weapons has no bearing on the illegality of DU weapons, and is best left to those with expertise in military ordnance questions. Controversy about where DU weapons have been used also has no legal bearing on the illegality of DU weaponry: wherever it has been used is an instance of the use of illegal weaponry. Knowing where DU weaponry is used, however, is essential to carry out remedial measures.

¹⁸ Trying to prove which of possible multiple causes is the operative one can be difficult. However, there is a famous case in which two persons shot at a man and the man was killed. It could not be proved affirmatively who killed the man, so each defendant had to try to prove he didn’t kill the man. As that could not be done both were determined guilty. There are many ways that attorneys in DU cases would be able to show sufficient causation.

¹⁹ The controversies about weapons-delivery and where DU has been used have, intentionally or inadvertently, also seemingly draws undue attention from or undermines information about the illegality of DU weaponry.

illegality of DU in their materials and do not have any references to the UN resolutions or the reports of Justice Sik Yuen. While it is certainly important to have as accurate an understanding of DU weaponry from all aspects (deleterious effects, weapons delivery, and location of all use), resolving these questions will not change the fact that DU weapons are illegal or make DU “more” illegal. DU is bad enough to be banned, and that is what should be as widely and quickly disseminated as possible.

Is DU weaponry “nuclear” or “conventional?”

There is also conflicting opinion from scientists as to whether DU weapons should be considered “nuclear” and thus also governed by the treaties dealing with nuclear weapons or conventional (i.e. non-nuclear).²⁰ DU is also referred to as a “radiological”, or “poison” substance. While potentially important from a scientific perspective, the status of DU as nuclear, radiological, poison or conventional does not change its illegality: when the weapons test is applied to DU weaponry, it fails. Even if DU weapons are considered “conventional” they are subject to the same weapons test set out here. Further, they would also be subject to the Conventional Weapons Convention of 1980. That Convention itself incorporates most of the elements of the weapons test set out here: civilians must be protected from the effects of hostilities (Preamble, paragraph 3); “weapons, projectiles and materials and methods of warfare” may not cause unnecessary suffering or superfluous injury (Preamble, paragraph 4); weapons may not severely damage the natural environment (Preamble, paragraph 5). Paragraph 6 of the Preamble sets out the Martens clause. The inclusion of these rules in this convention reinforces the fact that these tests are universal and legally binding.

Consequences of use of DU weaponry in military operations

Under international law, there are a number of requirements to remedy breaches of the Geneva Conventions and other rules forming the laws and customs of war. A minimum requirement of the duty to remedy from use of illegal weaponry is compensation for victims.²¹ This can include, for example, military and civilian victims from wars and depleted uranium weaponry use at military ranges. Part of the minimum remedy is the duty to disclose fully all facts about the weapons and their development and deployment.²² Regarding environmental damages, users of these weapons are obligated to carry out an effective clean up. When lands and water resources cannot be effectively cleaned up, the State causing the damage must pay damages equal to the loss of those lands and waters from the national patrimony. In US dollars, the cost of legal claims and environmental cleanup for the Gulf Wars alone could be staggering.

In addition to liability for damages to victims or the environment, users of DU weapons should face penal sanctions under existing humanitarian law provisions. For example, the

²⁰ The United States tries to foster the idea that as DU weaponry is “conventional” it is not banned -- giving the erroneous impression that conventional weapons are not subject to the weapons test.

²¹ The Hague Convention of 1907, Article 3.

²² The Corfu Channel case underscores the duty to disclose.

Geneva Conventions of 1949 require that signatory States have domestic legal mechanisms for trying persons alleged to have committed serious violations of humanitarian law.²³ Article 146 further states that all signatory states have a duty to search for alleged violators and to bring them to its own tribunals, regardless of their nationality. Article 148 prohibits any State from absolving itself or any other State from liability for serious violations.

Because of these provisions in the Geneva Convention, the “agreements” sought and obtained by the United States under which other States agreed to not bring actions against United States military personnel for a number of years must be considered null and void to the degree those agreements violate provisions of Geneva Conventions. While the United States might be able to obtain anticipatory agreement to not bring US military personnel before the International Criminal Court to which the United States is not a party, the United States cannot abrogate these Geneva Conventions rules or require that other States abrogate Geneva Convention rules.

Grounds for considering DU weaponry use in military operations a war crime and crime against humanity

Some argue that use of DU weaponry, while in violation of existing norms, would not constitute a war crime or crime against humanity.²⁴ I disagree. 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 international treaties on war crimes and crimes against humanity.²⁵ In the 4th Geneva Convention (protection of civilians), for example, grave breaches include “willful killing . . . or inhumane treatment, . . . willfully causing great suffering or serious injury to body or health” of civilians -- which is exactly what DU weapons do.²⁶ Article 85 of Protocol Additional I adds indiscriminate attacks affecting civilians and other acts that necessarily occur with the use of DU weaponry to the enumeration of “grave breaches.” The genocidal effects on people long after hostilities cease is another ground for consideration of DU weapons use as a crime against

²³ Geneva Convention IV, Article 146. This provision is in all four conventions. For convenience, I cite to the article numbers from Geneva Convention IV (civilians).

²⁴ Some have argued that DU weapons are not weapons of mass destruction, therefore their use would not necessarily constitute a war crime. In my many statements and papers I have never urged that DU weapons are weapons of mass destruction. I merely set out the four- part test for weapons and showed why DU violates all four elements of the test. Use of a weapon that fails the test is, as I have set out, necessarily a war crime. The term “weapons of mass destruction” is currently in wide use 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. That said, I think that if there would be specific criteria for weapons of mass destruction, DU weaponry would meet that criteria, especially because of its continuing damage for many years after military use.

²⁵ See, esp., Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 754 UNTS 73. This treaty identifies genocide and as crimes against humanity. The elements of war crimes and crimes against humanity set out by the International Criminal Court are also instructive on these points.

²⁶ Note that the same article exists in the other three Geneva Conventions of 1949 so it is equally illegal to kill combatants with DU. A fundamental rule of armed conflict law is that combatants may only be targeted with weaponry when they are “in combat” -- meaning “on duty” and not sick, wounded or a POW.

humanity.

Conclusion

In the course of armed conflicts (wars), weapons may only be used against legal military targets and for the duration of the war. Weapons may not cause undue suffering or cause superfluous injury. Weapons may not use or employ “poison.” Weapons may not severely damage the environment. DU weaponry cannot be used in military operations without violating these rules, and therefore must be considered illegal. Use of illegal weapons constitutes a violation of humanitarian law and subjects the violators to legal liability for their effects on victims and the environment as well as criminal liability. In my view, use of DU weaponry necessarily violates the grave breach provisions of the Geneva Conventions, and hence its use constitutes a war crime or crime against humanity.

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²⁷ This bibliography is limited to major texts regarding humanitarian law, the best national military manual of the laws and customs of war (the Canadian manual), the major UN documents on the illegality of DU, and some of my written submissions to the UN regarding DU weaponry. It does not contain references to UN summary records of my oral statements or any of the general debates. Reference to certain summary records are made in the text and they and any “posted” summary record can be accessed at the website of the Office of the High Commissioner for Human Rights.

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Note: The Hague Conventions are found at www.cicr.org. Choose language. Go to “treaties and documents”, scroll to “Convention (IV) respecting the laws and customs of war on land and its annex, 18 October 1907. Click on small symbol at the end of the title for the text. Use the same general instructions for The Hague Convention of 1899. This website of the International Committee of the Red Cross also contains a number of interesting articles on the application humanitarian law.

All the other Conventions are found on the website of the Office of the United Nations High Commissioner for Human Rights, www.ohchr.org. From list on left, click on “Treaties”. Scroll down to “War Crimes and Crimes Against Humanity” and “Humanitarian Law” at end of list.

For UN documents, the easiest way is to retrieve by document number. Start at www.ohchr.org, from list at left, select “documents.” At next screen, select “Charter-based.” When a list of documents appears, click “symbol number” at top. The next screen will have a small box. Type

in the document number. Do not type in “U.N. Doc.”, but only the “E” number. Example: E/CN/4/Sub.2/2001/SR.24. (This is the summary record of part of the debate on DU at the 2001 session).

For resolutions and decisions of the Sub-Commission, start at www.ohchr.org, from list at left select “By body”. At next screen, select “Sub-Commission”, at next screen select year, and then “decisions and resolutions.”

For the Statute of the International Criminal Court, go to www.un.org/law/icc. For the “Elements of Crimes” start at ICC home page, go to “Preparatory Commission for the ICC, then to “Elements of Crimes.”