

Introduction

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THE GENESIS FOR THE 2009 Edinburgh Conference and this book lay in four related developments:

- the decision by the British government to renew the Trident nuclear weapons system, despite acceding to legal obligations to pursue disarmament as enshrined in the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and reinforced by the International Court of Justice in 1996;
- majority support in the Scottish Parliament for removing all nuclear weapons from Scotland, thereby contributing towards building security in a world free of nuclear weapons, as evidenced by the overwhelming Scottish Parliament vote against Trident renewal on 14 June 2007, which led to the creating of the Scottish Government Working Group on Scotland without Nuclear Weapons, chaired by the Minister for Parliamentary Business;
- growing international concerns about the implications of doctrines of nuclear deterrence, increasingly viewed as deeply flawed and dangerous in terms of security, legality, military logic, behavioural analysis, and the role of nuclear deterrence policies in justifying perpetual nuclear possession and proliferation; and
- developments in legal understanding that recognise that any use of nuclear weapons would constitute a crime against humanity and contravene international and humanitarian law applicable in times of both war and peace.

On 14 March 2007, the House of Commons in Westminster passed the following motion: 'this House supports the Government's decision as set out in the white paper *The Future of the United Kingdom's Nuclear Deterrent* (CM6994) to take the steps necessary to maintain the UK minimum strategic nuclear deterrent beyond the life of the existing system and to take further steps towards meeting the UK's disarmament responsibilities under Article VI of the Non-proliferation treaty'.

Since both the Labour and Conservative Parties imposed three-line whips, the motion was carried by 409 votes to 161. This apparently overwhelming support does not convey the true extent of the actual opposition to the decision to procure a further generation of Trident nuclear weapons. Of particular relevance, a majority of MPs from all parties representing Scottish constituencies voted against renewing Trident. Several Scottish junior ministers and ministerial aides, including the deputy leader of the House of Commons, Nigel Griffiths, chose to resign government jobs rather than go along with the whip. This Scottish revolt is significant because the UK's entire nuclear weapons system is based in Scotland, on the Clyde, some 35 miles northwest of Glasgow – over 200 warheads (of which 160 are deemed 'operationally viable') are stored at the Royal Naval Armaments Depot (RNAD), Coulport, and the four Vanguard class nuclear submarines that carry the US-made Trident missiles are home-ported at Faslane, near Helensburgh.

Two months later, on 3 May, in regional elections for Scotland's own parliament, re-established under the devolution settlement codified by the 1998 Scotland Act, the Scottish National Party (SNP) replaced Labour as the majority party in Scotland. As noted in the opening address to the Edinburgh Conference by Angus Robertson MP, Spokesperson for the SNP on Foreign Affairs and Defence in the UK (Westminster) Parliament, 'the SNP was elected on 3 May 2007 on a pledge that they would work towards removing nuclear weapons from Scotland'. On 14 June 2007, the Scottish Parliament debated a Green Party motion calling on the UK Government to reconsider the decision to renew the Trident nuclear weapons system. The motion was overwhelmingly passed by 71 votes to 16 with 39 abstentions. Those voting in favour were a mixture of SNP, Liberal Democrat, Labour and Green Members of the Scottish Parliament (MSP). The Conservatives voted against, and the rest of the Labour MSPs abstained.

Following from this clear opposition to Trident renewal, the Scottish Government held the first ever Summit for a Nuclear Free Scotland on 22 October 2007, three weeks after the end of Faslane 365's year of grass-roots mobilising and nonviolent blockading actions at the Trident deployment base at Faslane. The Summit was held in Glasgow and involved Scottish Members of Parliament from both Westminster and Holyrood, Church and Faith leaders, Councillors, trades unionists, prominent lawyers,

journalists and peace activists, including several members of the Faslane 365 Steering Group. Opening the Summit, Deputy First Minister of the Scottish Government, Nicola Sturgeon MSP, paid direct tribute to Faslane 365 for mobilising public opinion and providing impetus and arguments for Scotland to reject Trident.¹

The Government subsequently established a Working Group on 'Scotland Without Nuclear Weapons', an awkward title designed to get round its lawyers' concerns that for the government to discuss how to make Scotland nuclear free could be construed as violating the separation of powers and responsibilities set out in the 1998 Scotland Act that established the limits of Scottish devolution. I was invited to serve on this Working Group, together with representatives from the Scottish Churches and Islamic Communities, Trades Unions, Industry, environmental and peace organisations, academics and a local councillor from Argyll and Bute Council, which includes the Faslane nuclear base. The Working Group was chaired by Bruce Crawford MSP, Minister for Parliamentary Business.

The Working Group was charged, among other things, with exploring 'the various international opinions that exist on the legality of nuclear weapons so far as relevant to matters within the devolved competence of the Scottish Government'.² To feed into the Working Group discussions, the Acronym Institute for Disarmament Diplomacy, the Edinburgh Peace and Justice Centre and Trident Ploughshares jointly organised an international conference on 'Trident and International Law: Scotland's Obligations', which was held in Edinburgh on 3 February, 2009, with participation by Members of the Scottish Parliament, eminent Scottish and international legal scholars and practitioners, and representatives of Scottish civic and political society.

In my capacity as a Working Group member, I circulated the presentations from the Edinburgh Conference, and arranged for Judge Weeramantry to speak directly to the Working Group, present his arguments and respond to members' questions. Though some of the key arguments discussed at the Conference were incorporated into the Working Group report, particularly the introduction and chapter 2 (political and legal issues), the process of negotiations among government officials, lawyers and members of the Working Group resulted in equivocal recommendations. It appeared that a major reason for watering down the conclusions and recommendations was to avoid giving any grounds for political opponents

or London officials to claim that the Working Group (and by extension, the Government) had stepped beyond the confines of the devolution settlement in the 1998 Scotland Act.

The report contained four chapters, covering economic and social issues, political and legal issues, regulatory issues and promoting peace and disarmament.³ Three of the conclusions in particular are relevant for this book:

- i The deployment and storage of the UK's nuclear arsenal in Faslane and Coulport places Scotland in a special position and means that the Scottish Government has a particular and legitimate interest in, and contribution to, issues relating to strengthening the Non-Proliferation Treaty (NPT) which States Parties will discuss at the Treaty's eighth Review Conference at the United Nations May 2010;
- ii The Working Group encourages the UK Government to be bolder in carrying through its commitments and to consult with the Scottish Government and others in preparation for ending the deployment of British nuclear weapons;
- iii Opinions on the legality of nuclear weapons and the responsibilities of States and administrations within States are divided. Consideration should be given to understanding the implications of all the relevant legal opinions, especially for the assistance given by the Scottish Government and agencies to the deployment and operation of the Trident system.

The Working Group Report was made public in November 2009, together with an eight page response from the Scottish Government.⁴

In its public response, the Scottish Government agreed with many of the findings of the Working Group, 'including the irrelevance of nuclear weapons in today's society and the case for removal of nuclear weapons at an early date'. Noting the 'moral, economic and strategic arguments against the renewal of Trident', the Scottish Government clearly stated its opposition to,

the use, threat of use and possession of nuclear weapons and to the UK Government's commitment to replace the current Trident system at an estimated cost of up to £100 billion (total cost of replacement and operation over 50 years) and strain on public spending.

The Government accepted that 'Scotland has a special position as a nation within a State, opposed to the presence of nuclear weapons on its territory and the implications for its devolved responsibilities'. On the legal issues raised by the Working Group, however, the Government took a very cautious view. While acknowledging the usefulness of examining 'a range of competing arguments around the legality of nuclear weapons' it decided

that the legality of the presence of Trident in Scotland remains governed in law by the binding decision of the High Court of Justiciary in the leading Scottish authority on the issue, *Lord Advocate's Reference No. 1 of 2000*.

It is right and understandable that the Scottish Government should consider itself 'legally and constitutionally bound to abide by the law'. The issue – discussed by eminent judges and lawyers in this book – is which laws take precedence. The Government was advised that the Lord Advocate's Reference (LAR) No. 1 of 2000 is the pre-eminent and binding law on nuclear weapons in Scotland. Incorporating a range of analyses on the current application of international and humanitarian law to the use and deployment of nuclear weapons, this book demonstrates where the High Court of Justiciary in its Lord Advocate's Reference No.1 of 2000 went wrong in its interpretation of international law and the 1996 Advisory Opinion of the International Court of Justice (ICJ) on the use and threat of use of nuclear weapons. Since the Lord Advocate's Reference was misdirected in law, it should no longer be relied upon by the Scottish Government.

As set out in their detailed and compelling arguments, several of the judges and lawyers participating in the Edinburgh Conference advised that neither the LAR nor the 1998 Scotland Act could take precedence over the legal obligations of Scottish citizens, courts and responsible government officials to comply with international law, including the principles and obligations of international humanitarian law.

This LAR was the outcome of the decision of a Scottish Sheriff Court to acquit three Trident Ploughshares activists (Angie Zelter, Ulla Roder and Ellen Moxley) charged with 'malicious damage' after tipping into Loch Goil various computers and other equipment involved in facilitating the transport and deployment of Trident nuclear missiles. The three women argued that they had been justified in causing such damage because they

were seeking to prevent the Trident nuclear weapons system from being used. They successfully made the case before the Sheriff that the deployment of Trident was in breach of customary international law, and therefore in breach of Scots law, and that their actions as 'citizen interveners' were intended to enforce the law. That was the basis on which they were acquitted. Although there could be no appeal of such an acquittal, certain points of law raised in this decision could be presented by the Lord Advocate for the opinion of the High Court. Afraid that the Sheriff's acquittal could set a precedent that would encourage other courts to acquit anti-nuclear protesters, the Lord Advocate referred the legal points to the High Court in 2000. The LAR Opinion on these points of law has been the subject of controversy ever since.

In this book eminent judges and lawyers, including a former President and a Vice President of the International Court of Justice, several law professors and Queen's Counsels, provide a range of arguments, analyses and insights concerning the relationship between international and domestic law and the current state of international law with regard to the use, threat of use, deployment, renewal and modernisation of nuclear weapons. From these deep, scholarly analyses, five basic conclusions emerge:

- The launching of a nuclear-armed Trident missile would be unlawful in any conceivable circumstance.
- The deployment, renewal and modernisation of nuclear weapons and the application of deterrence doctrines based on the use or threat of use of nuclear weapons, including the Trident nuclear weapons system, violate existing international law.
- Scotland's obligations and responsibilities under international law are not nullified by the 1998 devolution settlement.
- Citizens have a lawful right to protest the deployment of nuclear weapons and breaches of international law by governments and State authorities.
- In addition to national obligations to cease deploying, developing and renewing nuclear weapons, there is an international law obligation to conclude multilateral negotiations to achieve the total abolition of nuclear weapons, encompassing prohibitions on the acquisition, deployment and use of nuclear armaments and the progressive elimination of all existing arsenals.

These conclusions suggest that the LAR and the advice received by the Scottish government were overly cautious and may, in their errors, owe more to political expedience than to the legal obligations and facts pertaining to nuclear weapons in general and the Trident nuclear weapons system in particular.

The fundamental question that confronts us is what we do about this now.

Under both international and domestic law, individuals and governments have obligations to prevent crimes, especially criminal actions that harm and threaten innocent, vulnerable people. International law makes it particularly clear that civilians and non-combatants should not be military targets. Domestic law provides for lawful excuse when it is necessary to damage property or restrain an aggressor in order to save lives or prevent serious crime. Judge Christopher Weeramantry explicitly addressed these challenges, arguing that

anti-nuclear civil resistance is the right of every citizen of this planet, for the prevention of such an international crime is basic to human dignity.

Intended as a resource for legal practitioners, politicians and responsible citizens, this book is made even more necessary because of what Judge Mohammed Bedjaoui called the 'regrettable legal vagueness' surrounding nuclear weapons. The Working Group's equivocation and the Scottish Government's regrettable timidity on this issue underscore yet again the need to develop further effective campaigns to clarify and give unequivocal legal force to the widely accepted understanding that the use, threatened use and therefore deployment of nuclear weapons are contrary to our humanity. We need domestic and global civil society and governments to campaign in partnership against nuclear possession, deployment and doctrines of nuclear deterrence, and so transform the current, partial, divided non-proliferation regime into a global security architecture. As recognised in the consensus final document of the 2010 NPT Review Conference, some form of universally applicable, multilaterally negotiated nuclear weapons convention will be needed – a framework or treaty covering all aspects of nuclear weapons abolition, including specific prohibitions and a timetable for verified elimination. This is the tried and tested approach taken when the international community decided to ban other weapons systems, including biological and chemical weapons, land mines and cluster munitions.⁵

To lay the groundwork for such negotiations will take time, however. As nuclear arsenals are reduced, the tipping point for abolition will come when nuclear-armed governments and militaries recognise that there is no legitimate or useful role for nuclear weapons in their doctrines and security policies. An important step, therefore, could be to engage the International Criminal Court, the UN Security Council or other appropriate bodies in developing clearer legal recognition that any use of nuclear weapons would be contrary to international law and should be treated as a war crime and crime against humanity. Whichever approach was pursued, the aim would be to clarify once and for all that nuclear weapons cannot legally be used by anyone for any purpose. Such legal clarification would reinforce the non-proliferation regime, firmly embed the taboo against nuclear use that has developed since 1945, and pave the way for negotiations on a universal nuclear weapons convention.⁶

One of the most important lessons learned from recent efforts to prohibit land-mines and cluster munitions and ban nuclear testing, as well as on campaigns to reduce poverty, environmental destruction and climate chaos, is that for transformational progress to occur, civil society must rise up and push governments to go beyond the powerful but narrow interests of the military and industrial establishments that continue to manufacture and profit from the tools and technologies that bring us destruction and insecurity. Unless people in the streets are motivated to demand nuclear abolition, governments will remain too timid and constrained to face up to the challenges of disarmament.

The perception that there is a 'grey area' in the application of domestic and international law to nuclear weapons has been exploited by the nuclear-weapon states who have been complicit in deploying, retaining, up-grading, renewing and continuing to proliferate nuclear weapons for far too long. Though the range of legal arguments in this book demonstrate beyond doubt that the use, threat of use, deployment and renewal of the Trident nuclear weapons system already contravene existing international laws and binding agreements, it is likely that until additional political action brings about further treaties, resolutions and rulings, timid politicians, lawyers and governments will continue to be complicit in allowing international and humanitarian law to be flouted or wrongly sidelined by domestic courts, legislation and political interests. Concerted civil society and international action must therefore pursue further non-

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violent actions and legal and political initiatives to rule out all nuclear uses, prevent unilateral proliferation such as the replacement of Trident, and promote a multilateral nuclear weapons convention that will provide an unequivocal, legally-binding prohibition on the use and deployment of nuclear weapons for all.⁷

Key Points from the Edinburgh Conference

- 1 The launching of a nuclear-armed Trident missile would be unlawful in any conceivable circumstance.

H.E. Mohammed Bedjaoui, President of the International Court of Justice from 1994 to 1997, during which time the Court adopted its historic 1996 Advisory Opinion on the Use and Threat of Use of Nuclear Weapons (see Appendix), summarised the Court's view, including:

The International Court of Justice highlighted two cardinal principles that it declared to be 'intransgressible principles of international customary law': first, that states must never target civilians, nor use arms that are incapable of distinguishing between civilian and military targets; and second, that it is not permitted to cause superfluous harm to combatants, i.e. states do not have an unlimited right as to the arms they may utilise. The Court also referred to the 'Martens clause', according to which civilians and combatants remain under the protection and rule of the principles of the law of nations, as they result from established customs, from the laws of humanity, and from the dictates of the public conscience.

Noting that the ICJ had been asked to consider only a general case, Judge Bedjaoui applied its findings to the specific facts concerning the UK's Trident nuclear weapons system and concluded:

In accordance with evidence heard by the Court, it is clear that an explosion caused by the detonation of just one 100 kt warhead would release powerful and prolonged ionising radiation, which could not be contained in space or time, and which would harmfully affect civilians as well as combatants, neutral as well as belligerent states, and future generations as well as people targeted in the present time. In view of these extraordinarily powerful characteristics and effects, any use of such a warhead would contravene international and humanitarian laws and precepts. In other words,

even in an extreme circumstance of self-defence, in which the very survival of a State would be at stake, the use of a 100 kt nuclear warhead—regardless of whether it was targeted to land accurately on or above a military target—would always fail the tests of controllability, discrimination, civilian immunity, and neutral rights and would thus be unlawful.

Accordingly,

the use of even a single [Trident] warhead in *any* circumstance, whether a first or second use and whether intended to be targeted against civilian populations or military objectives, would inevitably violate the prohibitions on the infliction of unnecessary suffering and indiscriminate harm as well as the rule of proportionality including with respect to the environment. In my opinion, such a system deployed and ready for action would be unlawful.

Philippe Sands QC and Helen Law, of Matrix Chambers, argued that

The use, or threat of use, of nuclear weapons in self-defence will be unlawful under the *jus ad bellum* where it fails to meet the requirements of necessity and proportionality. Where their use is contemplated in response to a threatened rather than actual attack, the additional requirement of imminence must be fulfilled. The use of nuclear weapons to protect such interests [‘vital interests’ as described in the 1998 Strategic Defence Review] is likely to be disproportionate and therefore unlawful under Article 2(4) of the UN Charter.

Sands and Law also noted:

It is difficult to conceive of any circumstances in which the use of nuclear weapons in self-defence to deter future chemical or biological attacks on UK forces overseas could be proportionate and therefore lawful.

Moreover,

It is hard to envisage any scenario in which the use of Trident, as currently constituted, could be consistent with the [International Humanitarian Law] IHL prohibitions on indiscriminate attacks and unnecessary suffering. Further, such use would be highly likely to result in a violation of the principle of neutrality.

- 2 The deployment, renewal and modernisation of nuclear weapons and the application of deterrence doctrines based on the use or threat of use of nuclear weapons, including the Trident nuclear weapons system, violate existing international law.

Dr John Burroughs, law professor at Rutgers University, noted,

The fact that the use of nuclear weapons would be unlawful under the law of armed conflict necessarily means that any specific threat to use nuclear weapons would be unlawful. This arises from the established rule of the law of armed conflict that it is unlawful for a state to threaten to use force that it would be unlawful in fact to use.

Burroughs argued:

While declining to make a formal pronouncement on the policy of 'deterrence', the International Court of Justice concluded that the policy would be unlawful under the United Nations Charter if use of nuclear weapons in self-defence pursuant to the policy would violate the principles of necessity and proportionality.

THE Judge Christopher Weeramantry, member of the International Court of Justice from 1991 to 2000, stated:

Deterrence is not an act of deception but a demonstrated intent to use. Hence, a real intent of use in certain circumstances underlies the activity of preparation and the concept of deterrence.

Judge Weeramantry concluded,

In relation to the positive obligation imposed by the unanimous opinion of the International Court of Justice, the continuing work on Trident and its replacement with a further nuclear weapon system constitutes a violation of Article VI of the NPT.

Judge Bedjaoui stated:

Article VI, which lays out the obligation to negotiate nuclear disarmament in good faith, was clearly conceived as the necessary counterpart to the commitment by the non-nuclear states not to manufacture or acquire nuclear weapons; it is without a doubt one of the essential elements of the 'acceptable equilibrium of mutual responsibilities and obligations between nuclear powers and non-nuclear powers' which, according to the [United Nations] General Assembly, was to be established by the Nuclear Non-Proliferation

Treaty which it called for in 1965. In 1995, at the time of the fifth Conference of Parties, which decided the extension of the NPT for an indefinite duration, the reciprocal nature of the said obligations was vigorously reaffirmed. Article VI should for this reason be considered an *essential provision* of the NPT, the breach of which could be considered 'material' in terms of Article 60 of the Vienna Convention on the Law of Treaties and could entail the legal consequences thereto attached.

Hence,

The modernisation, updating or renewal of such a nuclear weapon system would also be a material breach of NPT obligations, particularly the unequivocal undertaking by the nuclear-weapon states to 'accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament' and the fundamental Article VI obligation to negotiate in good faith on cessation of the arms race and on nuclear disarmament, with the understanding that these negotiations must be pursued in good faith and brought to conclusion in a timely manner.

In view of this, Judge Bedjaoui advised,

any state that aids and abets another country in the deployment and maintenance of nuclear warheads of 100 kt or comparable explosive power would also be acting unlawfully.

Burroughs argued,

Article VI and the commitments made in 1995 and 2000 enjoin reduction and elimination of nuclear arsenals. They are wholly incompatible with planning and implementation of maintenance and modernization of nuclear forces for decades to come.

With specific reference to UK nuclear policies, Sands and Law argued:

A broadening of the deterrence policy to incorporate prevention of non-nuclear attacks so as to justify replacing or upgrading Trident would appear to be inconsistent with Article VI [of the NPT]; attempts to justify Trident upgrade or replacement as an insurance against unascertainable future threats would appear to be inconsistent with Article VI; enhancing the targeting capability or yield flexibility of the Trident system is likely to be inconsistent with Article VI; renewal or replacement of Trident at the same capability is likely to be inconsistent with Article VI; and in each

case such inconsistency could give rise to a material breach of the NPT.

Rabinder Singh QC and Professor Christine Chinkin argued that the use of the Trident system would breach customary international law, in particular because it would infringe the 'intransgressible' requirement that a distinction must be drawn between combatants and non-combatants.

Singh and Chinkin further advised,

The replacement of Trident is likely to constitute a breach of Article VI of the NPT. Such a breach would be a material breach of that treaty.

Professor Nick Grief QC stated,

Law must play a decisive role as the embodiment of normative values. The rule of law is a fundamental principle of civilised society and respect for the rule of law is an essential prerequisite of international order... Either we have the rule of law or we do not. As Judge Shi declared in the *Nuclear Weapons Case*, the policy of nuclear deterrence should be an object of regulation by law, not vice versa. International law is not simply whatever those with 'the say' (in practice, the nuclear weapon states) say it is.

3 Scotland's obligations and responsibilities under international law are not nullified by the 1998 devolution settlement

Scottish solicitor and Member of the Scottish Parliament, Roseanna Cunningham MSP, stated,

Although the Scottish Parliament does not have power over nuclear weapons or nuclear power stations, it does have environmental, planning and transport powers which may turn out to be more effective... practising lawyers need to be more imaginative in looking at ways in which some of these issues can be dealt with, how we can block or put obstacles in the way of nuclear weapons using the common or garden variety of laws and by-laws that may already be in existence. This is an interesting and very important debate for Scotland because it is a way in which we could express the view of the Scottish people.

Aidan O'Neill QC, noted,

Section 58 [of the 1998 Scotland Act] provides the basis for an enforceable legitimate expectation to the effect that the actions of the Scottish devolved institutions will be compatible with the UK's international obligations. On this basis it might be said that the Scotland Act effectively binds the Lord Advocate (and the other Scottish Ministers) to respect the whole range of international treaty obligations which have been ratified by the Crown, even where they have not been incorporated into the domestic law of the United Kingdom.

O'Neill stated,

the United Kingdom Parliament arguably also effectively introduced Nuremberg derived principles regarding the justifiability of conduct under national and international law directly into domestic law... there can properly be no conflict between the requirements of the (domestic) 'law of the land' and any 'moral imperative' – at least as derived from international legal principles – since both domestic law and international humanitarian and human rights law would now appear to operate in principle within the same normative framework.

In discussing the judgement of the LAR (2000), O'Neill noted,

customary international law was recognised by the [High Court of Justiciary] automatically to form part of municipal Scots law without need for any formal treaty incorporation. It would appear that the Court implicitly accepted, too, that customary international law could be relied upon by individuals in determining the lawfulness of their actions – and the lawfulness of the actions of the State.

O'Neill quoted the Special Rapporteur of the International Law Commission charged by the United Nations in 1950 with the task of re-formulating the Principles applied by the Nuremberg Tribunal, who stated that,

international law may impose duties on the individual without any interpretation of domestic law directly... That international law imposes duties and liabilities upon individuals as well as upon States... has long been recognised.

Highlighting the meaning of various Nuremberg Principles, O'Neill emphasized

Nuremberg Principle VII provides that '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.'

Judge Weeramantry wrote,

All nations are required to comply with international law. It is elementary that there cannot be one law for some and another law for others... The principles of international and humanitarian law exist and are active, not only in times of war but also in times of peace. The fallacy that humanitarian law is silent in times of peace is parallel to the fallacy that international law is silent in times of war.

With regard to Scotland, Judge Weeramantry held that,

Although the 1998 Scotland Act provides that the conduct of international relations is a matter reserved for the UK Parliament and the UK Government, paragraph 7(2) (a) provides *inter alia* that implementing and observing international obligations are not so reserved. This gives strength to the view that gross violations of international obligations are not excluded from the purview of the Scottish Parliament.

Moreover,

Even if foreign policy and defence are the prerogative of the UK government, the health and safety of the population of Scotland, the welfare of future generations and the protection of the environment and adjacent seas are concerns for Scotland's people and their government.

4 Citizens have a lawful right to protest the deployment of nuclear weapons and breaches of international law by governments and State authorities.

Janet Fenton, Coordinator of the Edinburgh Peace and Justice Centre, recalled:

The UK Ministry of Defence recognises that it is possible that an accident on public roads involving the convoys carrying fully armed nuclear warheads could result in a nuclear explosion. At

the very least, any major accident would be likely to cause the dispersal of plutonium and other radioactive substances over a wide area. A nuclear accident would involve police and other services in the protection of the public, as well as requiring actions across the range of responsibilities devolved to the Scottish government, notably health, agriculture and fishing.

Recognising that 'Civil defence is devolved', Fenton noted,

In the event of a nuclear attack as an act of war or terrorism, targets could include Faslane or Coulport, with immediate and devastating effect in Scotland. Other targets might include waterways where nuclear submarines might be located, or roads where warheads might be being transported.

Judge Weeramantry advised,

The people of Scotland have a right to demonstrate their concern with their safety, their health, their environment, their food chains, their future generations and their cultural inheritance. If it is a basic human right to be free of threat or violence, if the right to life is a basic human right, and if the protection of children and future generations is a basic human duty, anti-nuclear civil resistance is the right of every citizen of this planet, for the prevention of such an international crime is basic to human dignity.

Noting that 'Deterrence means the threat of use', Judge Weeramantry argued:

Use attracts retaliation, with a likely target being the geographical area where the weapons are based. The decision to use Trident will be a decision taken by the UK Government. International law cannot stand aside when human rights are violated and negated by doctrines of state sovereignty.

O'Neill suggested testing the current law in Scotland, proposing an approach that would

bring before the domestic court the current state of international criminal law on matters of war and peace. This would be to request the State prosecution authorities to initiate criminal investigations and the prosecution of persons within the jurisdiction against whom a case might colourably be made of their complicity in recognised international crimes—in particular the crime of international aggression, or other crimes against peace.

Arguing that

it would appear to be at least competent for the prosecution authorities in Scotland, if so advised, to raise prosecution in Scotland in respect of the international crime of aggression,' O'Neill stated, 'Insofar as the Scottish prosecution authorities fail or refuse to do so where there are otherwise reasonable grounds for so proceeding, it would seem in principle that such a decision might itself be the subject of challenge before the courts by way of judicial review.'

Noting, however,

that the judges in Scotland are, if anything temperamentally, culturally and institutionally even more conservative than their English counterparts,

O'Neill conceded that

the likelihood of any such challenge having any immediate success, at least before the judges in Scotland, would not be great. However, given that judicial review is a matter of civil law in Scotland, there would remain the possibility of taking the case, as a matter of constitutional right without the need for leave of any court, on appeal to the House of Lords, or as from October 2009, its replacement the UK Supreme Court.

- 5 **In addition to national obligations to cease deploying, developing and renewing nuclear weapons, there is an international law obligation to conclude multilateral negotiations to achieve the total abolition of nuclear weapons, encompassing future prohibitions on the acquisition, deployment and use of nuclear armaments and the progressive elimination of all existing arsenals.**

Judge Bedjaoui underlined,

The International Court of Justice unanimously recalled to all the states party their good-faith duty to negotiate nuclear disarmament in accordance with Article VI of the 1968 Treaty on the Non Proliferation of Nuclear Weapons (NPT), which they ratified, and also went on to task them with a second, vigorous obligation – to 'bring to a conclusion' these negotiations – which is nothing more nor less than actually to bring about concrete nuclear disarmament.

Noting 'the impossibility of limiting nuclear weapons' effects to military objectives necessarily places them in contradiction with the principles and rules of the law of armed conflict and of humanitarian law' Judge Bedjaoui concluded that this

cannot therefore do otherwise than make it a weapon prohibited under international law. Hence, though the Court concluded that conventional and customary law did not directly prohibit nuclear weapons as such, it recognised that the whole body of the law of armed conflict, and especially humanitarian law, indirectly prohibits this highly lethal weapon. Though not explicitly and specifically forbidden by international law, nuclear weapons are... weapons whose effects are clearly contrary to certain prescriptions of that *corpus juris* of certain rules of humanitarian law.

Acknowledging that 'the direct prohibition of the use of nuclear weapons as such lies in a kind of legal grey area,' Judge Bedjaoui concluded,

It is therefore necessary to put an end to this regrettable legal vagueness, and the complete nuclear disarmament so long promised seems the best way to achieve this result.

The obligation [in Article VI of the NPT] to negotiate nuclear disarmament in good faith is an obligation to adopt a certain conduct to achieve a certain result. This is an obligation of conduct that requires parties to that Treaty to give meaning to the negotiations on nuclear disarmament; to reach a mutually satisfactory compromise, not insisting on their own position without envisaging any modification of it; to make serious efforts with the goal of reaching an agreement.