

‘Preparation and Presentation of NZ Submissions to the International Court of Justice’

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Symposium Celebrating the 20th Anniversary of the 1996 World Court Judgment on Nuclear Weapons, Panel 2 – The Case, University of Canterbury, 8 July 2016

- Welcome to everyone, also have luminaries present, too many for me to single out, and also super-luminaries, so welcome to them too. Also like to thank and pay tribute to Kate Dewes, not only for organising this symposium but also for all her work over so many years on the World Court Project including at the ICJ in the Hague in 1995 to support the Attorney-General Paul East, who presented so splendidly having had practise on the case against French nuclear testing only 2 months earlier, and me when we presented NZ's oral submissions. Also remember Ian Prior of IPPNW who was a strong supporter of the project, including giving me at the time a video of the proceedings that I still have.
- This is my first visit to Christchurch since the earthquakes, so I would also like to sympathise with the people of Christchurch for all that they went through. I did have a son working here at the time, who subsequently went on to do a degree at this very university. Perhaps one way of looking at it is that Christchurch sacrificed and put itself in harm's way in place of Wellington, I don't know if earthquakes work that way, but maybe some good could be seen to come out of it in that way.
- I propose to set out some history and credentials, then make some comments on the law if there is time.
- Well, I blame weetbix for my involvement in this. Growing up as I did on a Taranaki dairy farm, those of you who are of a good age may remember the series of cards that used to come out in weetbix packets in the 1960s. One series was on nuclear weapons, with individual cards on various missiles (possibly the Minuteman, for instance) but also the Polaris missile and possibly other's nuclear weapons as well. One thing that fascinated and appalled me was the level of technical detail on the back of each card, setting out, for example, the speed of each missile, its range and the warhead. I thought then that this was terrible, and that something had to be done about it.
- Roll on 20 years to 1984. After 10 years in the Ministry of Foreign Affairs and Trade, including two stints in the Legal Division, the government's adviser in

international law, I was a disarmament officer in the United Nations Division working with the remarkable and brave Chris Beeby (surprised no book has yet been written to remember him by). He would have had the second sharpest mind (I won't say smartest guy in the room because that smacks of Enron) that I have ever come across; the sharpest, and by a margin, on policies, ideas and law would be Colin Keating, but Chris would be second on that particular list.

- During the first half of 1984, we worked on a substantial report on the Nuclear Non- Proliferation Treaty (NPT) for the Foreign Affairs and Defence Committee of Parliament, but Helen Clark, who was chairperson of the committee at that time, didn't quite want it to be issued. In the second half of 1984, Chris got negotiations on the South Pacific Nuclear Free Zone Treaty (nuclear-free zones are provided for in the NPT) underway. Ken Graham, here today, was also on the negotiating team, and we had his excellent doctoral thesis on the subject as the starting point and reference point during the negotiations.
- I did not see the conclusion of the treaty the following year because I spent the next 4 years at the NZ Permanent Mission in Geneva. Early on, we had one of the periodic review conferences of the NPT, which did finally succeed in getting an agreed Final Document. Among many other things (including human rights, environment, special conferences and UN specialised agencies), I was probably the first New Zealander to devote any real time to the Conference on Disarmament, the UN's primary negotiating body on that subject. NZ had only observer status in the CD but, early on, David Lange addressed the CD, becoming the first head of government in the world to do so, and the CD was at that time engaged in constructive work on the Chemical Weapons Convention which it did eventually adopt. There were also bizarre trips by CD participants to the USSR for chemical weapons and the destruction of the first missiles under the US/USSR INF Treaty as part of President Gorbachev's glasnost and perestroika programmes (but I haven't the time to say anything more about that today).
- After a year in the NZ Embassy in Moscow trying to understand Russians, the rest of my time in a Ministry which had virtually been converted into a trade ministry in the 1990s was spent in the Legal Division in Wellington. What you need to know about the Legal Division is that it had limited numbers of staff (being the only division in which only certain staff, ie legally trained, can be put) and operated more as a training and a crisis management and fire-fighting division, not helped by a period in the 1980s when it virtually self-inflictedly transformed itself into an Antarctic division. My observation is that for only two of the 22 years that I was in the Ministry, both in the early 1980s, was it well staffed. So an experienced mug like myself was left with hard and tricky areas like status of forces, extradition cases and diplomatic law.

- One major preoccupation was advising on humanitarian law during NZ's two years on the UN Security Council in 1993 and 1994 and dealing with terrible situations notably former Yugoslavia and Rwanda, with war crimes tribunals breaking new ground.
- A lot of this came together with the World Court Project about this time.
- First, the World Health Assembly in 1993 asked its organisation, WHO, to seek an advisory opinion on nuclear weapons from the ICJ. The ICJ sought written statements from states, subsumed oral proceedings with the subsequent UNGA request, and eventually ruled 11-3 that WHA's request was not within the scope of its activities. NZ submitted only a brief 'holding' statement, I think because the main action was in the UN, that UN request was more broadly couched and urgent, and there were doubts about WHA's jurisdictional competence.
- Meanwhile, the question was also before the UN General Assembly. Not sure whether Legal Division was involved in the decision, but the resolution would first have had to be adopted in the First (disarmament and security) Committee one week before referral to the full Assembly where it was adopted 73-43-38-26 on 15 December 1994, with NZ voting yes. Some surprise was expressed that this was not NZ's usual 'Western' company (ie San Marino) but it did include South Africa, Fiji, PNG, Samoa and Solomon Islands, and NZ Permanent Representative Colin Keating was in the NZ seat that day. It is amusing to note that the Japanese Judge Oda was the only judge to vote to reject the request largely because of such split support for the resolution.
- The resolution hurried everyone up because it sought an advisory opinion “urgently”. Don MacKay, who had taken over in Legal Division (there is another name under the radar, but Don was not someone who simply occupied positions but has significant achievements in subsequently chairing or leading international negotiations I think, from memory, on new treaties on liability annex (the hardest part) to Antarctic Environmental Protection Protocol, on cluster munitions, and on rights of disabled persons, and now Law of the Sea negotiations), took a very matter-of-fact approach to the resolution: we had voted for it so we should get on and give submissions our best shot.
- So on a 'drop everything' basis, two of the young guns in the division were tasked to draft a written statement for which the ICJ had set a deadline of 20 June 1995, ie to furnish information on the question.
- They did a good job, and many drafts later we got in a statement that we were all happy with just days before the deadline.

- A serious complication was that France announced on 13 June 1995 that it would resume nuclear testing in the Pacific, and that announcement less than a month after the NPT Review Conference had decided to extend the treaty indefinitely. There was, however, still time for us to insert a hard-hitting footnote on the matter to paragraph 33 of the written statement.
- The ICJ had also fixed late October/early November 1995 for oral proceedings. NZ's oral statement drew on the written statement on all the areas of international law covered in it, but also added comments on why the ICJ should assume jurisdiction in the case, to which Ken Keith contributed, and expanded and stronger comments on nuclear testing (drawing on arguments which NZ had presented to the ICJ only two months previously unsuccessfully seeking to reopen its old case against France over its nuclear testing, with Don preoccupied in running that complex case) and on the NPT. If I recall correctly, I think I drafted much of this at home over Labour weekend, and perhaps it was late Monday when I was writing the section on the NPT that ended up in two places of the oral statement, which may explain the passion or head of steam behind the chastising comments on the obligations on the nuclear weapon states under that treaty. In short, we were arguing that the decision to eliminate and delegitimise nuclear weapons has already been taken, in the NPT and its permanent extension.
- The draft oral statement was discussed with Ministers at a meeting with the Prime Minister and three other Ministers, and I was authorised to discuss it with the leader of the Opposition (I knew Helen Clark from university days, when we flatted across the road from each other, and she seemed pleased enough with what we were doing and saying, not of course that she would have been influenced by any such association, she is much too professional for that). I don't think it is saying too much to note that a bipartisan consensus on nuclear weapons is evident from that time, 'gone by lunchtime' aberrations notwithstanding, although that is not a point that appears to have been taken by Malcolm Templeton in his book "Standing Upright Here" or by other writers that I am aware of on the subject.
- On the law, international humanitarian law is complex and subtle, being based on rules in all the Geneva Conventions, Additional Protocols, many other earlier and later treaties as well as customary international law, and somewhat bedeviled by some fine distinctions notably that between international and non-international armed conflicts where the distinctions have hopefully been to some extent collapsed by the new international criminal court that I am not familiar with. But international humanitarian law does boil down to a set of great principles, or that would be great if they were complied with and enforced in situations where it really mattered, including former Yugoslavia and Rwanda over 20 years ago, Syria and Iraq now, and many other places in Africa.

- These principles are: distinguishing civilians from combatants; avoiding unnecessary suffering and indiscriminate effect; and (although less a humanitarian principle) the principle of neutrality.
- These are venerable principles with a long history, and underpinned by the principles of necessity and proportionality applicable in armed conflict, by the wonderful and fundamental Martens clause (I could say marvellous, but that might satirise John Campbell and I wouldn't want to do that) by which international law and humanitarian principles apply on a continuing basis to new weapons and which is specified or reflected in many international instruments, and by the fact, I might add, that state practice (the basic element in customary law) supports the non-use of nuclear weapons.
- The ICJ, in its judgment not issued until 8 July 1996, accepted unanimously that these principles apply to nuclear weapons, and quoted from the NZ written statement in this regard, apparently approvingly, in paragraph 86 of its judgment, followed by statements to similar effect by three of the nuclear weapon states.
- There is arguably also now a more recent principle on protection of the environment that may be fundamental or getting that way, but the ICJ did not really make so much of that, although its statement in paragraph 29 suggesting that extraterritorial protection of the environment is now part of customary international law is important.
- Nevertheless, and despite its strong endorsement of Article VI of the NPT as an obligation of nuclear disarmament that goes beyond mere conduct and requires a precise result to pursue and conclude negotiations on nuclear disarmament, the ICJ ducked in its severely split ruling (decided on the President's casting vote) from reaching a definitive conclusion. Some judges criticised the ruling about survival of a state as introducing a novel concept into the law of armed conflict and derogating from international humanitarian law, but I think it just reflects the difficulties the ICJ was under. Concern at the risk that the ICJ might undermine progress in disarmament was also not borne out.
- And one must note paragraph 104 of the judgment about all the legal grounds being read together, which is open to various interpretations.
- However, the judgment provides plenty of ammunition, as it were, for the future, despite the ICJ's own injunction possibly to the contrary, and emphasises the point that there are always avenues and solutions in international law to situations such as Syria and other international problems. And, of course, it behoves NZ, as a strong supporter of the international system, to raise its voice, trenchantly at times, in all appropriate fora, against those who are not living up to their

obligations. After all, so far as nuclear weapons are concerned, the famous Doomsday clock has hardly ever been closer to midnight.