

**CELEBRATION OF TWENTIETH ANNIVERSARY OF THE INTERNATIONAL COURT OF JUSTICE'S
ADVISORY OPINION ON THE LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS**

Christchurch, 8 July 2016

Roger S. Clark (Counsel to Samoa in 1995-6)

Dr. Dewes has asked me to contribute both some anecdotes and some legal analysis, so I start first with the anecdotes. I first learned about the World Court Project from two old friends at the Commonwealth Law Conference in Auckland in 1990. Then-Professor Christopher Weeramantry¹ of Monash University mentioned it in his keynote address and Harold Evans, former New Zealand diplomat and retired Christchurch Stipendiary Magistrate, was ardently pushing his literature on the subject with the participants. Katie and Rob Green were involved then, but I did not meet them until the hearings in The Hague in 1995. I was sympathetic to their efforts but confessed a fear to Evans, and later to other protagonists, that the result might be bad law that could set the movement for abolition back rather than accelerating it.² The ultimate judgment proved me wrong. The next person I heard from on the subject was my former physician in Wellington, Dr. Eric Geiringer, who was pushing for a resolution from the World Health Organization on behalf of the International Physicians for the Prevention of Nuclear War. I later became convinced that his draft was largely written by my former Wellington colleague, Ken Keith, who as Sir Kenneth recently completed his own term on the Court. The effort at the World Health Assembly took two years, 1992 and 1993. A United States diplomat, involved in

¹ I lobbied diplomats in New York on three occasions in support of Weeramantry's campaigns for election to the ICJ – two of them unsuccessful, but he was elected to a single nine-year term beginning in 1991.

² I had been involved in efforts in the early 1960s as an officer of the NZ University Students' Association to have New Zealand sponsor efforts in the ICJ against French nuclear testing in the Pacific. See, R.S. Clark, 'French Tests and International Law', 52, *New Zealand Monthly Review* No. 52 (1964-5), 5; Roger S. Clark, 'Is *The Butter Battle Book*'s Bitsy Big Boy Boomeroo Banned? What Has International Law to Say about Weapons of Mass Destruction? (Symposium on Dr. Seuss and the Law), (2014) 58 *New York Law School Law Review* 507.

making the argument that the question asked by the WHO was ultra vires the Organization, told me they thought after the first attempt that they had heard the last of it. He admitted to being blindsided the next year when a lot of little countries turned up determined to push the resolution through. Alas, a majority of the Court bought the ultra vires argument in the WHO case in 1996. From the WHA, the scene moved to the General Assembly and its slightly different question.

Geiringer was on my trail once the move at the WHO succeeded and asked me to give some advice to IPPNW on how to get itself heard in the proceedings, or at least in the written part. The Court had accepted that it has discretionary power to hear from NGOs in such proceedings, but gave IPPNW the brushoff, informing it that it did not wish to avail itself of IPPNW's assistance. Around the same time, I was asked to participate with a group from the Lawyers Committee on Nuclear Policy in New York that was formulating a model set of submissions in answer to the questions.³

That might have been the end of my involvement but early in 1995 I got a call from Tuiloma Neroni Slade, the Samoan Ambassador to the United Nations. Neroni was the former Attorney-General of Samoa and my student when I taught at Victoria. We had kept in touch over the years and I had agreed to do some occasional pro bono legal work for him if the opportunity occurred. This was the opportunity!⁴ Meanwhile, I learned that the Solomon Islands Government had been talking with Philippe Sands of the University of London, who was assisting them in environmental negotiations, about putting together a team to argue the nuclear

³ See, 'Draft Memorial in support of the Application by the World Health Organization for an Advisory Opinion by the International Court of Justice on the Legality of the Use of Nuclear Weapons under International Law, including the W.H.O. Constitution, prepared by Peter Weiss, Esquire, Professor Burns H. Weston, Professor Richard A. Falk, Professor Saul H. Mendlovitz, in cooperation with The International Association of Lawyers Against Nuclear Arms', (1994), 4 *Transnational Law and Contemporary Problems* 721. Alyn Ware was also involved in this effort. Many of the draft's arguments were echoed in later written and oral submissions to the Court. Professor Falk's visit to NZ in 1986 was an important catalyst in the thinking of Harold Evans and others on nuclear weapons and the law.

⁴ We later worked together on the negotiations to create the International Criminal Court and he became one of the first judges on that Court.

case. Some discussions ensued that led to Sands ultimately coordinating a team from Marshall Islands, Samoa and the Solomons. Samoa and Marshall Islands put in written statements which, while modest in length, hit the major issues on the nail. Solomon Islands contributed lengthy, scholarly, memorials drafted largely by Sands and the Belgian professors David and Salmon.

By combining the time that the Court afforded us for the oral proceedings, we were able to get a block of four and a half hours for the three states to speak. Ambassador Slade led off and the argument of the eight lawyers was concluded by James Crawford, an Australian who held a prestigious Chair of International Law in Cambridge. Crawford is now a member of the Court, taking Sir Kenneth's place. As a witness we called Mrs. Lijon Eknilang, from Rongelap Atoll in the Marshalls. In 1954 Rongelap, where she lived as a child, was downwind of the "Bravo" hydrogen test, the biggest of the 67 American tests. She stood in this ornate room in the Peace Palace in her simple, white, Pacific Islander's Sunday dress and told her story. She heard a terrible bang and the heavens lit up. White stuff fell from the sky. As she put it: "We had heard about snow from the missionaries and other westerners who had come to our islands, but this was the first time we saw white particles fall from the sky and cover our village". She talked about the devastation and sickness that followed. I admit that I cried.⁵

I turn to the law. The basic argument for our side was that the laws of armed conflict contain both some specific cases of weapons that are banned absolutely (exploding shells below a certain size, bullets that expand inside the human body, poison, asphyxiating gases and bacteria) to which nuclear weapons are analogous, and some general principles that should make nuclear weapons categorically illegal. These principles talk about disproportionate force,

⁵ The team's arguments are collected in Roger S. Clark and Madeleine Sann eds, *The Case against the Bomb: Marshall Islands, Samoa and Solomon Islands before the International Court of Justice in Advisory Proceedings on the Legality of the Threat or Use of Nuclear Weapons* (Rutgers University School of Law 1996).

indiscriminate force, causing unnecessary suffering, weapons of mass destruction and targeting civilians rather than the military. By analogy and by general principle, we argued, nuclear weapons are forbidden. We also had arguments that struck a raw nerve with some of the nuclear powers, based on the theory used in Nuremberg, crimes against humanity, and the concept that grew out of it, genocide. We argued too that human rights law guaranteed the right to life. We argued about the purity of the environment and about the earth, the sky and, above all, the sea, and whether any State has the awesome power to destroy our Spaceship Earth.

Those supporting the use of nuclear weapons argued that they do not poison or asphyxiate – apparently they just blow people to smithereens or liquidate them – and that while the treaties on forbidden weapons speak in broad generalities, the bottom line is that they only prohibit certain limited examples of the general category. There is no explicit prohibition of nuclear weapons, or smithereeners or liquidators; ergo it is lawful for them to use such weapons.

Not all of us on the team were agreed on this, but I thought that one of the strongest arguments for the other side, at least for the five avowed original nuclear powers, was the existence of the 1968 Non-Proliferation Treaty. That treaty acknowledged that the Five had the bomb (subject to the obligation to negotiate in good faith as the trade-off for the other parties' promise not to acquire such weapons). If the Five are "entitled" under the NPT to have the weapons they must be entitled to use (or threaten to use) them. The treaty, on this argument, legitimated their possession and thus their use (on their own behalf or on behalf of their allies). Or so they contended. One way in which we tried to confront this, was to argue that the case was not about possession, but about use or threat of use. At most, possession did not imply a right to use. This was not as bizarre as it sounds at first sight, since a similar situation happened in 1925 in respect of the Geneva Protocol's ban on poisonous or asphyxiating weapons. The treaty did

not ban the possession of such weapons – that would wait for the Chemical Weapons Convention of 1993 – but it did prevent their use. We made what was our most focused version this, I thought very persuasively, in answer to a question from one of the judges:⁶

In our view, a nuclear Power party to the 1968 NPT may continue to possess nuclear weapons, subject to its international obligations, including in particular those arising under the NPT. Article VI of the 1968 NPT commits the nuclear States “to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control”. In this sense the right of these States to maintain nuclear arsenals is a temporary right. In our view, the existence of nuclear weapons is a fact which international law is seeking to alter ... The international community’s commitment to rid the world of nuclear weapons, as reflected in Article VI and elsewhere, cannot be taken to imply a right to use nuclear weapons.”

I have to say that we got more out of the Court’s Opinion than I feared in the early stages of thinking about the case. While only three members of the Court accepted our argument that the laws of armed conflict rendered nuclear weapons illegal in all circumstances, the majority did accept that “the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law.”⁷ It might even amount to genocide if the necessary circumstances and intent could be shown. “Generally” was a downer and there is much debate about what it and the reference to the possibility of use “in an extreme circumstance of self-defence” really means.

⁶ *The Case against the Bomb* at 302 (question by Judge Schwebel).

⁷ Advisory Opinion. Para. 105 (2) (E).

But we also got the surprising unanimous statement based on Article VI of the NPT that none of us saw coming:

There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

This is the germ of the current Marshall Islands cases on which we shall hear more later in the day. I believe that it refers not only to an obligation on parties to the NPT to negotiate and bring to a conclusion efforts at nuclear disarmament but also to a customary law obligation on all States to engage in, and conclude, that endeavour.