

Symposium Marking the 20th Anniversary of the 1996 ICJ Judgment.

Notes for Panel Discussion at University of Canterbury

Friday 8 July 2016

Sir Geoffrey Palmer QC

I want to relate the nuclear weapons case to the Nuclear tests cases.

The legality of the use of nuclear weapons in any circumstance must be regarded as dubious in international law. It is very difficult, if not impossible, to envisage how nuclear weapons could ever be used lawfully. The scope of human and environmental destruction that would be caused by their use is out of all proportion to any military objective that can be envisaged. Whether that legal theory can ever be given any operational reality must be regarded as doubtful.

The legality of the use of nuclear weapons was the subject of the advisory opinion of the International Court of Justice in 1996 that is the subject of this symposium.¹ The General Assembly of the United Nations resolved to seek an advisory opinion from the court on the following question: ‘Is the threat or use of nuclear weapons in any circumstance permitted under international law?’

The arguments ranged against legality were formidable. They included the following:

- the use of nuclear weapons would violate the right to life;
- in some circumstances the use of nuclear weapons would amount to genocide;
- the use of nuclear weapons would be contrary to existing norms relating to the safeguarding and protection of the environment and nuclear explosions would be a catastrophe for the environment;

¹ *Legality of the Threat or Use of Nuclear Weapons, Advisory opinion*, [1996] ICJ Reports at 226.

- the use of nuclear weapons would be a serious danger to future generations;
- the general prohibition in the Charter of the United Nations on the use of force applies to nuclear weapons;
- the use of nuclear weapons by a nation exercising its right to self-defence would be disproportionate and therefore unlawful in most cases;
- possession of nuclear weapons may justify an inference of preparedness to use them;
- nuclear weapons should be banned for the same reason that poisoned weapons are prohibited;
- recourse to nuclear weapons is prohibited by treaty in some parts of the world;
- since nuclear weapons have not be used since 1945 it can be inferred there is a rule of customary international law prohibiting their use;
- the General Assembly of the United Nations has declared the use of nuclear weapons to be illegal and in violation of the Charter of the United Nations; and
- the use of nuclear weapons would be contrary to international humanitarian law in that their use kills civilians and such weapons cannot discriminate between civilians and combatants. The weapons cause unnecessary suffering for combatants and their use would be in breach of elementary considerations of humanity.

As to the effects of nuclear weapons, the advisory opinion says:²

By its very nature, that process, in nuclear weapons as they exist today, releases not only immense quantities of heat and energy, but also powerful and prolonged radiation. According to the material

² Above, at 243–244.

before the Court, the first two causes of damage are vastly more powerful than the damage caused by other weapons, while the phenomenon of radiation is said to be peculiar to nuclear weapons. These characteristics render nuclear weapons potentially catastrophic. The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet.

The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations.

It follows from the International Court of Justice's advisory opinion that there is no circumstance in which a state can be sure that any use it makes of nuclear weapons will be lawful. Thus, the legal consequences of using such weapons potentially are profound. Their use is plainly unlawful in most circumstances and may be unlawful in all circumstances. Have things changed in this regard since 1996? That depends upon how the tests for customary international law apply in these circumstances. Do we have

1. the same practice by a number of states in regard to a particular situation;
2. the continuation of the practice over time;
3. a belief that the practice is required by the prevailing international law (*opinio juris*); and
4. general acquiescence in the practice by other states.

In other words, the search is for a general recognition among states that a certain practice is obligatory: ie nuclear weapons cannot be used. Custom

allows international law to evolve over time, to respond to new challenges. Sometimes, the main obstacle in deciding that a concordant state practice amounts to customary international law is the requirement of what is known as *opinio juris* - a belief that the practice is obligatory as a matter of law. On nuclear issues this may prove to be a real obstacle to the obtaining of relief against the use of such weapons, depending upon the circumstances. The nuclear weapons states may be regarded as persistent objectors.

In May 1973 New Zealand had commenced proceedings in the International Court of Justice, as did Australia, against the French Government seeking an end to their atmospheric testing of nuclear weapons in French Polynesia.

Australia and New Zealand argued that the French nuclear testing programme was contrary to international law. New Zealand argued that the French government tests in the South Pacific region that gave rise to radioactive fallout constituted a violation of New Zealand's rights. The Court gave interim relief.³ It indicated that pending further stays of the case France should cease testing. In December 1974 the Court held, following the issuance of a media release by the French government, that since France had promised not to test nuclear weapons in the atmosphere and was bound by its own promise to that effect, the proceedings could be terminated as they no longer had any purpose and the Court did not need to decide them.⁴ France moved to terminate its acceptance of the compulsory jurisdiction of the International Court of Justice under the optional clause as it was entitled to do. It resumed underground nuclear testing at the same location.

In 1995 this case was resumed by New Zealand at the International Court of Justice. New Zealand filed with the Court a Request for an Examination of the Situation in light of the 1974 judgment because France announced it would conduct a final series of eight tests of nuclear weapons in the South Pacific starting in September 1995.⁵ The resumed case concerned underground testing,

³ *Nuclear Test Cases (New Zealand v France) (Provisional Measures)* [1973] ICJ Rep 135 at 138.

⁴ *Nuclear Test Cases (New Zealand v France) (Jurisdiction)* [1974] ICJ Rep 457.

⁵ *Request for an Examination of the Situation* [1995] ICJ Rep 288.

not the atmospheric testing that the French had ceased that had the effect of rendering the original case moot. The Prime Minister Rt Hon Jim Bolger said:⁶

It was New Zealand's view that any resumption of nuclear testing in the South Pacific was totally unacceptable, and contrary to the legal, environmental, and political developments of the last two decades. The Government looked, therefore, to every possible avenue to challenge the testing, including legal means.

I was appointed by the New Zealand Government as the ad hoc Judge on the Court for the case. I was signed into office by Sir Garfield Barwick, the former Chief Justice of Australia, who had been the ad hoc Judge for both Australia and New Zealand at The Hague in 1974. While the case was a big ask, some members of the Court did not want to hear the case, and I had to be firm and downright at the judicial conferences to say that New Zealand expected to be heard. France made big efforts to ensure the case was not heard. And with the court being in the Netherlands proximate to France, French influence at The Hague was ever present. The expedience with which the matter had been approached to begin with drew criticism from Judge Stephen Schwebel in his concurring opinion. He refuted the notion that there was no case, there was no room for appointment of agents or an ad hoc Judge and the court could not have oral hearings. He concluded rather delightfully:⁷

Whatever the reservations expressed, it is plain that when 15 judges gathered in their robes in the Great Hall of Justice of the Peace Palace, and when Judge *ad hoc* Sir Geoffrey Palmer took his oath of office, the Members of the Court did not meet, Pirandello style, in search of a courtroom or a case, but conducted an oral hearing on a phase of a case.

I found it an unsatisfactory professional experience. There seemed to be an acute sensitivity to the political limits of the Court's authority. Furthermore, I felt that many of Judges had political factors weighing heavily on their mind and did not want to upset powerful nations who were permanent members of the Security

⁶ New Zealand Ministry of Foreign Affairs & Trade *New Zealand at the International Court of Justice- – French Nuclear Testing in the Pacific – Nuclear Tests Case New Zealand v France* (Wellington, 1995). Foreword by Rt Hon Jim Bolger at 7.

⁷ Declaration of Vice-President Schwebel (1995) ICJ Rep 288 at 309.

Council over the nuclear issue. Those same influences were at work a little later in 1996 when the Court delivered the *Nuclear Weapons* Advisory Opinion.⁸ The court on that occasion spoke in strong condemnation of the use of nuclear weapons but stopped short of holding them to be illegal in all circumstances. In extreme circumstances involving the very survival of the state, the use of nuclear weapons may be lawful, the court held. The fact that the five permanent members of the Security Council always have a Judge on the Court and that they are all nuclear weapons states did not add to my sense of fairness. It needs to be recognised, however, that the P5 are on the Court because they are elected there with the support of many countries, including New Zealand.

This was not a court that operated in the same way as courts to which I was accustomed to in New Zealand, the United Kingdom and the United States. It was partly because a majority of the Judges are not common lawyers, but lawyers trained in the civil law tradition that is based on Roman law where there is a code. The different approaches influence the attitude to international law, even though the law is supposed to be the same whether one is a product of the civil law tradition or a common lawyer. But I came away from this unusual legal experience with the conviction that the judges at The Hague needed a strong dose of judicial independence as I understood that principle. The experience was a disappointment. Perhaps, but only perhaps, this sense of unease is confined to nuclear cases.

The fact that France had withdrawn its acceptance of the compulsory jurisdiction under the optional clause over the earlier case in 1974 was also a factor in the 1995 resumption of the case. On the previous occasion France had not even appeared at the court to argue the substantive case. This time they appeared and made legal arguments.

Yet I saw first-hand that justice according to law was not an easy ingredient to obtain in a court where many of the Judges had been diplomats and legal advisers to Foreign Offices. International law is more influenced by political factors than law administered in domestic jurisdictions with which I am familiar. Of course it would have been a very brave court that would have decided that the tests at Mururoa were unlawful. That was obvious enough. But I was

⁸ *Advisory Opinion on the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226.

convinced on the grounds of the potential damage to the environment that they probably were. Judge Christopher Weeramantry wrote a wonderful dissenting opinion of permanent juridical importance outlining the arguments.⁹ I also wrote a dissenting judgment mainly concerned with the development of international environmental law and the principles that applied to underground French nuclear testing.¹⁰

New Zealand lost its application to reopen the case by 12 votes to 3. Despite the result the purposes of the New Zealand government were well served by the case in the view of the New Zealand government. It brought political pressure to bear on France on the nuclear issue. The Prime Minister Mr Bolger said after it was over the Government remained satisfied with the decision to bring the case. “The case received great attention internationally and this without doubt added to the pressure on France to cease testing.”¹¹

My conclusion from these experiences is that obtaining justice through law in the international arena on nuclear issues is not only difficult it may be impossible, unless substantial reform of the International Court of Justice is undertaken.¹²

The case for reform is in my opinion strong. How likely is it that the veto wielding P5, all nuclear weapons states will agree to that? Will it take another catastrophe?

⁹ Dissenting opinion of Judge Weeramantry [1995] ICJ Rep 317.

¹⁰ Dissenting opinion of Judge *ad hoc* Sir Geoffrey Palmer [1995] ICJ Rep 381.

¹¹ Rt Hon Jim Bolger *Foreword*, above n 6, at 34.

¹² Geoffrey Palmer “International Law and the Reform of the International Court of Justice”

A Anghie and G Sturgess (eds.) *Legal Visions of the 21st Century :Essays in Honour of Judge Christopher Weeramantry* (1998,Kluwer Law International, The Hague) p 579.