From Dr Strangelove to Dr Suess: contributions of Professor Roger Clark on the legal norm against nuclear weapons[1]

By Alyn Ware[2]

'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.'

International Court of Justice, 1996[3]

On 1 March 2013, New York Law School held a conference on *Exploring Civil Society through the Writings of DrSuess.* The conference examined aspects of civil society reflected in a selection of books by Theodor Seuss Geisel,[4] including tolerance, punishment, equality, war, civil and human rights, land use and property rights, and corporate responsibility,

One of the sessions discussed *The Butter Battle Book*, a picture book published by Geisel in 1984 in response to U.S. President Ronald Reagan's escalation of the nuclear arms race with the Soviet Union, a policy that he characterized as evincing "deadly stupidity."[5]

[1] Contribution to "Essays in honour of Roger Clark' to be published in 2015

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[3] Legality of the Threat or Use of Nuclear Weapons, International Court of Justice Advisory Opinion, 8 July 1996, paragraph 35.

[4] Dr Suess is the pen-name for Theodor Seuss Geisel, a popular children's picture book author.

[5] *International Law, Armed Conflict, and the Construction of Otherness: A Critical Reading of Dr. Seuss's The Butter Battle Book and a Renewed Call for Global Citizenship, John Hursh,* New York Law School Law Review, VOLUME 58 | 2013/14. Pp 618-652.

The story revolves around two peoples – the Yooks and the Zooks - who have fundamentally different ways of spreading butter on bread and eating it (an analogy about different economic and political systems). They perceive their neighbours' system as unacceptable and threatening their moral and political order. In response they build a wall between their societies which they guard with increasingly destructive weapons until they both have a 'Big Boy Boomeroo' which could destroy everyone.[6]

Professor Roger Clark, a New Zealand-born Professor of International Law at Rutgers School of Law, gave a presentation on the *Butter Battle Book* and international law with respect to nuclear weapons.[7] Clark recognises that the *Butter Battle Book* does not mention international law in the story-line. However, the issues it raises give clarity to the application of international law to nuclear weapons – a key political issue which impacts on the survival of humanity. As Clark says, *'Surely the law, which seems to deal fairly effectively with such mundane issues as defective widgets and the like, can be brought to bear on weapons of mass destruction… it (*the book*) is surely an invitation to imagine how law might be used to get out of such situations…'*[8]

Clark then evokes aspects of the Butter Battle Book to analyse political and legal dimensions of nuclear deterrence. Clark argues that the moral and philosophical opposition to nuclear

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[6] *The Butter Battle Book,* Dr Suess, Random House, New York, 1984.

[7] Is *the Butter Battle Book's Bitsy Big-Boy Boomeroo Banned? What Has International Law to Say About Weapons of Mass Destruction*?,Roger Clark, New York Law School Law Review, VOLUME 58 | 2013/14 pp 655-673; By coincidence, one year after the *Butter Battle Book* was published, a real Butter Battle over nuclear weapons policies occurred between the US and New Zealand instigated by Ronald Regan; In an effort to pressure New Zealand to reverse its decision in 1984 to ban all nuclear-armed ships from port-visits, President Regan placed a moratorium (boycott) on trade deals with New Zealand just as representatives of the New Zealand Dairy Board (which markets butter and cheese) were in Washington;The Dairy Board representatives returned to NZ empty handed (no trade deals) and some-what red-faced. However, the moratorium was short-lived; Sympathetic women's organizations in the United States participated in a "girlcott" campaign which prevented US Congress ratification of the US administration's boycott, and resulted in doubling of NZ dairy sales to the US over the following five years. See, Clark, 2013/2014, footnote 43.

[8] Roger Clark, New York Law School Law Review, VOLUME 58 | 2013/14, p657.

weapons depicted in the Butter Battle Book finds support in international law – particularly international humanitarian law – as affirmed by the International Court of Justice in its 1996 Advisory Opinion. Accordingly nuclear weapons should be banned and eliminated.

However, like in the Butter Battle Book, the power of politics and the promotion of 'fear of the other' have so far prevented this. Indeed, the Butter Battle Book bears some similarities to the Dr Strangelove complex depicted by Peter Sellers in the movie '*Dr Strangelove: or how I learned to love the bomb*,'[9] which depicts a combination of nuclear-deterrence postures, political suspicions and misplaced faith in the bomb leading to the inadvertent but inevitable destruction of the world.

Legal scholars might wince at the notion that complex legal questions can be considered in terms of simple morals or principles able to be depicted in children's picture books or Hollywood movies.

However, Christopher Weeramantry, former Vice-President of the International Court of Justice, notes that '*The principles underlying international law are based upon universally accepted values and moral standards. They can be understood by every schoolchild. When children are informed about them their eyes light up with appreciation that the international world is governed by principles which are so acceptable to them. International law represents the essence of the progress of civilization towards a world ruled by law rather than a world ruled by force*.'[10]

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[9] Columbia Pictures, 1964.

[10] C.G. Weeramantry and John Burroughs, *International Law and Peace,* Hague Appeal for Peace, 1999. http://www.haguepeace.org/files/morePeaceLessons/International%20Law%20and%20Peace%20%28Weeramantry%20Sri%20Lanka%20and%20Buroughts%20USA%29.pdf .

Weeramantry also notes that the illegality of nuclear weapons under international law is obvious and easily understandable by lawyer and non-lawyer alike. The threat or use of nuclear weapons would violate general principles of humanity enshrined in international humanitarian law, including the prohibitions in war-time against causing unnecessary suffering, indiscriminate harm (impact on non-combatants), disproportionate harm, damage to neutral states and long-term damage to the environment. *'The jus in bello covers all uses of force. There can be no exceptions without violating the essence of its principles*.'[11]

Weeramantry notes that nuclear weapons are also in violation to religious and ethical principles which provide a strong underpinning for international law. '*Support of the nuclear bomb with its potential to destroy all civilizations and all the values we cherish, is a gross betrayal of the basic teachings of every religion. Every one of them is categorically opposed to the use of weapons that cause cruel and unnecessary suffering. No government in the world can afford to be guilty of this fundamental breach of the teachings to which the bulk of its people are committed*.'[12]

However, the implementation of this norm clashes with the politics of power and money. The most powerful countries in the United Nations system are the five permanent members of the Security Council, each of which has the power of veto over any Security Council decision – a power held only by these five. These are the same five countries recognised under the nuclear Non-Proliferation Treaty to be 'Nuclear Weapon States.' They are also the only ones to

[11] C.G. Weeramantry, Dissenting Opinion, International Court of Justice Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, July 1996, p291 http://www.icj-cij.org/docket/files/95/7521.pdf .
[12] C.G. Weeramantry, *The Time to Act is Now,* in SECURING A NUCLEAR WEAPON-FREE WORLD TODAY: Our Responsibility to Future Generations, World Future Council, May 2010. http://www.worldfuturecouncil.org/fileadmin/user_upload/PDF/Securing_a_nuclear_weapon-free_world_today-online_version.pdf.

always have a judge from their country sitting on the International Court of Justice. Their arguments for the nuclear status quo are supported by strong corporate interests.[13]

Upholding and advancing the law against nuclear weapons in this context requires a mix of sound legal argument, political nuance and clarity of communication to cut through the legal obfuscation used to defend the bomb.

Commander Robert Green notes that in the fable 'The Emperor's New Clothes' it was a boy, unburdened by authoritarian dictates on what he should think, who thus saw clearly the simple reality and challenged the power of the ruler who had been hoodwinked by the greedy weavers. Green notes that such clarity of perception and thinking is required to cut through the doctrine of nuclear deterrence which has been advanced by the powerful nuclear States as a doctrine that should be accepted without question.[14]

Professor Roger Clark has made considerable contributions to the debate on nuclear weapons and the law, which indeed cut through the nuclear deterrence priesthood with a clarity of thinking, supported by considerable legal expertise. His writings and classes have done much to educate law students and other law scholars. More-over, Clark has been incredibly effective in bringing this clear legal thinking into key legal, diplomatic and political processes which have had considerable impact on the development and implementation of international law and the norm against nuclear weapons.

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[13] Nuclear weapons production is a multi-billion dollar industry with over US$100 billion spent annually by the nine nuclear-armed States, most of this going to a small number of corporations. See *Dirty Dozen: corporate partners in mass destruction*, Reaching Critical Will, http://www.reachingcriticalwill.org/resources/publications-and-research/research-projects/6202-dirty-dozen-corporate-partners-in-mass-destruction.

[14] Robert Green, *The Naked Nuclear Emperor: Debunking Nuclear Deterrence*, Disarmament & Security Centre, Christchurch, New Zealand, 2000**;** also see Commander Robert Green, Royal Navy, *Security Without Nuclear Deterrence*, Disarmament & Security Centre, 2010.

This includes, *inter alia*, participation in the Nuclear Tests Cases before the International Court of Justice (1975 and 1995), the International Court of Justice Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (1995), advancing the criminality of nuclear weapons in the negotiations of the Statue for an International Criminal Court, participation in the drafting of a Model Nuclear Weapons Convention circulated by the UN Secretary-General as a guide to nuclear disarmament negotiations, and serving on the legal team for the case lodged by the Marshall Islands in the International Court of Justice against the nuclear-armed States (2014).

Nuclear tests cases

In 1962 France announced it would commence nuclear tests, i.e. nuclear weapons detonations, in French Polynesia – a group of islands in the Pacific under French control. By this time, the devastating health and environmental impact of French tests in Algeria and the US nuclear tests in the Marshall Islands was coming to light. As such, the announcement was greeted with considerable concern in the Pacific.

In 1964 and 1965, a group of young university students and lawyers, including Roger Clark, petitioned the New Zealand government to contest the legality of impending French nuclear tests in the International Court of Justice. They argued that New Zealand would have a case against France on a number of grounds: a) that the trans-border impact of the radiation released by the tests infringes on the sovereignty of other countries in the Pacific including New Zealand, b) that the closure by France of sections of the high seas during the tests was in violation of the right of freedom of the high seas; and c) the Partial Test Ban Treaty

prohibiting atmospheric tests had achieved customary status even though France had not yet signed or ratified.

Keith Holyoake, the Foreign Minister of the conservative New Zealand government of the time, replied that this was 'one of the dumbest, stupidest ideas he had ever heard.'[15] However, as the French nuclear tests continued and opposition to them grew, the incoming Labour government of 1972 took a different view and initiated proceedings in the ICJ against France, in conjunction with a similar case lodged by Australia. During the proceedings France announced that it would end its atmospheric nuclear tests (shifting them underground) thus leading the Court to drop the case. [16]

In 1995, New Zealand petitioned the ICJ to re-examine the case on the basis of the French underground testing program. The Court declined to take-up the case. However, as in 1974, the political goal of New Zealand – to end the testing program being challenged – was achieved.

The ICJ case on the threat and use of nuclear weapons

In 1992 a global civil society campaign was launched in Geneva which aimed to achieve an advisory opinion from the International Court of Justice on the legality of nuclear weapons. The World Court Project had been proposed by New Zealand anti-nuclear activists during the dispute between New Zealand and the United States over New Zealand's decision to ban the

[15] Clark 2013/2104, p664.

[16] *ICJ Nuclear Tests (New Zealand* v. *France) Judgement of 20 December 1974* at http://www.icj-cij.org/docket/files/59/6159.pdf.

port visits of nuclear-armed vessels.[17] In 1994 the campaign succeeded in moving the United Nations General Assembly to formally request the ICJ to render its opinion on whether the threat or use of nuclear weapons is in any circumstance permitted under international law.[18]

C.G. Weeramantry, former Vice-President of the ICJ, argues that this is the most important case ever to come before the ICJ.

'*In the historical context of the court, this is the most important case that ever came before the international court. So many countries making submissions, we had witnesses, we had weeks of hearings and deliberations, and it was an issue of importance to the entire history of the world, because my personal view is that the future of humanity depends, to a large extent, on our being able to get rid of nuclear weapons… So certainly in all the--so many decades--of the court's existence, there was never a more important case*.'[19]

Indeed, 44 countries participated in the ICJ advisory opinion through written and/or oral submissions,[20]more than twice the number of countries for any previous case in the history of the court.[21]

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[17] Kate Dewes and Robert Green, Aotearoa / New Zealand at the World Court, Disarmament and Security Centre, Christchurch 1999.
Athttp://www.disarmsecure.org/Aotearoa_New_Zealand_At_The_World_Court.pdf

[18] UN General Assembly request to the International Court of Justice for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, pursuant to UNGA Resolution 69/75K of 15 December 1994, ICJ Documents at http://www.icj-cij.org/docket/files/95/7646.pdf.

19 *NUKE JUDGMENT/ Weeramantry: Small proviso ruins chance to declare nuclear weapons illegal*, Interview with C.G. Weeramantry, Asahi Shimbun, 1 August 2014. At http://ajw.asahi.com/article/behind_news/politics/AJ201408010085.

[20] Participating countries included Australia, Azerbaijan, Bosnia and Herzegovina, Burundi, Colombia, Costa Rica, DPRK, Ecuador, Egypt, Finland, France, Germany, India, Indonesia, Iran, Ireland, Italy, Japan, Kazakhstan, Lesotho, Lithuania, Marshall, Islands, Mexico, Moldova, Nauru, Netherlands, New Zealand, Norway, Papua New Guinea, Philippines, Russia, Rwanda, Qatar, Samoa, San Marino, Saudi Arabia, Solomon Islands, Sri Lanka, Sweden, Uganda, Ukraine, United Kingdom, USA and Zimbabwe.

[21] The ICJ cases which had the next highest number of participating states prior to this case were the 'Apartheid' case (Legal Presence of South Africa in Namibia, 1970) with 12 participating States, the 'Genocide' case (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1950) with 13 participating States. Since the nuclear weapons case, there have been two advisory opinions which have

Roger Clark served as legal agent in the case for Samoa, a Pacific Island close to French Polynesia where France was still conducting nuclear tests at the time. Samoa joined with the Solomon Islands and the Marshall Islands to present compelling factual information on the impact of nuclear tests, and legal arguments against the threat or use of nuclear weapons to the Court.[22] Indeed the conclusion by the Court that '*The destructive power of nuclear weapons cannot be contained in either space or time'* came directly from the testimony of the Marshall Islands that has suffered considerably from the 67 nuclear tests carried out in their territory by the United States. The testimony to the Court from Lijong Eknilang from the Marshall Islands indicates why the small Pacific Island countries were so active in this case.

> *On the morning of 1 March 1954, the day of the "Bravo" shot, there was a huge, brilliant light that consumed the sky. We all ran outside our homes to see it. The elders said another world war had begun. Not long after the light from Bravo, it began to snow in Rongelap. 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.*
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> *My own health has suffered very much, as a result of radiation poisoning. I cannot have children. I have had miscarriages on seven occasions. On one of those*

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also had high numbers of participating States – the Kosovo case (*Accordance with international law of the unilateral declaration of independence in respect of Kosovo, 2008*) with 35 participating States (at http://www.icj-cij.org/docket/index.php?p1=3&p2=4&code=kos&case=141&k=21&p3=0) and the Palestine/Israel Wall case (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2003) with 46 participating States (at http://www.icj-cij.org/docket/index.php?p1=3&p2=4&code=mwp&case=131&k=5a&p3=0).

[22] See Roger Clark, *The case against the bomb*: *Marshall Islands*, *Samoa, and Solomon Islands before the International Court of Justice,* Rutgers University School of Law, 1996.

occasions, I miscarried after four months. The child I miscarried was severely deformed; it had only one eye…

Women have experienced many reproductive cancers and abnormal births. They give birth, not to children as we like to think of them, but to things we could only describe as "octopuses", "apples", "turtles", and other things in our experience. We do not have Marshallese words for these kinds of babies because they were never born before the radiation came.

The most common birth defects on Rongelap and nearby islands have been "jellyfish" babies. These babies are born with no bones in their bodies and with transparent skin. We can see their brains and hearts beating. The babies usually live for a day or two before they stop breathing. Many women die from abnormal pregnancies and those who survive give birth to what looks like purple grapes which we quickly hide away and bury.

My purpose for travelling such a great distance to appear before the Court today, is to plead with you to do what you can not to allow the suffering that we Marshallese have experienced to be repeated in any other community in the world.[23]

The ICJ concluded that 'the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict,' that it could not reach a conclusion one way or the other regarding legality of threat or use in the 'extreme circumstance of self-defence when the very survival of a State is at stake', and that 'there

[23] Lijong Eknilang, oral presentation to the International Court of Justice, 14 November 1995.

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.'

Although this did not rule nuclear weapons as illegal outright, it advanced the legal norm against nuclear weapons in three key ways.

Firstly, it affirmed that the 'threat or use of nuclear weapons should [also] be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law.' Thus, even in cases where nuclear weapon States argue military necessity for the threat or use of nuclear weapons in the extreme circumstance of the very survival of a State, they cannot exempt such threat or use from the restrictions imposed by international humanitarian law. This includes the prohibitions against causing unnecessary suffering, indiscriminate harm, disproportionate harm, damage to neutral states and long-term damage to the environment. Some analysts have argued that this precludes any possible use of nuclear weapons.

Secondly, the decision turns the Lotus principle on its head with respect to nuclear weapons. Prior to the decision, the illegality of specific uses of nuclear weapons had to be proved – something virtually impossible as targeting plans of the nuclear weapon States are classified. Following the decision, any specific threat or use is presumed illegal unless it can be proven to be an exception to the provisions affirmed by the Court. Indeed, a Scottish Court, in hearing a case concerning 'Ploughshares activists' who damaged nuclear weapons equipment at the UK nuclear naval base in Faslane, upheld the activists' defence that the nuclear weapons system was illegal as it included nuclear weapons that could not be used without

violating international humanitarian law, and it was deployed with the weapons ready to be used despite there being no immediate threat to the very survival of the United Kingdom.[24]

Thirdly, the ICJ decision demolishes the conditionality placed on nuclear disarmament by the nuclear weapon States. These States have accepted that they have an obligation under Article VI of the nuclear Non-Proliferation Treaty (NPT) to pursue negotiations on nuclear disarmament. However, prior to the ICJ decision they argued that Article VI also calls for negotiations on a treaty on general and complete disarmament and that progress on nuclear disarmament is thus conditional on progress on conventional disarmament. With the Court demolishing this argument of conditionality, the nuclear weapon States were forced, at the subsequent NPT Review Conference in 2000, to agree to an 'unequivocal undertaking to achieve the total elimination of nuclear weapons.'[25]

International Criminal Court

International law took a big leap forward in 1998 with the adoption of the Rome Statute establishing an International Criminal Court. Despite some flaws in the statute, and some key countries not yet parties, the establishment of the court has enhanced the norm of individual responsibility for crimes against humanity, war crimes and genocide – and provided an international mechanism complementary to national criminal systems – to implement this norm.

[24] See 'Trident disarmers acquitted in Scotland based on the International Court of Justice opinion', John Burroughs, Lawyers' Committee on Nuclear Policy, at http://lcnp.org/wcourt/Gimblett.htm

[25] See, 'U.S. Implementation of the "13 Practical Steps on Nonproliferation and Disarmament" Agreed to at the 2000 NPT Review Conference', Daryl Kimball, Arms Control Association, April 2002, at http://www.armscontrol.org/aca/npt13steps.

A positive feature of the negotiations for the ICC was that small countries and NGOs played just as important a role as the larger, more powerful countries in the negotiations of the crimes and procedures incorporated into the Statute. One exception to this was in the case of nuclear weapons. The initial negotiating draft for the Statute included as war crimes the employment of expanding bullets and chemical weapons (poison weapons, asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices). A number of countries – including Samoa, New Zealand, Mexico and the Philippines – proposed that the employment of nuclear weapons should be included as a war crime. Roger Clark, who represented Samoa in the ICC negotiations, repeated the reference made in by the Solomon Islands to French writer Balzac in the ICJ hearings: 'Is the law like a spider web that only catches little flies. Do the big flies simply burst through?' [26]

> *'Did we mean what we said in Nuremberg and Tokyo when we tried (and hanged) the defeated for war crimes. Does the law apply to us? Just down the road at The Hague the Tribunal for the Former Yugoslavia is gearing up for the first international trials since Tokyo. What is required to be consistent? Is it possible to think that it is illegal to kill one person with a dum-dum bullet or by torture but not hundreds of thousands with a weapon of mass destruction? If so, the law is an ass.'* [27]

The proposal to include specific prohibition of nuclear weapons in the draft Statute was of course unacceptable to the nuclear-armed States (except for India) and those States under extended nuclear deterrence relationships (NATO countries, Japan, South Korea and

[26] Oral statement of the Solomon Islands to the International Court of Justice, 14 November 1995, ICJ *CR 95/32* para 6.

[27] Roger S. Clark, Letters Regarding His Representation of the Government of Samoa in the International Court of Justice (1995-1996), http://www.nylslawreview.com/wp-content/uploads/sites/16/2013/02/Seuss-and-Society.CLE-Materials.full_.pdf.

Australia). In order to enable at least some of these countries to sign and ratify the Statute, the proposal had to be dropped.

However, the criminality of nuclear-weapons-use is covered by other more general provisions in the Statute. This includes Article 8 (b) (iv) of the Statute ('War Crimes') which makes it a crime to intentionally launch '*an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.'*

Following the adoption of the ICC Statute, France attempted to rule out the possibility of nuclear weapons use coming under ICC jurisdiction by adding an interpretative declaration to its instrument of ratification. France stated that the war crimes provisions of the Statute 'relate solely to conventional weapons and can neither regulate nor prohibit the possible use of nuclear weapons nor impair the other rules of international law applicable to other weapons necessary to the exercise by France of its inherent right of self-defence.'

New Zealand responded by adding its own interpretive declaration upon ratifying the Statute, squarely rejecting any nuclear exemption. New Zealand stated that *'it would be inconsistent with principles of international humanitarian law to purport to limit the scope of article 8, in particular article 8(2)(b), to events that involve conventional weapons only… New Zealand finds support for its view in the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons (1996) and draws attention to paragraph 86, in particular, where the Court stated that the conclusion that humanitarian law did not apply to such weapons "would be incompatible with the intrinsically humanitarian character*

of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.'[28]

Clark notes that the use of nuclear weapons might also be covered by Article 6 of the Statute which makes it possible to prosecute those responsible for genocide and various provisions under Article 7 of the Statute ('Crimes Against Humanity') which provides for ICC jurisdiction over acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.[29]

'In the Nuclear Weapons advisory proceedings, some of the anti-nuclear states argued "that the number of deaths occasioned by the use of nuclear weapons would be enormous; [and] that the victims could, in certain cases, include persons of a particular national, ethnic, racial or religious group." They argued, moreover, "that the intention to destroy such groups could be inferred from the fact that the user of the nuclear weapon would have omitted to take into account the well-known effects of the use of such weapons.'[30]

Model Nuclear Weapons Convention

In 1997 the United Nations Secretary General circulated a Model Nuclear Weapons Convention to UN members as a guide to support the implementation of UN General Assembly Resolution 51/45M calling on implementation of the 1996 ICJ Advisory Opinion through negotiations leading to the early conclusion of a nuclear weapons convention

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[28] *International Criminal Court: New Zealand Rejects Nuclear Exemption Claimed by France*, by John Burroughs, Lawyers Committee on Nuclear Policy, Bombs Away, Fall 2000;http://lcnp.org/pubs/Bombsaway!%20fall00/article3.htm.

[29] Roger S. Clark, *The International Criminal Court and Nuclear Weapons*, presentation at a New Zealand/Switzerland sponsored discussion on Nuclear Weapons and International Law, New York, 18 October 2013.

[30] Roger Clark, 2013/2014, p671.

prohibiting the development, production, testing, stockpiling, deployment, transfer, threat or use of nuclear weapons and providing for their complete elimination.[31]

The Model Convention was prepared over nine months by a small group of disarmament experts and international lawyers including Roger Clark. It was modelled to some degree on the Chemical Weapons Convention which prohibits chemical weapons and provides a phased process for the elimination of stockpiles under international verification, implementation and compliance procedures. However the Model NWC also includes additional innovative measures, some proposed by Clark, such as strong individual responsibility measures, criminal law and protection for whistle-blowers.

The Model Convention was revised in 2007, [32] taking into consideration relevant developments over the previous decade, and circulated by the new UN Secretary General Ban Ki-moon as part of his Five Point Plan for Nuclear Disarmament.

Clark notes that although the Model Convention has not yet triggered actual negotiations, the exercise has been useful in outlining the legal, technical and institutional elements required to achieve a nuclear-weapon-free world, and thus shifting from a purely idealistic goal to a practical task-oriented endeavour. It thus 'demonstrates the feasibility and practicality of nuclear disarmament.'[33]

Marshall Islands cases on the nuclear disarmament obligation

[31] *Model Nuclear Weapons Convention*, UN General Assembly Document A/C.1/52/7.
[32] *Revised Model Nuclear Weapons Convention*, UN General Assembly Document A/62/650.
[33] Roger Clark, *The Model Nuclear Weapons Convention*, Tribute to Peter Weiss - Law's Imperative: A World Free of Nuclear Weapons, 2 April 2014. http://lcnp.org/events/04_02_14/Roger%20Clark.pdf.

On April 24, 2014, the Republic of the Marshall Islands (RMI) filed applications in the International Court of Justice (ICJ) to hold the nine nuclear-armed states accountable for violations of international law with respect to their nuclear disarmament obligations under the 1968 Nuclear Non-Proliferation Treaty (NPT) and customary international law. The respondent nuclear-armed states are the United States, United Kingdom, France, Russia, China, India, Pakistan, North Korea, and Israel.

The relief requested is a declaratory judgment of breach of obligations relating to nuclear disarmament and an order to take, within one year of the judgment, all steps necessary to comply with those obligations, including the pursuit, by initiation if necessary, of negotiations in good faith aimed at the conclusion of a convention on nuclear disarmament in all its aspects under strict and effective international control.

Clark, who is a member of the legal team representing the Marshall Islands, is confident that the merits of the case are strong. In the 18 years since the Court concluded unanimously that there "exists an obligation to pursue in good faith and bring to a conclusion negotiations leadings to nuclear disarmament in all its aspects under strict and effective international control," the nuclear-armed States have not even commenced such negotiations, let alone brought them to a conclusion.

On the other hand, if the 1996 advisory opinion did not have much impact on the nuclear-armed States, can one expect a contentious case to do much more? Perhaps Clark summed this up in his reference to the end of the Butter Battle Book where the boy asks his

grandfather how the conflict between the Yooks and the Zooks ended. The grandfather's reply was – 'be patient… we'll see, we'll see.'[34]

[34] Roger Clark, 2013/2014, p672.