

Nuclear Weapons: The Legality Issue

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Soon after becoming United Kingdom Chair of the World Court Project* (WCP) in October 1991, I found fascinating parallels between it and the British campaign to abolish slavery. By chance I discovered the direct descendant of Thomas Clarkson living two miles from me. William Wilberforce is generally credited with having led the antislavery movement. However I quickly learned that, while Wilberforce was the parliamentary champion, Clarkson conceived the campaign and drove it through. In so doing British public opinion was mobilized for the first time on a human rights issue. And despite taking forty-eight years (1785-1833), the campaign succeeded. [1]

What surprised me was that he homed in on the *illegality* of slavery. It all began at St John's College, Cambridge, when he wrote a prize-winning essay on the question: 'Is it lawful to make slaves of others against their will?' In a notoriously cruel world where life was cheap, it was the illegality which finally forced politicians to vote against a system which underpinned the nation's economy. (Incidentally, Wilberforce was MP for Hull – the only major British port not dependent upon the slave trade. Politicians do not change...)

On horseback, without telephone, fax or photocopier, Clarkson toured the country setting up committees in every major city. A million signatures were collected on petitions from a population of less than 20 million, most of them illiterate. Meanwhile the slavers used all the pro-nuclear lobby's arguments: 'a necessary evil', 'cost-effective', 'no alternative', and 'not against the law'.

The WCP is out to emulate the anti-slavery campaign – and the British people seem to like the analogy. Instead of petitions, however, individually signed Declarations of Public Conscience are being collected world-wide and sent to the International Court of Justice, or World Court. These are new, and invoke the 'de Martens' clause from the 1907 Hague Convention, [2] drafted by one of the first Russian writers on international law, Frederic de Martens (1845-1909). The following clause appears in the preamble:

Until a more complete code of the Laws of war has been issued, the high contracting parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the **principles** of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the *dictates of the public conscience* (emphasis added).

** The World Court Project is an international citizens' initiative to seek advisory opinions from the International Court of Justice confirming that the threat or use of nuclear weapons is illegal.*

What this means is that the ‘dictates of the public conscience’ must be taken into account when judging the legal status of a new weapon. Only World Court judges can do that; but ordinary citizens can say whether they think a weapon is *right or wrong* – and these decisions should be linked.

Harnessing public conscience and the law is proving potent again in reining in the same three former great slaving nations – the United States, United Kingdom and France. On 15 December 1994 the WCP had its biggest breakthrough yet. It persuaded the United Nations (UN) General Assembly to ask the World Court for an urgent advisory opinion on the question: ‘Is the threat or use of nuclear weapons in any circumstance permitted under international law?’

Despite desperate countermoves by the three North Atlantic Treaty Organization’s nuclear weapon states (Russia quietly voted with them, while China did not vote), this historic resolution was passed by 78 votes to 43, with 38 abstentions and 26 not voting. The high number of states keeping their heads down shows how controversial it was. For the first time since the creation of the UN almost fifty years ago, the legality of the unwritten qualification for permanent membership of the Security Council had been challenged.

The nuclear cartel have more than that to fear. Their nuclear deterrence policies will now stand trial in the highest court in the world – and the prosecution case is damning. A World Court opinion outlawing nuclear weapon threat or use would not be enforceable. However, nuclear weapons would be given the same stigma as chemical and biological weapons. The Royal Navy would have to review the legality of Polaris and Trident patrols. International pressure would mount for rapid progress to a Nuclear Weapons Convention, using the widely-acclaimed Chemical Weapons Convention as a blueprint. As with the abolition of slavery, behind this lies a story epitomizing Margaret Mead’s words: ‘Never doubt that a small group of thoughtful, committed citizens can change the world. Indeed, it’s the only thing that ever has.’

The Gestation of the WCP

The question of banning nuclear weapons was implicit in the UN’s first resolution, Resolution 1(1) unanimously adopted by the UN General Assembly on 24 January 1946 to establish an international atomic energy commission. This included a clause ‘for the elimination from national armaments of atomic weapons and of all other major weapons of mass destruction’. The Cold War froze out further attempts to act on it. Nevertheless, since 1961 the overwhelming majority of states have regularly voted in the General Assembly that the use of nuclear weapons would be a crime against humanity. For example, in 1992 Resolution 47/53c was adopted by 125 votes to 21, with 22 abstentions and 16 not voting.

In 1969 Sean MacBride, a former Irish foreign affairs minister, senior UN civil servant

and human rights lawyer and winner of the 1974 Nobel Peace Prize while President of the International Peace Bureau (IPB), wrote:

The [1925] Geneva [Gas] Protocol was drawn up before the discovery of atomic power, and today the damage which indiscriminate use of such energy could cause is out of all proportion to military requirements. There is of course the view that no use of nuclear weapons can be justified, and that the total prohibition of such weapons in warfare should form a separate convention or part of a non-proliferation treaty. [3]

He brought his thinking on the problem to fruition in the London Nuclear Warfare Tribunal, which he organized and chaired in 1985, but sadly died before its report was published. [4] The tribunal, which included US international law expert Professor Richard Falk, concluded that ‘current and planned nuclear weapons developments, strategies and deployments violate the basic rules and principles of international law’.

In 1987 MacBride launched a Lawyers Appeal which called for the prohibition of nuclear weapons. It declared that the use of a nuclear weapon would constitute a violation of international law and human rights, and a crime against humanity. By 1992 this appeal had been signed by 11,000 lawyers from 56 countries, including two of the judges at the World Court.

Meanwhile, in 1986 Richard Falk was invited to Aotearoa/New Zealand by its Foundation for Peace Studies to speak on nuclearism and international law. Two years earlier, a Labour government led by David Lange had been elected with a mandate to outlaw nuclear weapons and power in Aotearoa. Harold Evans, a retired Christchurch magistrate, picked up Falk’s idea of a WCP-type approach, and never looked back.

Labour Pains

With supporting testimony from Falk and five other distinguished international lawyers, Evans wrote an open letter to the Aotearoa/NZ and Australian Prime Ministers in March 1987, three months before the New Zealand nuclear-free bill became law. In it he challenged them to sponsor a UN resolution to seek a World Court opinion on ‘the legality or otherwise of nuclear weaponry’. He followed it up with appeals to all 71 UN member states with diplomatic representation in Canberra and Wellington. Australian Prime Minister Robert Hawke rejected the idea, but Lange showed real interest. A long dialogue ensued, strongly backed by the newly-formed Public Advisory Committee on Disarmament and Arms Control (PACDAC). Among other things, this unique body was required by the Nuclear Free Act to monitor implementation of the act. However, it lacked the clout to prevail over reactionary foreign affairs officials on this issue.

Undeterred, Evans set about mobilizing citizen support, especially among anti-nuclear lawyers and doctors. Dr Robin Briant was a PACDAC member. As NZ Chair of International Physicians for the Prevention of Nuclear War (IPPNW), she arranged for him to address them in March 1989, and later that year they passed an Aotearoa/NZ-

sponsored resolution through IPPNW's World Congress.

Meanwhile a PACDAC Peace Foundation representative, Katie Boanas-Dewes, was chosen by the government to be one of two non-governmental organization members of the NZ delegation to the May 1988 UN Special Session on Disarmament in New York. She had worked on peace issues with Evans since 1979, and organized Richard Falk's Christchurch visit.

In his UN speech, NZ Foreign Minister Russell Marshall made a noncommittal reference to the idea; but Boanas-Dewes took her chance when addressing the UN on behalf of Aotearoa/NZ NGOs, saying:

We strongly urge all nations and peace groups to support a move by jurists in New Zealand and other countries to have the International Court of Justice give an advisory opinion on whether or not nuclear arms are illegal. The symbolic power of such a ruling would be immense...

Evans now took his cause to Europe. At its annual conference in Brighton in September 1989, the International Peace Bureau endorsed his strategy. The newly-formed International Association of Lawyers Against Nuclear Arms (IALANA) followed suit a few weeks later at its first World Congress in The Hague. Meanwhile, Sweden's Disarmament Ambassador, Maj-Britt Theorin discussed possible co-sponsorship of a UN resolution with her NZ opposite number Fan Wilde, but Labour lost the 1990 NZ election.

WCP is Born

In March 1991 another Aotearoa citizen arrived in New York, representing NGOs worldwide opposing the Gulf War. Alyn Ware, then a 29 year-old ex-kindergarten teacher and peace activist, approached several UN missions with the WCP idea, and found support. Three months later Boanas-Dewes and IPB Secretary-General Colin Archer had a similar response from eight missions in Geneva. Boanas-Dewes then visited the UK, where she helped mobilize a strong group led by Keith Mothersson which was already working on the idea sown by Evans in 1989. It was Mothersson who organized an obscure meeting in London on 12 October 1991 which I attended as an observer for Just Defence – from which I emerged as the dazed first Chair of WCP(UK)! Plunging into a crash course on international law and the World Court, I soon realized it could be a winner.

The doctors, lawyers and peace activists came together in Geneva for the WCP's international launch in May 1992. An International Steering Committee was formed of representatives of the three principal cosponsoring NGOs (IPPNW, IALANA and IPB) with Boanas-Dewes and myself. Alyn Ware returned to New York as a volunteer with the Lawyers' Committee on Nuclear Policy (LCNP, the US affiliate of IALANA), and later became its Director.

World Health Organization Breakthrough

Just before the May 1992 launch, Dr Erich Geiringer and IPPNW(NZ) masterminded an attempt to table a WCP resolution in the annual assembly of the World Health Organization (WHO). Exploiting IPPNW's excellent contacts in the WHO bureaucracy and member states' health ministries, the move failed mainly because the resolution was not formally on the agenda. Learning from this, support for the resolution was gained in time for it to be tabled properly the next year. On 14 May 1993 the resolution was passed by a big majority despite heavy pressure from the NATO nuclear cartel. It asked the World Court:

In view of the health and environmental effects, would the use of nuclear weapons by a state in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?

After some delay, the question was received by the Court in September 1993.

The World Court and Advisory Opinions

The International Court of Justice, which sits in the Peace Palace at The Hague, is the principal judicial organ of the UN and the supreme tribunal ruling on questions of international law. Its jurisdiction is governed by its Statute, which is an integral part of the UN Charter. [6]

The Court comprises 15 judges drawn from the different legal systems of the world. The UN General Assembly and Security Council simultaneously and independently elect them for nine years

regardless of their nationality from persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juriconsults of recognized competence in international law. [7]

They are under oath to act impartially and conscientiously. They are paid by the General Assembly. As a general practice, however, there are nearly always judges from the permanent members of the Security Council.

The Court's two functions are to decide legal disputes between states (known as contentious cases), and to give advisory opinions. The General Assembly may request an advisory opinion on any legal question. Other UN organs and specialized agencies (such as the WHO) may also request opinions on legal questions arising within the scope of their activities. While advisory opinions themselves are not binding on governments, an advisory opinion on the questions put by the WHO and UN General Assembly would provide a definitive clarification of the law on this issue, and would carry unrivalled authority.

Nuclear Weapons and the Law

International treaties and agreements such as the Hague Conventions, Geneva Conventions, Genocide Convention and Nuremberg Principles prohibit the use of weapons which:

- cause unnecessary suffering to combatants and indiscriminate harm to civilians
- release poison or analogous liquids, materials or devices
- affect neutral states
- cause widespread, severe and long-term environmental damage, or
- are disproportionately destructive compared to the military objective.

Nuclear weapons do all these. Furthermore, chemical and biological weapons, though far less destructive than nuclear weapons, are already prohibited by specific international conventions. However, UN General Assembly resolutions do not have binding force. Hence nuclear weapons states, in justifying their nuclear arsenals, claim that there is no international law which specifically bans nuclear weapons.

Nevertheless, the nuclear weapon states are all parties to the Hague and Geneva Conventions and, apart from China, have affirmed the Nuremberg Principles. They are therefore bound to abide by these conventions and norms. Four of the nuclear weapon states (the United States, Union of Soviet Socialist Republics, France and the United Kingdom) were the principal creators of the Nuremberg Principles in 1946 (China did not vote for the affirmation of the principles in UN Resolution 1 (95) of 1946 because the People's Republic of China did not then occupy the seat). Thus, if the Court decides that the threat or use of nuclear weapons violates these conventions and principles, all parties to them will be bound to recognize this.

Furthermore Article VI.2 of the US Constitution, for example, provides that international law shall be part of 'the supreme law of the land'. In the United Kingdom 'the (customary) law of nations in its fullest extent is and forms part of the law of England'.
[9]

Citizens' Evidence at the Court

The Court normally allows only governments or UN agencies to present evidence. However, in the Peace Palace on 10 June 1994 I was in a citizens' delegation welcomed by the Court Registrar. Representing over 700 NGOs which have endorsed the WCP, we presented a unique collection of documents, including:

- 170,000 Declarations of Public Conscience
- a sample of the 100 million signatures to the Appeal from Hiroshima and Nagasaki
- the 11,000 signature MacBride Lawyers' Appeal Against Nuclear Weapons
- material surveying 50 years of citizens' opposition to nuclear weapons.

In accepting these into the Court archive, the Registrar undertook to draw the judges'

attention to them when considering the case. He took care to point out that they had not been accepted as legal evidence. Nonetheless, it is believed that this is the first time that the Court has accepted material from a citizens' delegation. It indicates that the Court acknowledges the strength of public concern worldwide about the issue.

WCP 22, Nuclear Cartel 9

Taking up the saga from September 1993, the Court allowed states until 20 September 1994 to make submissions on the WHO question. It announced that 35 submissions had been received. [10] This was an unusually large total, and some 26 more than the nuclear cartel wanted. Judge Mohammed Bedaoui, President of the Court, in an address to the UN General Assembly on 13 October 1994, said:

[The WHO] request, raising as it does some serious issues, has prompted much concern in the international community judging by the unusual number of States ... which have submitted written statements to us.

The indications are that only five non-nuclear states (Australia, Finland, Germany, Italy and the Netherlands) made submissions echoing the line taken by the NATO nuclear trio and Russia (China opted out). Of the remainder, 22 argued that any nuclear weapon use would be illegal, one (Ireland) wanted the question answered, and three (Aotearoa/NZ, Japan and Norway) were on the fence. Submitting states received a copy of every other submission, and were given until 20 June 1995 to comment in writing on them. Eight states did so: the United States, Russia, the United Kingdom and France were balanced by India, Malaysia, Nauru and the Solomon Islands.

WCP Challenges Nuclear Deterrence

A major objection by the NATO nuclear states, and the Australian and Aotearoa/NZ governments, was that the UN General Assembly, not the WHO, was the correct forum for the WCP issue. Accordingly Alyn Ware, working with LCNP Co-Presidents Peter Weiss and Saul Mendlovitz, approached several UN missions in New York following the WHO success. Led by Zimbabwe's Foreign Minister, the Non-Aligned Movement (NAM) – 111 of the UN's 185 member states – agreed to table a more ambitious resolution at the 1993 General Assembly disarmament session.

The last week of October 1993 saw a struggle in the General Assembly's First Committee. Zimbabwe, backed by a determined group of South Pacific states, lobbied hard, helped by a WCP team which included Alyn Ware, Katie Boanas-Dewes, Maori elder Pauline Tangiora, Australian QC Edward St John and myself. After some crucial lobbying by Vanuatu's Ambassador Robert Van Lierop, supported by ex-Health Minister Hilda Lini, the resolution was introduced reluctantly by the NAM Chair, Indonesia.

The United States, United Kingdom and France sent delegations to many NAM capitals threatening trade and aid if the resolution was not withdrawn. On 19 November the NAM consensus buckled, and Indonesia announced that action on it had been deferred. However, every UN member government now knew about the WCP, and how it

threatened the privileged position of the nuclear weapon states. [11]

The WCP International Steering Committee, meeting in Geneva in May 1994, held out little hope that the NAM would risk further loss of face by trying again that autumn. Three weeks later a momentous fax arrived. NAM Foreign Ministers meeting in Cairo had decided not just to re-table the resolution, but to put it to a vote! The spotlight then swung across to The Hague and the WHO case until late September. Ware gave hints from New York of a struggle within NAM not to falter. Only Benin decided to oppose it; and the NAM forged on to what must surely be their finest moment so far.

The British government tried to stem the anti-nuclear tide, but showed no sign of having thought through the implications. It had the gall to claim that the resolution risked ‘being seen as a deliberate attempt to exert pressure over the Court to prejudice its response [to the WHO question]... [it] can do nothing to further global peace and security’. The French showed signs of hysteria: ‘It is a blatant violation of the UN Charter. It goes against the law. It goes against reason’ – from the government responsible for the *Rainbow Warrior* atrocity.

Next Steps at the Court

Because the General Assembly question is urgent, the Court received it from the UN Secretary-General within two working days. On 27 June 1995 it announced that 27 states had made submissions on the General Assembly question. [12] The smaller total reflects its greater sensitivity: however, 7 new states made submissions, all of them assessed to be supportive of the WCP (Bosnia, Burundi, Ecuador, Egypt, Lesotho, Qatar and San Marino). Aotearoa/NZ announced that this time it had made a substantive submission, probably arguing for illegality. With Australia failing to make a submission, the WCP effectively held the line by a probable majority of 18 to 8 plus one (Japan) still on the fence. The Court will consider the WHO and General Assembly questions separately but simultaneously. Public hearings will start on 30 October 1995 for 2-6 weeks; and an advisory opinion could be given by the end of the year.

The judges will come under severe pressure from the NATO nuclear states to drop the case because it is ‘hypothetical and political’ and challenges their security policy. Almost any opinion would cause them grave problems.

There have been dire warnings from some cynical commentators. For example, the Wellington *Evening Post* has reported that the US Ambassador to New Zealand, Josiah Beeman, asked: ‘What would happen if the Court ruled they were legal?... Would New Zealand be prepared to be in violation of a decision of the ICJ by keeping tactical nuclear weapons out of your country when the World Court has declared they are legal?’ [13]

Nevertheless, it is certain that the Court will *not* decide that any threat or use of nuclear weapons would be legal. Under existing treaties and conventions, even a gun can be used only in accordance with the laws of war by one combatant against another. And, as already mentioned, in the case of chemical weapons any use of these weapons of mass

destruction is illegal. For biological weapons, any use is condemned in the preamble of the Biological Weapons Convention.

While the definition of threat is open to wide interpretation, at the very least the judges will outlaw any use of all but very low-yield nuclear weapons in tightly constrained scenarios. This will discredit the rationale for deterrence, challenge the legality of (for example) ballistic missile submarine patrols, and highlight the military uselessness of nuclear weapons.

Keeping the Judges Straight

Michael Mansfield QC is a British legal champion of the WCP. He gained fame as the lawyer who had the convictions overturned of the ‘Birmingham Six’ and other Irish people wrongly accused of bombing atrocities. He is convinced that what kept the judges straight was that they knew the public were watching and knowledgeable, and the media were reporting the proceedings. What the WCP has to do is to convince the World Court judges that the world will be watching them, and that media supportive of the WCP cause will report proceedings and understand the arguments. Much will depend on how well the WCP mobilizes public opinion before October. The French threat to resume testing, together with the focus on the 50th anniversary of the founding of the UN, and the atomic bombings of Hiroshima and Nagasaki, will provide a powerful boost.

Ordinary citizens from around the world have persuaded the UN to rattle nuclear deterrence. Now they have to persuade the United States, British and French governments that outlawing nuclear weapons is the golden bridge to a new system of mutual security based on a just, sustainable world order. There will never be a better opportunity.

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