

INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMANITARIAN LAW

I. INTRODUCTION

Two long-standing issues were completed in the course of 2013. In October, New Zealand acceded to the Third Protocol to the Geneva Conventions, paving the way for its entry into force for New Zealand on 23 April 2014.¹ Second, New Zealand acceded to the First and Second Protocols to the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict.² The necessary implementing legislation had been passed in late December 2012, and came into force on 1 July 2013.³ Accession to the Protocols paved the way for entry into force of the Protocols for New Zealand in 2014.

Key developments in the period under review were the conclusion of the Arms Trade Treaty and the continuing work on the humanitarian impacts of nuclear weapons. These are discussed below, as well as a necessarily brief update on the glacial progress regarding the Kampala Amendments to the Rome Statute.

II. ARMS TRADE TREATY

In 2012, the United Nations Conference on the Arms Trade Treaty failed to reach agreement on a treaty text and the General Assembly subsequently decided that a further conference should be convened to continue attempts to agree on a treaty.⁴ That conference took place from 18-28 March 2013 but, despite overwhelming support, the consensus rule of decision-making meant that the treaty could not be adopted (due to opposition by Iran, Democratic People's Republic of Korea and Syria).⁵ A few days later, a group of more

1 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III) 2404 UNTS 261 (opened for signature 8 December 2005, entered into force 14 January 2007), art 11.2.

2 First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 249 UNTS 215 (opened for signature 14 May 1954, entered into force 7 August 1956) [First Protocol]; Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 2253 UNTS 172 (opened for signature 17 May 1999, entered into force 9 March 2004) [Second Protocol]. See Treasa Dunworth "Year in Review: International Humanitarian and International Criminal Law" (2012) 10 NZYIL 245.

3 Cultural Property (Protection in Armed Conflict Act) 2012.

4 *The Arms Trade Treaty* A/C.1/67/L.11 (2012). See Treasa Dunworth "Year in Review: International Humanitarian Law and International Criminal Law" (2012) 10 NZYIL 244 at 246-248.

5 See generally, Stuart Casey-Maslen, Gilles Giacca and Tobias Vestner *Academy Briefing No 3: The Arms Trade Treaty (2013)* (Geneva Academy of International Humanitarian Law and Human Rights, June 2013).

than 90 countries moved the draft treaty to the General Assembly where it was adopted on 2 April 2013, with 154 votes in favour, three against and 23 abstentions.⁶ It opened for signature on 3 June 2013 with New Zealand among the original signatory states.

The treaty is an important instance of humanitarian arms control, with one of its stated purposes being to reduce human suffering.⁷ To that end, it puts in place binding international standards for regulating international trade in conventional arms, as well as measures to prevent and eradicate illicit trade in conventional arms.⁸ “Conventional arms” are defined, for the purposes of this treaty, as including battle tanks, armoured combat vehicles, large-calibre artillery systems, combat aircraft, attack helicopters, warships, missiles and missile launchers, as well as small arms and light weapons.⁹ The treaty also regulates the export and control of ammunition and munitions fired, launched or delivered by these conventional arms,¹⁰ as well as parts and components of such arms.¹¹

Article 6 of the treaty requires that exports of conventional arms, their components and ammunition are prohibited outright when the transfer would breach United Nations sanctions or other international obligations, or where it is known that the arms would be used in the commission of genocide, war crimes or crimes against humanity. For exports that are not prohibited outright, art 7 requires a risk assessment of any planned export as regards the risk that such exports would contribute to or undermine peace and security, or could be used to committed serious violations of international humanitarian or human rights law. There are also provisions regarding transshipment and transit of weapons, as well as brokering.¹²

The treaty requires 50 ratifications for entry into force,¹³ and that is expected to happen in the course of 2014. New Zealand has been a strong advocate for the treaty since at least 2006,¹⁴ and expectations are that it will be among the original states parties. However, before ratification can proceed, the usual international treaty examination processes will need to be conducted as well as considering any legislative amendments that need to be made. New Zealand already has in place a number of export control processes that would cover these treaty obligations, as well as limits on the imports of some weapons pursuant to the Arms Act 1983. A review of those regimes will be needed, along with the required treaty examination process.

6 *The Arms Trade Treaty* GA Res 67/234 B, A/RES/67/234 B (2013).

7 *The Arms Trade Treaty* (opened for signature 3 June 2013, not yet in force), art 1.

8 At arts 6 and 7.

9 At art 2.1.

10 At art 3.

11 At art 4.

12 At arts 9 and 10 respectively.

13 At art 21.

14 See Treasa Dunworth “Year in Review: International Humanitarian Law and International Criminal Law” (2012) 10 NZYIL 244 at 247.

III. HUMANITARIAN IMPACT OF NUCLEAR WEAPONS

The other important humanitarian initiative in the context of weapons is the continuing work on promoting the idea that nuclear weapons should be examined from a humanitarian perspective. This initiative continued to gather pace throughout 2013. From 4-5 March, New Zealand attended the Norwegian hosted Conference on the Humanitarian Impact of Nuclear Weapons. The aim of the Conference was to have a discussion of the humanitarian and developmental consequences of a nuclear weapons detonation. Three key points emerged from the Conference.¹⁵ First, it is unlikely that any state or international body could address the immediate humanitarian emergency caused by a nuclear weapon detonation in an adequate manner and provide sufficient assistance to those affected. Second, the historical experience from the use and testing of nuclear weapons has demonstrated their devastating immediate and long-term effects. Third, the effects of a nuclear weapon detonation, irrespective of cause, will not be constrained by national borders, and will affect states and people in significant ways, regionally as well as globally. In a statement at the closing session, New Zealand stressed that its support of the initiative in no way undermined the Nuclear Non Proliferation Treaty, or any work in the Conference on Disarmament. In fact, the statement explained, discussions about the humanitarian impact of nuclear weapons could assist in implementing the requirement to achieve the goal of nuclear disarmament.¹⁶

On 24 April, New Zealand supported a Joint Statement on the humanitarian impact of nuclear weapons delivered by South Africa to the Second Session of the Preparatory Committee for the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons.¹⁷ On 26 September, Prime Minister John Key addressed the General Assembly's High Level Meeting on Nuclear Disarmament, criticising the slow progress being made on disarmament and welcoming the humanitarian initiative, noting that a second Conference on the humanitarian aspects was to be convened by Mexico early in 2014.¹⁸

New Zealand delivered the Joint Statement on Humanitarian Consequences of Nuclear Weapons to the First Committee of the General Assembly on 21 October 2013.¹⁹ This statement was made on behalf of 125

15 Royal Norwegian Ministry of Foreign Affairs *Chair's Summary Humanitarian Impact of Nuclear Weapons* 4-5 March 2013 <www.regjeringen.no/en> [March 2013 Conference].

16 Statement by New Zealand "Final Session, Conference on the Humanitarian Impact of Nuclear Weapons, Oslo, 4-5 March 2013" (Oslo, 4-5 March 2013).

17 Joint Statement on the humanitarian impact of nuclear weapons delivered by Ambassador Abdul Samad Minty, Permanent Representative of South Africa "Second Session of the Preparatory Committee for the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 24 April 2013" (Geneva, 24 April 2013).

18 Claire Trevett "Key critical of slow pace of nuclear disarmament" *The New Zealand Herald* (online ed, Auckland, 27 September 2013).

19 Joint Statement on the Humanitarian Consequences of Nuclear Weapons delivered by Ambassador Dell Higgin, Ambassador for Disarmament "First Committee of the United Nations General Assembly, 21 October 2013" (Geneva, 21 October 2013).

countries and expressed deep concern about the catastrophic humanitarian consequences of nuclear weapons. The statement welcomed the renewed resolve of the international community to deal with the issue, noting that the only way to guarantee that nuclear weapons would not be used again is through their total elimination. On the same day, Ambassador Higgie delivered New Zealand's own statement to the First Committee and made it clear that the humanitarian approach would remain a priority for New Zealand.²⁰ She stated:²¹

The growing support for the humanitarian initiative reflects a more general impetus to focus on human, rather than state-centric, security. Some, indeed, suggest that this is one of the tectonic shifts between twentieth and twenty-first century thinking – and that in this century it will always be our citizens, and not our State apparatus, that must be put first. Increasingly, then, I think we can expect discussions on the humanitarian consequences of nuclear weapons to be at the core of all future consideration of nuclear disarmament.

IV. KAMPALA AMENDMENTS TO THE ROME STATUTE

In July 2010, the States Parties to the Rome Statute for the International Criminal Court met in Kampala for the first Review Conference of the treaty.²² During that conference, the states adopted a resolution, providing for an amendment to the treaty which defines the crime of aggression and sets out the conditions under which the International Criminal Court would take jurisdiction over the crime.²³ By the end of 2013, 13 states had ratified the amendment, which requires 30 ratifying states as a pre-condition to taking effect.²⁴

In New Zealand, on 5 June, in response to a motion tabled by Kennedy Graham, Parliament urged New Zealand to become one of the founding 30 ratifying states.²⁵ In the course of the year, the Foreign Affairs, Defence and Trade Committee conducted a briefing on the Kampala Amendment, recommending that the Government give priority to New Zealand's ratification of the Amendment.²⁶ Nevertheless, despite these expressions of support, there are no signs that New Zealand intends to ratify the amendment in the near future.

20 Statement by Dell Higgie, Ambassador for Disarmament "First Committee of the General Assembly, 21 October 2013" (Geneva, 21 October 2013).

21 At 1.

22 See Treasa Dunworth "Year in Review: International Humanitarian and International Criminal Law" (2010) 8 NZYIL 214 at 215-216.

23 *The Crime of Aggression* RC/Res 6 (2010). See Treasa Dunworth "Year in Review: International Humanitarian and International Criminal Law" (2010) 8 NZYIL 214 at 216.

24 Following 30 ratifying states, a further vote in favour by a two-thirds majority of the Assembly of States Parties is required, and in any event the amendment will not take effect sooner than 2017: Annex I of RC/Res 6 (2010), above n 23.

25 (5 June 2013) 690 NZPD 10715.

26 Foreign Affairs, Defence and Trade Committee *Briefing on the International Criminal Court and the Kampala Amendment on the Crime of Aggression* (27 September 2013).

The Review Conference agreed on a second amendment whereby three further crimes (all related to the use of weapons in non-international armed conflict) were included in the Statute.²⁷ Ratification by New Zealand of this amendment will require an amendment to the domestic implementing legislation, the International Crimes and International Criminal Court Act 2000, but this should be uncontroversial and straightforward. Nevertheless, although the treaty amendment is now listed on the Treaties Online database, there is no indication that New Zealand is close to ratifying this amendment.

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²⁷ *Amendments to Article 8 of the Rome Statute* RC/Res 5 (2010). See Treasa Dunworth “Year in Review: International Humanitarian and International Criminal Law” (2010) 8 NZYIL 214 at 216.