

INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMANITARIAN LAW

I. INTRODUCTION

The entry into force of the Arms Trade Treaty (ATT) in December 2014 was widely seen as a successful humanitarian initiative, seeking as it does to regulate the international arms trade and in particular reduce illicit arms deals. New Zealand was among the original states parties. New Zealand also remained actively involved in the Humanitarian Initiative – a challenge to reframe discussions around nuclear weapons. Less progress was made in international criminal law, with the Kampala amendments to the Rome Statute apparently languishing domestically.

II. KAMPALA AMENDMENTS TO THE ROME STATUTE

A further seven states ratified the Kampala Amendment on Aggression in the course of 2014, bringing the total number of states to 20 by the end of the year. New Zealand was not among them and indeed, despite the recommendation of the Foreign Affairs, Defence and Trade Committee (FADTC) in 2013 that the Amendment be ratified, and Parliament's urging to do so, no further progress seems to have been made.¹

In January, the Report of the Working Group on the Universal Periodic Review, stated that New Zealand, in the course of its discussions on the Universal Periodic Review, had "confirmed it was a long-standing supporter of the International Criminal Court, and would make a formal decision in the first quarter of 2014 on ratification of the Amendments."² Such a decision was not forthcoming, and furthermore, it is not clear how that prediction equated with the earlier position of the Government that there is no intention to ratify the Amendment until after 2017 (the earliest date by which the Amendment can enter into force).³

In March, the Ministry of Foreign Affairs and Trade, in cooperation with the Global Institute for the Prevention of Aggression, hosted a Workshop in Auckland, the title of which was "Workshop for the Universality of the Rome Statute of the International Criminal Court and the Kampala Amendments on the Crime of Aggression in the Pacific Region". Despite the title of the Workshop, the emphasis in the discussions seemed to be on the Rome Statute, rather than the Amendment. For example, in the Opening Address

1 See Treasa Dunworth "Year in Review: International Humanitarian Law and International Criminal Law" (2013) 11 NZYIL 278 at 281.

2 Human Rights Council *Draft Report of the Working Group on the Universal Periodic Review: New Zealand* A/HRC/WG.6/18/L.1 (2014) at [10].

3 (22 June 2011) 664 NZPD 12009. See art 15 *bis* (2) and (3) and art 15 *ter* (2) and (3) for the entry into force provisions of the Amendment.

by the Hon Judith Collins (then Minister of Justice), there is only a passing reference to the Kampala Amendment.⁴ Similarly, at the end of the year, in the Assembly of States Parties, the New Zealand statement contained only a passing reference to the Amendment and that was in the context of informing the Assembly about the March workshop.⁵

Regarding the weapons amendment, by the end of 2014, 21 states had deposited their instruments of ratification. Once again, New Zealand is not among them. The New Zealand Treaties Online webpage simply lists this as “In Progress”.⁶

III. ARMS TRADE TREATY

The Arms Trade Treaty entered into force on 24 December 2014. New Zealand was among the original states parties, having deposited its instrument of ratification on 2 September 2014. As a strong advocate for the treaty for many years, it was politically important for New Zealand to be among the original states parties and there was therefore a sense of urgency in ensuring our domestic processes were concluded in order to allow ratification to proceed.⁷

With this in mind, the Treaty was referred to FADTC on 17 June and it conducted the treaty examination on 26 June and 3 July 2014.⁸ The Committee recommended that the treaty should be ratified urgently so that New Zealand could participate fully at the first Conference of the States Parties (CSP).⁹ It had been widely anticipated that the 50 ratifications required for entry into force would be reached in the course of 2014, meaning that the first Conference of the States Parties would take place sometime in 2015.¹⁰ Thus, if New Zealand wished to be among the participating states parties at the First Conference of States Parties, time was of the essence. New Zealand’s participation was not simply a matter of political profile – rather, it was anticipated that the First CSP will take a number of decisions that will shape the future of the treaty. An important example of that is deciding on the Rules of Procedure of the future Conference of States Parties, in particular the basis of decision-making

4 Judith Collins “Address to the Workshop for the Universality of the Rome Statute of the International Criminal Court and the Kampala Amendments on the Crime of Aggression in the Pacific Region” (Auckland, 6 March 2014).

5 Statement by Penelope Ridings, International Legal Adviser, Ministry of Foreign Affairs and Trade, New Zealand “New Zealand statement to 13th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court” (New York, 11 December 2014).

6 See <www.treaties.mfat.govt.nz>.

7 See Treasa Dunworth “Year in Review: International Humanitarian Law and International Criminal Law” (2013) 11 NZYIL 278 at 279.

8 Foreign Affairs, Defence and Trade Committee *International treaty examination of the Arms Trade Treaty* (2014).

9 At 2.

10 *The Arms Trade Treaty* (opened for signature 3 June 2013, entered into force 24 December 2014), art 17.

(by consensus, which has proved to have a chilling effect on making any progress in a number of other disarmament fora, or by some form of majority voting). The rules of procedure will also determine the basis of participation by civil society in the future work on the treaty.

The urgency required New Zealand to ratify the treaty prior to the implementing legislation being completed. On one view, this was not a serious deficiency because, broadly speaking, the domestic legal framework was adequate to comply with the obligations that would arise on ratification. However, scrutinising the question of domestic implementation more carefully, the situation is less than ideal. The treaty requires national export controls to be in place.¹¹ To a great extent, these obligations are already captured under existing law, including through the Customs and Excise Act 1996, the Customs Export Prohibition Order 2011 and the operation of the New Zealand Strategic Goods List.¹² While this legal framework is adequate to meet the treaty's requirements, ideally, there would be specific reference to the treaty in domestic law, specifically the requirements of articles 6 and 7 of the ATT (relating to war crimes).

The ATT also requires states parties to regulate the import of and brokering in small arms.¹³ In contrast to the provision dealing with exports (where the treaty's requirements are much more onerous and specific), states have a great deal more latitude in devising their domestic regulatory system. The Arms Act 1983 already regulated the imports of small arms.¹⁴ However, there were some gaps in those systems, particularly as they related to brokering. That being said, because of the permissive language of the treaty, the lack of a more comprehensive domestic framework did not prevent ratification.

With the treaty scheduled to enter into force late in the year, a series of preparatory meetings were held (in Mexico from 9-10 September 2014; and in Berlin from 27-28 November). New Zealand participated in both meetings. With the 50th ratification, the treaty entered into force on 24 December 2014. The first Conference of the States Parties will be held in Mexico City from 24-27 August 2015.

IV. HUMANITARIAN IMPACT OF NUCLEAR WEAPONS

2014 saw the continuing momentum on the Humanitarian Initiative. Having attended the first Conference on the Humanitarian Impact on Nuclear Weapons in Norway in 2013,¹⁵ New Zealand was also an active participant at the second Conference in this series held in Nayarit, Mexico in February. Stressing the consequences of nuclear testing in the Pacific region, New Zealand's statement made clear that the catastrophic consequences of

11 At art 7.

12 Foreign Affairs, Defence and Trade Committee, above n 8, at 8.

13 *The Arms Trade Treaty*, arts 8 and 10.

14 Foreign Affairs, Defence and Trade Committee, above n 8, at 8-9.

15 See Treasa Dunworth "Year in Review: International Humanitarian Law and International Criminal Law" (2013) 11 NZYIL 278 at 280-281.

any nuclear weapons use or detonation means that it is insufficient to simply rely on general principles of international humanitarian law and that it is time “to place the abolition of nuclear weapons on a legally binding, and a durable, basis.”¹⁶

In October, New Zealand delivered the Joint Statement on Humanitarian Consequences of Nuclear Weapons to the First Committee of the General Assembly.¹⁷ This statement was made on behalf of 155 countries and repeatedly stressed the catastrophic effects of a nuclear weapon detonation, noting that no state or international body could address the consequent immediate humanitarian emergency or provide adequate assistance to victims. The statement concluded that the only way to guarantee that nuclear weapons will never be used again is through their total elimination.

In December, New Zealand participated in the third Humanitarian Impact Conference held in Vienna, Austria. As with the earlier conferences in Oslo and Nayarit, the conference again focused on a facts-based analysis of the humanitarian impact of nuclear weapons. New Zealand’s statement to the conference continued to build on the idea that the humanitarian lens gives support to the need to move to a “special regime to abolish nuclear weapons”.¹⁸

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16 Final Statement by Ambassador Dell Higgle, Second Conference on the Humanitarian Impact of Nuclear Weapons, Nayarit, Mexico (13-14 February 2014).

17 Joint Statement on the Humanitarian Consequences of Nuclear Weapons delivered by Ambassador Dell Higgle, Ambassador for Disarmament, First Committee of the United Nations General Assembly (New York, 20 October 2014).

18 New Zealand statement by Ambassador Dell Higgle, Vienna Conference on the Humanitarian Impacts of Nuclear Weapons, Vienna, Austria (9 December 2014).