

## THE INTERNATIONAL CRIMINAL COURT AND NUCLEAR WEAPONS

Roger S. Clark, New York, 18 October 2013 (New Zealand/Switzerland discussion on Nuclear Weapons and International Law)

The law develops in strange ways. It is absolutely forbidden in armed conflict, international or non-international, to use a barbed lance or a poisoned arrow, and as recent events have reminded us, chemical weapons. It is perhaps not yet absolutely forbidden to use nuclear weapons, although the vast majority of those States making submissions in the Nuclear Weapons Advisory Proceedings in the ICJ thought so, as did three of the judges. Various proposals before the Rome Conference on the Establishment of the International Criminal Court would have adopted the views of the dissenting judges and criminalized *per se* the use of nuclear weapons in both international and non-international armed conflict. It was, however, not possible to obtain a consensus to include the absolute illegality of those weapons in the Statute, which thus does not mention them specifically.

That is not the end of the matter. Mexico is to be commended for its lonely efforts to achieve an appropriate amendment to the Statute unequivocally criminalizing the employment of nuclear weapons. Moreover, and this is the basic point I want to stress today, genocide, war crimes and crimes against humanity, the core crimes in the Statute as it now stands, are what I shall call “weapons-neutral”. So too is the crime of aggression, whose ratification is proceeding apace. Those crimes can be effected with simple tools like guns and machetes, or with sophisticated ones like atomic bombs or sarin gas. Existing criminal law, in short, is not totally silent on nuclear weapons. There are many ways in which a prosecutor can formulate a case in the event of their use. What is needed is a careful examination of the substantive elements of the relevant offences and of the contextual features which give rise to jurisdiction in the ICC. Leaders of both aggressor and victim states need to be aware of the potential criminal consequences.

Consider genocide. “Genocide” (Article 6 of the Statute) is defined for the purposes of the Statute to mean any one or more of a list of “acts” committed “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” The acts include: “killing members of the group”; “causing serious bodily or mental harm to members of the group”; and “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”. Nuclear weapons can achieve all of these. Under Article 30 of the Statute, the acts must be committed “with intent and knowledge”. As Paragraph 3 of the General introduction to the ICC’s Elements of Crimes, adopted in 2002, notes: “Existence of intent and knowledge can be inferred from relevant facts and circumstances”. Using an atomic weapon is a powerful “fact” and “circumstance” from which genocidal intent may be inferred. The ICJ itself noted this in its Nuclear Weapons Advisory Opinion. Responding to the argument that the very use of a nuclear weapon would be, in itself, genocide, the Court insisted that the prohibition of genocide would be “pertinent . . . if the recourse did indeed entail the element of intent, towards a group as such...”

“Crimes against Humanity” (Article 7 of the Statute) contains another list of “acts” that are crimes within the jurisdiction of the Court when they are “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. The acts here include “murder” and extermination”. Once again, use of a nuclear weapon is strong circumstantial evidence both of the existence of the “widespread or systematic attack” threshold and of intent and knowledge to kill or to exterminate.

“War crimes” are codified separately in the Statute in respect of international and non-international armed conflict. In the *dispositif* of its Nuclear Weapons Advisory Opinion, the ICJ notes that “the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law”. The Court

insisted that it “shares the view” that “there can be no doubt as to the applicability of humanitarian law to nuclear weapons”. It added:

Indeed, nuclear weapons were invented after most of the principles and rules of humanitarian law applicable in armed conflict had already come into existence; the Conferences of 1949 and 1974-77 left these weapons aside, and there is a qualitative as well as quantitative difference between nuclear weapons and all conventional arms. However, it cannot be concluded from this that the established principles and rules of armed conflict did not apply to nuclear weapons. Such a conclusion 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.

In an interpretive declaration accompanying its ratification of the Rome Statute, New Zealand drew attention to this statement, and added that: “The Government of New Zealand further notes that international humanitarian law applies equally to aggressor and defender states and its application in a particular context is not dependent on whether or not a state is acting in self-defence.”

In international armed conflict, the use of a nuclear weapon could readily fit the category of “grave breaches” of the Geneva Conventions (Article 8 (2) (a)) encompassed by “willful killing”, “torture or inhuman treatment” or “willfully causing great suffering, or serious injury to body or health”. It can equally come within the category “other serious violations of the laws and customs applicable in international armed conflict” (Article 8 (2) (b)), namely such specific items as “intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities”, or “intentionally launching 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”.

The Statute’s list of crimes in non-international armed conflict is not as extensive as that in international armed conflict, although distinctions between the two classes of warfare are slowly collapsing. Nevertheless, a use of nuclear weapons in a civil war could well implicate the prohibition based on Common Article 3 of the Geneva Conventions, namely violence to life and person of those taking no part in hostilities, in particular murder, mutilation, cruel treatment and torture. (Article 8 (2) (c)). Similarly it could come within the category of “intentionally directing attacks against the civilian population as such or against individual civilians not taking a direct part in hostilities” (contained in Article 8 (2) (e) (i) on “other serious violations . . . applicable in armed conflicts not of an international character”).

Fifty years and eight days ago, on 10 October 1963, the Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water entered into force. Its preamble had the parties:

Proclaiming as their principal aim the speediest possible achievement of an agreement on general and complete disarmament under strict international control in accordance with the objectives of the United Nations which would put an end to the armaments race and eliminate the incentive to the production and testing of all kinds of weapons, including nuclear weapons.

As a young man in New Zealand’s Department of External Affairs, I helped draft New Zealand’s instruments of ratification to that instrument. I have never stopped wondering about that paragraph. Was this language mere literary conceit, a stunning example of hypocrisy, or was it a genuine commitment? Be that as it may, the Rome Statute stands as a deterrent and as a pledge that there should be no impunity for those leaders who would dare to again use a weapon the “destructive power of which”, as the Court said, “cannot be contained in either space or time”.