XIV. Disputes

The International Court of Justice Action by Nauru against Australia—Settlement

The *Aust YBIL* 1994, vol 15, pp 652 *et seq*, contains details of the action initiated in the International Court of Justice by Nauru against Australia, and its settlement. Following that settlement, three agreements were concluded between Australia on the one side and Nauru, New Zealand and the United Kingdom on the other, about implementation of the settlement. The following is the text of a press release issued by the Minister for Development Co-operation and Pacific Island Affairs, Mr Gordon Bilney, on 5 May 1994 on the agreement between Australia and Nauru:

> Australia and Nauru will sign an agreement for the implementation of a rehabilitation and development program in Barbados today. (The signing takes place on Friday 6 May at 0800 hours, Australian Eastern Standard Time.)
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> The signatories will be Australia's Minister for Development Cooperation and Pacific Island Affairs, Gordon Bilney, and the President of the Republic of Nauru, Bernard Dowiyogo. Both are currently attending the Global Conference on the Sustainable Development of Small Island Developing States in Barbados.
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> "It is particularly appropriate that this historic agreement should be signed on the occasion of this conference on environmental and development challenges facing small island nations," Mr Bilney said.
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> "The agreement is an excellent example of the growing cooperation between developed countries, such as Australia, and small island developing countries, such as Nauru, in dealing with these important issues.
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> "Australia and Nauru can take pride in the fact that we are now sharing environmental and engineering knowledge, technology and skills in addressing a major environmental challenge," Mr Bilney said.
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> The agreement follows the Compact of Settlement signed in August 1993 by Prime Minister Keating and President Dowiyogo. It covers the rehabilitation of mined-out phosphate land and a range of possible development activities on Nauru, including land use planning, environmental management, agriculture, forestry, housing, and port development.
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> Under the terms of the agreement Australia will provide $2.5 million each year for rehabilitation and other development activities in Nauru for the next 20 years.
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> The first major activity under the agreement will be a joint Australia–Nauru feasibility and design study to determine the best way to rehabilitate the island.
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> The study is due to commence in June and about 20 Australian specialists will be involved in the initial study and planning phase.

Reference to the International Court of Justice on Legality of Nuclear Weapons

There was public discussion in Australia about the attitude which the Government had taken to the value of the reference made by the World Health Organization to the International Court of Justice on the legality of nuclear weapons. The following is the text of a question without notice, and answer by the Foreign Minister, Senator Gareth Evans, in the Senate on the subject (Senate, *Debates*, 2 June 1994, p 1206):

> Senator Margetts—My question is directed to the Minister for Foreign Affairs. I refer him to a speech made in the other place on 30 May 1994 by the honourable member for Moreton, Mr Gibson, who claimed that the minister, in a letter dated 4 May 1994, supports so-called stable deterrence. I ask the minister: firstly, did his party colleague in the other place correctly represent his views? If not, how was he misrepresented? Secondly, how does the government see stable nuclear deterrence operating in the post-Cold War world, especially in light of the Russian and American decisions to stop targeting each other with nuclear weapons? Thirdly, has the government submitted, or will it be submitting, to the World Court a statement on the legal status of nuclear weapons? Will the minister table in the Senate a copy of any such statement? If not, why not? Fourthly, will he also table the letter referred to by his colleague in the other place? If not, why not?
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> Senator Gareth Evans—I am very happy indeed to seek leave to incorporate in *Hansard* that particular letter to my colleague Garrie Gibson to which Senator Margetts refers. I am particularly pleased to do so because the paragraph of that letter referring to stable deterrence makes very clear that our support for that principle is only in the context of managing the nuclear weapon situation until such time as absolute disarmament is achieved. It is something which remains very much our objective. The passage of the letter beginning "In order to manage the possession but non-use of these weapons" to the end of that paragraph in the document, which I seek leave to incorporate, makes that position very clear.
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> Leave granted.
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> *The letter read as follows:*
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> Dear Garrie,
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> Thank you for your letter dated 24 March 1994 concerning the World Court Project on the illegality of nuclear weapons.
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> As you are aware, this government is completely committed to nuclear disarmament and non-proliferation. Australia is amongst the most active countries internationally in promoting these objectives. Apart from our strong support and encouragement for nuclear disarmament negotiations (including the unilateral and bilateral agreements of the recent past between the United States and Russia), we are actively involved in strengthening and extending indefinitely the Nuclear Non-Proliferation Treaty (NPT) and are taking a leading role in the conclusion of a Comprehensive Test Ban Treaty. We are seeking agreement on arrangements against the use of nuclear weapons (Negative Security Assurances) and on the conclusion of a Convention providing for the cut-off of the production of fissionable material for weapons purposes.

Given our strong commitment to nuclear disarmament, evidenced by our promotion of these practical measures, it will come as no surprise that the Government and I, personally, understand very well the motivation of the proponents in calling for an advisory opinion on the legality of the use or threat of use of nuclear weapons by the International Court of Justice (ICJ). There are, however, some rather complex aspects to this question which raise some real concerns in my mind (which I know are shared by many of my colleagues around the world) about seeking such an opinion.

Proponents of the project seem to assume the Court will find that the possession and/or use of nuclear weapons are necessarily illegal. I have doubts about this. I fear that the Court may well rule that certain uses of nuclear weapons may be legal in particular circumstances. These include if the weapons were used for defensive or retaliatory purposes in a manner proportional to the attack and with due regard to discrimination in targeting. The Court could hold that the use of nuclear weapons might be legal as a response to a nuclear attack. The Court's decision could even extend beyond a finding that the use of nuclear weapons might be legal as a response to a nuclear attack only. I do not think that it can be assumed, for example, that the Court would necessarily reject NATO's "flexible response" doctrine, under which nuclear weapons are maintained as an option for responding to an overwhelming conventional attack. I am not certain that such a ruling would assist the cause of nuclear disarmament or move us any closer to the complete elimination of nuclear weapons. Indeed such a finding could complicate the already difficult process of extending the NPT in 1995.

In raising these doubts I am conscious that the legal opinion of key states, which here includes the nuclear weapon states (NWS), is to some extent definitive of international law, and will have to be considered by the Court. The bitter differences of view on nuclear weapon matters between many non nuclear weapon states (NNWS) and the NWS, in the context of NPT review conferences and the negotiation of the 1977 additional Protocol to the Geneva Conventions (where the NWS entered reservations on the applicability of humanitarian law to the use of nuclear weapons), attest to the unlikelihood of a categorical, let alone enforceable, judicial verdict on the matter of nuclear weapons. Nuclear weapon states are likely to make cases to the ICJ justifying their approach. It is for these reasons that I continue to believe that, whatever the ruling of the ICJ, it is unlikely to affect significantly attitudes of the nuclear weapon states to nuclear disarmament, and may, in fact, even have the effect of hardening their policies.

Even a ruling declaring all uses of nuclear weapons illegal could create problems in the disarmament process, which will necessarily be negotiated carefully by the nuclear weapon states within the context of their own security perceptions. In order to manage the possession but non-use of these weapons until such disarmament is achieved, the Australian Government, along with most others around the world, has supported the principle of stable deterrence—that is, a deterrence based on the perception that any first use of nuclear weapons would be met with a sufficiently large retaliation to render unattractive such a first strike. Obviously support for that principle is premised upon acquiescence to possession and the threat of use of nuclear weapons, provided that such possession and threat of use is directed to the purpose of deterrence of the use of nuclear weapons by someone else. I do stress that the Government, while supporting stable deterrence, does so only as an interim measure until nuclear disarmament is achieved.

In summary, given these very complex political, legal and strategic considerations my present view is that it is very doubtful whether the World Court Project will contribute to accelerating movement toward the goal it seeks to achieve. Certainly the range of negotiations taking place currently, in the absence of an advisory opinion, suggests that what you and I would regard as a favourable opinion is not a precondition for nuclear disarmament negotiations. Encouraging progress on these issues is being made in the context of START, in the Conference on Disarmament and in a number of other multilateral and regional forums. Australia, of course, will continue to be a central player in most of these forums.

At this stage, the Government has taken no decision on the questions of whether it will be submitting a written statement to the Court or whether we intend to present argument at any oral hearings. This will be a finely balanced judgment which will take into account the arguments I have outlined above—and also the fact that, for better or worse, legal process is now under way. I will certainly let you know our intentions when a decision is made.

Yours sincerely,

(Sgd) Gareth Evans

Senator Gareth Evans—On the question of the World Court case, as this letter makes very clear, while the government is certainly very sympathetic to the motivations which lie behind the referral of the question of the legality of the use of nuclear weapons to the World Court, we do have strong doubts as to whether consideration by the Court of this question will in fact assist the cause of nuclear disarmament and non-proliferation efforts.

In summarising a very complex set of concerns in just a couple of sentences, let me say this. A finding that the use of nuclear weapons was in fact legal in some circumstances—even if, for example, only by way of retaliation against certain kinds of attack—would in our judgment have very negative implications for the NPT and global non-proliferation objectives, giving considerable encouragement to those who do not share our disarmament aims. On the other hand, a finding that all use was indeed illegal would be in contradiction to the current stated doctrines of all existing nuclear weapons states and, as such—let us face it, in the real world—is quite unlikely to have any effect in practice on their approaches to nuclear disarmament.

World Court decisions are not self-executing. They have to be obeyed, and disobedience would undermine the authority of the court at a time when that authority has never been more badly needed. We think that, on balance, the important negotiations now being constructively carried out through bilateral arrangements and in various multilateral forums will simply not be assisted by the court deciding on the legality question. We will accordingly be submitting to the World Court that it exercise its discretion not in fact to determine the substantive matters at stake. If, notwithstanding submissions of that kind, the court does decide to go ahead and deal with the substantive issues, we have by making such a submission reserved the option of making a substantive submission at a later time on the question of legality.

In relation to the very complex political, legal and strategic considerations involved in considering this matter, what should not be in any doubt is this government's absolute commitment to nuclear disarmament and non-proliferation.

In fact, we are one of the most committed and active governments in the world on this particular issue, and we intend to remain so.

The following is the text of a further question on notice and answer by the Foreign Minister, Senator Gareth Evans (Senate, *Debates*, 23 August 1994, p 122):

Senator Bourne asked the Minister for Foreign Affairs, upon notice, on 4 May 1994:

(1) Is the Government aware of the invitation issued by the International Court of Justice to all members of the World Health Organization, including Australia, for submissions to be made on the legality of nuclear weapons.

(2) Will Australia be making a submission to the International Court of Justice on this matter, if so (a) what is the nature of public consultation which the Government is undertaking as a prelude to making the submission; and (b) is it intended that the Government's submission be made a public document before being presented to the International Court of Justice.

Senator Gareth Evans—The answer to the honourable senator's question is as follows:

(1) The Government is aware of the invitation issued by the International Court of Justice to member states of the World Health Organization, including Australia, to make submissions on the question of the legality of the use of nuclear weapons in armed conflict. An order of the Court dated 13 September 1993 fixed a time-limit of 10 June 1994 for lodging written statements on the question.

(2) After long and careful consideration, the Australian Government lodged a submission with the Court on 9 June 1994 arguing that the Court should exercise its discretion not to proceed with an opinion. I set out the reasoning behind the Government's position in my answer in the Senate to a question without notice by Senator Margetts on 2 June 1994, in which I incorporated the text of a letter on the subject to my parliamentary colleague Garrie Gibson.

(a) The Government's decision was a finely balanced one taking into account very complex political, legal and strategic considerations. There has been considerable interest among community groups and from members of Parliament in this issue, and the Government has taken into account the wide range of arguments put to it by them. I personally and my Department have engaged in dialogue with individuals and representatives of interested organisations through formal consultative mechanisms, such as the National Consultative Committee on Peace and Disarmament, and through extensive correspondence, as well as on an informal basis with interested individuals. In the end, while understanding the motivations behind the WHO referral to the Court of the question of the legality of the use of nuclear weapons, the Government had strong doubts as to whether an advisory opinion of the Court would in fact assist the cause of nuclear disarmament and non-proliferation, or whether it would be more likely to complicate the important disarmament negotiations now taking place.

(b) The Court treats the written statements submitted to it as confidential and will not release them to parties which have not made statements at least until the Court has reached the oral hearing stage. The ICJ is not expected to reach the stage of oral hearings on the WHO referral before the second half of 1995. Accordingly, until that time, the Government does not intend to release its submission as a public document. Nevertheless, the Government has made no secret of its thinking on this case and thus is prepared to provide interested individuals and community groups with further details of the approach in its submission to the Court.