International Criminal Law and International Humanitarian Law

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1 Introduction

The most significant development in 2016, discussed in Part 2 below, was the coming to fruition of the humanitarian consequences of the nuclear weapons initiative – a project that New Zealand has been strongly committed to over the past several years.¹

In contrast, there was a decided lack of progress in international criminal law. Seven years on from the Kampala Review Conference for the International Criminal Court, neither of the two amendments to the Statute agreed at that Conference have been ratified by New Zealand.² The first amendment, which extends the three war crimes relating to weapons (the use of poison or poisoned weapons (art 8(2)(b)(xvii)); the use of asphyxiating, poisonous or other gases (art 8(2)(b)(xviii)); and the use of expanding bullets (art 8(2)(b)(xix))) to non-international armed conflict, is entirely uncontroversial for New Zealand, and is currently in force for 34 states. Despite that, there are no indications that New Zealand is even close to ratification. The second amendment, defining the crime of aggression and putting in place modalities for the Court to operationalise its jurisdiction over the crime, raises more complex issues than its weapons counterpart. It, too, remains unratified by New Zealand and is discussed more fully in Part 3 below.

2 Nuclear Weapons and the Humanitarian Initiative

As 2015 came to an end, New Zealand joined the vote at the United Nations General Assembly to convene an open-ended working group (“oewg”) to “substantively address concrete effective legal measures, legal provisions and

norms that will need to be concluded to attain and maintain a world without nuclear weapons”.

The OEWG was to meet in Geneva in 2016 for up to 15 working days. The resolution had been the culmination of efforts over several years to gain traction on nuclear disarmament using the lens of the humanitarian consequences of nuclear weapons (whether accidentally released or deliberately used) to bring pressure to bear on states to agree to seriously discuss nuclear disarmament.

The precise language of the authorisation from the Assembly was important: New Zealand, for example, had expressed concern that the 2016 meeting would not simply be a repeat of the work back in 2013, that there would be some tangible outcomes and that it would not be simply further discussion. As Ambassador Higgie expressed it in her statement to the General Assembly’s First Committee:

“It is indeed the catastrophic consequences, and increasing risk, of a nuclear weapon detonation which remain the primary motivation for urgent progress on nuclear disarmament. It is New Zealand’s hope that any body – such as an Open-Ended Working Group – to be established by this Committee will have a mandate which reflects the urgency of progress on nuclear disarmament and offers us the real prospect of this.”

The OEWG duly convened for sessions in February, May and August. New Zealand participated fully, including as a member of the New Agenda Coalition and on its own account. As with many other states, attention continued to be drawn to the humanitarian consequences of nuclear weapons. For example, in New Zealand’s second statement, it focused on the long-term harmful effects of nuclear testing in the Pacific and concluded by reflecting that ‘adoption of legally-effective measures to prohibit nuclear weapons would enshrine international humanitarian law and humanitarian values which we hold dear’.

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4 Ibid [5].