

AOTEAROA / NEW ZEALAND AT THE WORLD COURT

By Kate Dewes and Robert Green
Foreword by the Rt. Hon. David Lange



© Kate Dewes and Robert Green, 1999.

AOTEAROA/NEW ZEALAND AT THE WORLD COURT



By Kate Dewes and Robert Green
Foreword by the Rt. Hon. David Lange

THE RAVEN PRESS

Cover photo: Attorney-General Paul East greets World Court Project supporters outside the Peace Palace at The Hague before presenting New Zealand's Oral Submission, 9 November 1995.

Back cover photo: Reproduced by kind permission of New Zealand Post from their November 1997 stamp issue 'Cartoonists'.

Published by the Disarmament and Security Centre,
P O Box 8390, Christchurch, Aotearoa/New Zealand.
ISBN 0-473-05976-2

Typeset in Sabon by The Raven Press
Printed by The Raven Press
Christchurch, New Zealand

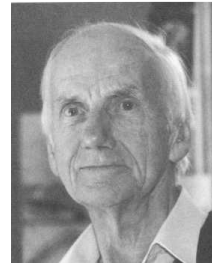
CONTENTS:

Acknowledgements		4
Foreword by David Lange		5
Background to the World Court		6
Introduction		7
Pioneering Initiatives	1945-63	9
Taking France to Court over Nuclear Testing	1970-74	11
Aotearoa/New Zealand Outlaws Nuclear Weapons	1984-87	16
Evolution of the World Court Project	1986-92	20
World Health Assembly Requests an Advisory Opinion	1992-93	26
UN General Assembly Challenges Nuclear Deterrence	1993-94	28
France Back in the Dock	1995	32
Oral Proceedings on Advisory Opinions	1995	35
The World Court's Decision	1996	39
Conclusions		42
Further Reading		44
Acronyms		45

ACKNOWLEDGEMENTS

This booklet is a contribution to the Hague Appeal for Peace Citizens' Centennial Conference 11-15 May 1999. It provides an opportunity for some of Aotearoa/New Zealand's anti-nuclear history, and especially its promotion and utilisation of the World Court, to be shared with the wider community.

Permission to reproduce the photographs, cartoons and other graphics has been generously given by Laurence Clark, Chris King, the Rt. Hon. David Lange, David Morgan, Tom Scott, Garrick Tremain, Alison Quentin-Baxter, New Zealand Post, The Alexander Turnbull Library, National Library of New Zealand, Te Puna Mātauranga o Aotearoa, NZ Herald, The Press, Auckland Peace Squadron, Martin Dunkerton and Pauline Tangiora. We extend thanks to the Peace and Disarmament Education Trust for a grant towards the cost of production. This Trust was established with reparation money from the French Government following the bombing of the Rainbow Warrior. We are grateful to Alyn Ware and Pauline Tangiora for their contributions to the text.



Harold Evans



Alyn Ware

This book is dedicated to Harold Evans and Alyn Ware whose vision, persistence, courage and skills helped to ensure the success of the World Court Project.

FOREWORD

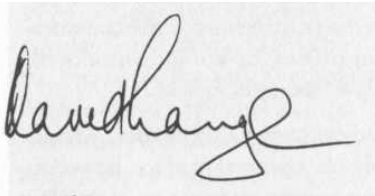
New Zealand is a small country. It is remote. It has to rely on reason and principle. It has no clout save for argument.

New Zealanders yearn for a world which is secure, peaceful and self-sustaining.

The peace following the second world war was soon ruptured by the trespassers from the northern hemispherical nuclear powers who chose to test weapons of mass destruction as conveniently far from their shores as they could.

This publication is a record of the passion felt by a peaceful people who trusted in the rule of law and the eventual triumph of reason. It is a tale of commitment by ordinary people who persuaded governments of both major political parties to pursue the cause before the World Court.

It should give us hope.



David Lange

Prime Minister (1984-89)



The Rt. Hon. David Lange addressing the World Congress of International Physicians for the Prevention of Nuclear War in May 1986.

BACKGROUND TO THE WORLD COURT



The International Court of Justice (known as the World Court), which sits in the Peace Palace at The Hague, is the principal judicial organ of the United Nations (UN) and the supreme tribunal ruling on questions of international law. Its jurisdiction is governed by its Statute, which is an integral part of the UN Charter.

The Court comprises fifteen judges drawn from different legal systems of the world. The Security Council and UN General Assembly elect them for nine years 'regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juriconsults of recognized competence in international law'. (Statute, Article 2)

They are under oath to act impartially and conscientiously (Statute, Article 20), and are paid by the General Assembly. As a general practice, however, there are nearly always judges from the five permanent members of the UN Security Council.

The Court's two functions are to decide legal disputes between states (known as contentious cases), and to give advisory opinions. The Security Council and General Assembly may request an advisory opinion on any legal question. Other UN organs and specialized agencies (such as the World Health Organisation) may also request advisory opinions on legal questions arising within the scope of their responsibilities.

INTRODUCTION

What we want to do is publicise what is happening in this remote part of the world so as to stimulate world opinion still further and attract wider support for the rights of small nations. Prime Minister Norman Kirk (1973)

Aotearoa/New Zealand (A/NZ)¹ is a small, isolated South Pacific state with a population of around 3.5 million people, mostly Maori and European. This booklet highlights the role of New Zealanders in taking two controversial cases to the International Court of Justice (also known as the World Court), to clarify the legal status of firstly atmospheric nuclear testing in the South Pacific, and secondly the threat or use of nuclear weapons.

As a strong supporter of the League of Nations and active participant in the formation of the United Nations (UN), Aotearoa advocated that all states joining the UN should agree to submit any quarrels not solved by other peaceful means to the International Court of Justice (ICJ) and be bound by its decisions. It called on the UN General Assembly to use the World Court's advisory function to help resolve disputes at that time, such as the treatment of Indians in South Africa and the question of Palestine. New Zealand argued that if these questions were referred to the Court, the 'trained minds' could

... sift the chaff from the oats, lay bare the fundamental issues, state the arguments for and against and perhaps establish a set of guiding principles that would help us in making up our own minds.²

Between 1945 and 1995, the United States (US), United Kingdom (UK) and France tested 317 nuclear weapons in Pacific Island states and Australia. In 1973, responding to growing public concern about the health and environmental effects, A/NZ and Australia asked the World Court to challenge the legality of France's atmospheric tests at Moruroa. During the following decade Belau (1979), Vanuatu (1982), the Solomon Islands (1983) and Aotearoa/New Zealand (1984) prohibited nuclear weapons from their territories, and in 1985 the region became the South Pacific Nuclear Free Zone.

In 1986, New Zealand citizens, building on a 40-year history of anti-nuclear activism, initiated what became known as the World Court Project (WCP). This grew into an international movement which succeeded in having both the World Health Assembly (1993) and the UN General Assembly (1994) request advisory opinions from the World Court on the legality of nuclear weapons. On 8 July 1996, the Court attempted to 'sift the chaff from the oats' and 'lay bare the fundamental issues' when it delivered its historic finding that:

... a 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,

and,

... there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to complete nuclear disarmament under strict and effective international control.



ICJ President Bedjaoui announcing the Advisory Opinion. (Photo: Martin Dunkerton)

1. Aotearoa is the Maori name, New Zealand is the European name. Both are official and will be used interchangeably.
2. Ministry of Foreign Affairs, *New Zealand Foreign Policy Statements and Documents, 1943-1957*, Government Printer, Wellington, 1972, pp. 194,104-5, 302-8, 321-323,460-461.

PIONEERING INITIATIVES: 1945-63

We stand for the suspension of nuclear tests, a complete ban on further production of nuclear weapons and the destruction of existing stocks with facilities for inspection in all fields by agreement by the powers concerned.
Prime Minister Walter Nash (1958)³

New Zealanders pioneered support for both the establishment of an International Court of Justice and the banning of nuclear weapons. For example, women from Christchurch - who had led the A/NZ suffrage movement which won the franchise for women in 1893 - advocated 'the establishment of a permanent court of arbitration which shall adjudge the claims of the strongest and weakest States on the basis of equal justice to all', with the backing of an international army 'to act as police and see that all judgments were enforced'.⁴

Possibly the world's first anti-nuclear lecture occurred at the University of Canterbury in Christchurch in August 1945, a few days after the bombings of Hiroshima and Nagasaki. Philosopher Karl Popper - then a lecturer at the University - addressed a packed auditorium with the words: 'When the first atomic bomb exploded, the world as we have known it came, I believe, to an end.' Ironically, this had been the academic home of New Zealander Lord Ernest Rutherford, who had been the first to split the atom and, as late as 1938, had perhaps naively asserted that his discovery could never be used for destructive purposes.

New Zealand's first Hiroshima Day march also occurred in Christchurch in 1947. In 1950 over 20,000 New Zealanders signed the Stockholm Peace Appeal. This called for 'the absolute banning of the atomic weapon', and demanded 'the establishment of strict international control to ensure the implementation of this banning measure'. The Appeal, which collected 650 million signatures worldwide also stated: 'We consider that any government which would be the first to use the atomic weapon against any country whatsoever would be committing a crime against humanity and should be dealt with as a war criminal'.⁵

Members of the general public called for the 'universal prohibition of the manufacture of thermo-nuclear weapons', and a 1956 petition called on the government to promote and foster agreement between the nations to ban further manufacture and testing of nuclear weapons by any nation whatsoever.⁶ However, the conservative government, led by Prime Minister Keith Holyoake, was compromised by its membership of the military alliance with the US and Australia, formalised in the ANZUS Treaty of 1951. In response to the petition

he acknowledged that 'our future safety is bound up with the safety of the great Western nations', and 'the greater risk to New Zealand would be for her to part company with her principal allies'.⁷

So, it was not surprising that the government voted against a 1956 Indiasponsored UN Trusteeship Council resolution calling for a World Court advisory opinion on the legality of atmospheric testing.⁸ However, in 1959, under the leadership of Labour Prime Minister Walter Nash, the government supported a UN resolution condemning nuclear tests, sought a nuclear test ban treaty, and helped develop the world's first nuclear weapon free zone in Antarctica.

In 1960, the newly-elected conservative government stated that A/NZ 'did not contemplate the acquisition of nuclear weapons', but the following year voted against the UN resolution declaring the use of nuclear weapons contrary to the laws of humanity. In 1963, the Campaign for Nuclear Disarmament (CND) organised the biggest petition (80,238) since the women's franchise. With the slogan 'No Bombs South of the Line', it called for a Southern Hemisphere Nuclear Free Zone. A senior Ministry official admitted that although the Foreign Ministry opposed a nuclear free zone, the 'pressure of public opinion and press opinion would probably force the government to protest any confirmed French decision to test nuclear bombs in its Pacific territories...' because 'this is an election year. ...'⁹

3. New Zealand Parliamentary Debates, vol. 318, 1958, p. 1744.

4. Margaret Lovell-Smith, *The Woman Question: Writings by the Women who Won the Vote*, New Women's Press, Auckland, 1992, p.228, p.230.

5. Elsie Locke, *Peace People: A History of Peace Activities in New Zealand*, Hazard Press, Christchurch, 1992, p. 135.

6. Locke (1992), p. 153, p.160.

7. New Zealand Parliamentary Debates, 9 October 1957, p. 2916.

8. J. Stephen Kos, 'Interim relief in the International Court: New Zealand and the Nuclear Tests cases', *Victoria University Wellington Law Review*, no.14, 1984, p. 357-387.

9. Satterthwaite to Sec-State, Mar 2, 1962, 711.5611/3-262, reported in footnote 45 of Chapter 15 in Lawrence Wittner, *Resisting the Bomb: A History of the World Disarmament Movement, 1954-1970*, vol.11, p.557.

TAKING FRANCE TO COURT OVER NUCLEAR TESTING: 1970-74

The Government is also free, in concert with other Governments, to request the United Nations General Assembly to obtain an advisory opinion on the legality of the French action from the International Court of Justice.
Dr D R Mummery (1970)

France carried out 44 atmospheric tests at Moruroa and Fangataufa between 1966 and 1974. The public, increasingly aware of the health and environmental effects and in solidarity with smaller Pacific Island states, formed coalitions across society and explored several visionary initiatives with the government. For example, in 1970, Auckland CND petitioned the government, 'either alone or with other protesting nations, to take action in the General Assembly of the United Nations and the South Pacific Commission on the question of the infringement of human rights and international law by France....'

During presentations to Parliament in support of the petition, Auckland University international law lecturer Dr D R Mummery promoted using the advisory opinion route. He suggested Australia, Japan and Latin American nations bordering the Pacific as potential co-sponsors. However, the Ministry of Foreign Affairs advised against it, warning that it 'would achieve nothing and could work against New Zealand's broader interests'.¹⁰

Nevertheless, persistent public pressure ensured that nuclear testing became an election issue. Government officials acknowledged that the intense activity was 'supported by the churches, by local bodies and community organisations, by trade unions, by student and other youth organisations, and by virtually every other grouping of public opinion in a vigilant democratic society'.¹¹

Auckland CND launched another petition (81,475 signatures), and Peace Media organised an international Peace Fleet to sail to the French test site during 1972. When the French Navy rammed one of the boats, the resultant worldwide publicity and growing international opposition helped strengthen the opposition Labour Party to make resolute anti-nuclear election promises.¹² In a fiery parliamentary debate, their leader Norman Kirk vowed that when Labour became government they would 'run up the New Zealand flag' on one of the country's 'four expensive frigates' and take it to Moruroa to protest the tests; ... 'we will create a situation in which the whole country can unite behind the Government...'.¹³

Prior to the 1972 election, the Foreign Ministry considered using either the advisory opinion or contentious case route at the World Court. 'Soundings' in the UN General Assembly revealed minimal support for an advisory opinion,

and there were fears that France could use its Security Council veto to prevent such an approach. The Foreign Ministry cautioned that, even if a majority were obtained, the Court might decline to give an opinion because 'advisory proceedings are not to be abused as a back-door means of obtaining a decision in a reservation-barred contentious case. And even if the Court gave a favourable opinion, that would not bind France to any course of action'.¹⁴

Although the Court was likely to declare testing to be unlawful, the Ministry had genuine concerns that a contrary opinion would 'adversely affect the way in which the law is ... clearly developing' and 'weaken New Zealand's general political case against France'. They recommended using the UN Committee on the Seabed to 'explore the legal issue and if possible express to the General Assembly the view that it should take further appropriate action on it', such as a request for an advisory opinion.¹⁵

The Australian states of Tasmania, South and Western Australia also researched the legal question and concluded that the Court would have jurisdiction in a contentious case. Both Australasian governments were informed, but did not act until their new Labour governments were installed. In January 1973, Australia told France that 'the tests would be unlawful', and warned that if France did not stop testing it would 'institute proceedings in the ICJ to restrain the conducting of future tests in the Pacific....'

A/NZ's Prime Minister Kirk saw the Court as only one avenue of protest. He hoped to host conferences for the Pacific region and for Commonwealth Foreign Ministers to press for accession by all states to the Partial Test Ban Treaty, and to promote a Comprehensive Test Ban Treaty and South Pacific Nuclear Free Zone.¹⁶

On 18 April 1973, in an effort to harmonise regional opposition, the South Pacific Forum passed a unanimous motion opposing the tests and urging France to abide by its obligations under international law.¹⁷ Later that month the A/NZ Deputy Prime Minister met the French President and the Ministers of Foreign Affairs and Armed Services in an effort to resolve the dispute through diplomatic means. The French government refused to accept that its atmospheric tests involved a violation of international law, and confirmed that as its policy was dictated by the overwhelming requirement of national security, the tests would continue.¹⁸

On 9 May 1973, A/NZ instituted legal action against France on behalf of the Cook Islands, Tokelau and Nuie, as a demonstration of 'our belief in the integrity of treaties and ... the rule of law'.¹⁹ A few days later, it made a

Request for Interim Measures of Protection, including an environmental impact assessment, and a declaration that the tests:

... give rise to radioactive fallout which constitutes a violation of New Zealand's rights under international law, and that these rights will be violated by any further such tests.

Australia sought a similar declaration and an injunction to stop further tests. On 22 June 1973, the Court ruled in favour of hearing New Zealand's case by eight votes to six. Its Order stated that:

The Governments of New Zealand and France should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court or prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case: and in particular, the French Government should avoid nuclear tests causing the deposit of radioactive fall-out on the territory of New Zealand, the Cook Islands, Nuie or the Tokelau Islands.

A similar Order was made in the Australian case and both countries were asked to make written and oral arguments.²¹ Kirk immediately announced that a frigate, with a Cabinet Minister on board, would sail to the test site to mobilise world opinion to help persuade France to comply with the Court's order.²¹ He sent cables to leaders of 100 countries seeking acknowledgement of the Court's decision.²² He reiterated the importance of the rule of law, especially in relation to security threats to small states. Within a week, he farewelled the HMNZS Otago on the official protest voyage saying:

We are a small nation but we will not abjectly surrender to injustice. We have worked against the development of nuclear weapons. We have opposed their testing anywhere and everywhere ...

No self-respecting nation with right on its side can merely acquiesce to the intransigence of others ... Today the Otago leaves on an honourable mission. She leaves not in anger but as a silent accusing witness with the power to bring alive the conscience of the world .²³

AINZ's case was presented at The Hague by Attorney-General Martyn Finlay. France, having refused to appear, defied the Court's interim order and conducted a further series of atmospheric tests. It would have been futile for New Zealand to challenge France's violation of the Court order in the Security Council which has the mandate to enforce international law, because of France's power of veto. Instead Kirk chose to use the frigate protest to garner

international attention and support, and highlight France's violation of the Court Order.

International condemnation of France grew considerably, and, in a move which appears to have been made to prevent a final Court decision against it, France announced that it would cease atmospheric testing, and instead would test underground in the future. In December 1974, the Court decided by nine votes to six, that as a result of France's announcement, 'the claim of New Zealand no longer has any object and the court is therefore not called upon to give a decision thereon'.²⁴

A/NZ was thus unsuccessful in achieving from the Court a determination on the legality or otherwise of French atmospheric testing, but did achieve a major goal which was the cessation of the testing itself. The case established an important legal precedent - in affirming that promissory declarations by states, in this case the promise by France not to resume atmospheric testing, are binding. In addition, the case set an example of how small states can use



The New Zealand legal team at the ICJ in 1974. Left to right: Ambassador Vincent Roberts, Mrs Alison Quentin-Baxter, Mr C E Beeby, Professor K J Keith, Solicitor General Mr R C Savage QC, Professor R O Quentin-Baxter, Attorney-General Martyn Finlay QC.

international law and international institutions such as the ICJ, to provide some protection when their security is threatened by more powerful states.

The Court challenge was a result of the work of citizen groups which, through vigorous campaigning, ensured that nuclear testing in the Pacific became an election issue in the early 1970s. Ideas flowed from ordinary citizens into the decision making process and bolstered the Australasian and Pacific Island governments in their legal challenges against France.

A/NZ demonstrated that politically it was influential enough to give a constructive lead at the Court and in other international fora. Kirk combined the qualities of a strong leader committed to an independent foreign policy with a belief in the responsibility of politicians to reflect strong public opinion by translating that into effective action. He led the transition from traditional dependence on Western military ideology to South Pacific-oriented identity and independent action. This was later consolidated under another Labour government with the passing of the *New Zealand Nuclear Free, Disarmament and Arms Control Act* in 1987.

10. 'Legal move urged against France', *The Press*, 8 October 1970, p.2.
11. Locke (1992), p. 298.
12. Locke (1992), pp. 286-296; Kevin Clements, *Back from the Brink: The Creation of a Nuclear-Free New Zealand*, Allen & Unwin /Port Nicholson Press, Wellington, 1988, pp. 49-87; Elsa Caron (ed), *Fri Alert*, Caveman Press, Dunedin, 1974.
13. Margaret Hayward, *Diary of the Kirk Years*, A H & A W Reed, Wellington, 1981, pP.51-52.
14. Kos (1984), op.cit., p. 363.
15. Ministry of Foreign Affairs Briefing Papers, 1972, pp. 5-7.
16. Kos (1984) op.cit., pp. 364-365.
17. Ministry of Foreign Affairs, French Nuclear Testing in the Pacific: *International Court of Justice Nuclear Tests Case New Zealand v France*, Wellington, 1973, p. 96.
18. *Ibid.*, p. 10.
19. Kos (1984), op.cit., p. 367.
20. Ministry of Foreign Affairs (1973), op.cit., p. 7.
21. Hayward (1981), op.cit., p.143.
22. For detailed responses see Joseph Goldblat, *French Nuclear Tests in the Atmosphere: The Question of Legality*, SIPRI, Stockholm, 1974, p. 4-5; Kos (1984), op.cit., p. 387.
23. Clements (1988), op.cit., p. 80.
24. Quoted in Michael E. Bassett, *The Third Labour Government: A Personal History*, Palmerston North, Dunmore Press, 1976, p. 52.

AOTEAROA/NEW ZEALAND OUTLAWS NUCLEAR WEAPONS: 1984-87

New Zealand is a nuclear -free country. We reject any strategy for our defence which relies on nuclear weapons. New Zealand will not in anyway take part in the nuclear arms race or join in any confrontation between nuclear forces. New Zealand will take no action which suggests that its security depends on nuclear weapons.

Prime Minister David Lange (1986)²⁵

The heady days of the Kirk Labour government were short-lived. Kirk died suddenly in August 1973, before the Court's verdict. However, with his oratory, passion and courage he set a precedent for similar bold actions by his successor, David Lange. Just prior to the 1975 election New Zealand successfully co-sponsored a UN resolution with Fiji and Papua New Guinea calling for a South Pacific Nuclear Free Zone.

With the re-election of a conservative National government, A/NZ's foreign policy reverted to a more subservient, pro-ANZUS position. It abandoned the South Pacific Nuclear Free Zone (SPNFZ) initiative, scorned anti-nuclear sentiment domestically and internationally as being naive and anti-US, and resumed invitations to the US and UK for nuclear warship visits.



Christchurch Peace Collective: Terry Wall, John Boanas, Te Ruru, Kate & Jessie Boanas-Dewes, David Buller, Mia Tay, Anne Findlay & Harold Evans, Hiroshima Day, 1979. (Photo: *The Press*)

During the late 1970s, public anger at the government's defiant promotion of these visits spilled over into waterborne protests by the Peace Squadron, attracting international media interest. People took to the streets demanding a ban on such visits, and in 1980 began declaring homes and schools nuclear free. In early 1982, Christchurch became A/NZ's first nuclear free city.

The organisation of the peace movement was unusual. In the early 1980s it developed into a network of over 300 small neighbourhood groups. They were not bound by political ideology, and they took whatever creative action was appropriate for their particular style. Most activists worked from home within their local community and took responsibility for lobbying their local politicians. This resulted in widespread public participation, and created a degree of accountability in nearly every electorate, to which all political parties became extremely sensitive.

In 1978, 51% of the population had supported visits by US nuclear-powered warships with 39% agreeing to the use of US nuclear weapons in A/NZ's defence.²⁶ By the 1984 election, a clear majority of 58% opposed the visits with 30% in support.²⁷ Over 66% of the population lived in locally declared nuclear free zones. Three of the four main political parties adopted strong anti-nuclear policies in response to this shift in public opinion.

In July 1984, a parliamentary bill, calling for the prohibition of nuclear weapons, attracted support from a few courageous National politicians who threatened to cross the floor to vote with the Labour Party. Rather than face defeat on such a crucial foreign policy issue, Prime Minister Muldoon dissolved parliament and called a snap election. During the election campaign the Labour Party pledged to pass nuclear free legislation outlawing both nuclear weapons and nuclear power, promote a South Pacific Nuclear Free Zone (SPNFZ), and renegotiate the ANZUS agreement to accommodate this. The policy found favour nationwide, and Labour's landslide victory owed much to the anti-nuclear vote.



Marking nuclear free zones on an electorate map. (Photo: *The Press*)

In Australia, a Labour government with a comparable anti-nuclear policy was elected. However, after a rushed review of the policy, the government under Prime Minister Bob Hawke concluded that it was unrealistic, and opted instead to continue the previous government's policy of welcoming its allies' nuclear warships. A/NZ was expected to follow suit.

Despite demotion from US ally to 'friend', curtailment of military cooperation under ANZUS, threats to trade with the US and UK, attempts to destabilise the Labour government and diplomatic ostracism from the Western group, the government held firm. Lange was assisted by a massive mobilization of support by the peace movement in A/NZ and the US. Ironically, the 1985 French bombing of the Greenpeace anti-nuclear flagship *Rainbow Warrior* in Auckland Harbour and the 1986 Chernobyl nuclear power plant explosion helped strengthen public and government resolve. A 1986 Defence Committee of Inquiry opinion poll revealed that 92% opposed nuclear weapons in A/NZ and 69% opposed warship visits; 92% wanted A/NZ to promote nuclear disarmament through the UN, while 88% supported the promotion of nuclear free zones.²⁸

At the same time, the Maori nation was making strong calls for self-determination, and the population was undergoing an identity crisis. Was Aotearoa a small South Pacific state, tied to the region by geography and shared ancestry, or was it still clinging to the apron strings of Mother England - and the US, the saviour in World War II? Was it time to assert some independence



Auckland Peace Squadron confronts nuclear submarine *USS Pintado*. (Photo: Doug Harris)

from Western Allies, including Australia, and to stand beside other vulnerable island states which also saw their security threatened by nuclearism? While the economic threats caused concern because of A/NZ's reliance on trade with its western allies, it was more economically secure than other Pacific Island states. The people looked to David Lange to promote the anti-nuclear policy globally. He was a charismatic, witty orator who spoke with strong moral force. As a lawyer he also understood the importance of underpinning a potentially fragile policy with the law. Moreover, he had earned respect within the peace movement when he had defended activists and Labour politicians in the domestic courts following Peace Squadron actions.

Inevitably the policy, and politicians, came under intense pressure from Western allies. Backed by overwhelming public opinion, Lange bravely expounded on the myths of nuclear deterrence to the international media via his celebrated 1987 Oxford Union debate, the UN General Assembly and the Conference on Disarmament. He argued that the policy was not pacifist nor isolationist, and affirmed the right to democratic process. He asked:

If a country like New Zealand cannot say no to nuclear weapons, what country could ever say no to nuclear weapons? If a country like New Zealand cannot be secure in the absence of a nuclear deterrent, what country can ever be safe without it?²⁹

The Nuclear Free Act was passed in June 1987. Prior to the election, five of the six main political parties had adopted the policy. Although treated with barely-concealed fury by most of its Western allies, Aotearoa/New Zealand won admiration and respect from many non-aligned states for being the first Western-allied state to legislate against nuclear weapons and thereby renounce nuclear deterrence. By 1990, political expediency forced the National opposition to adopt the nuclear free policy. Later, in an attempt to appease the US administration, the government tried to change the Act to allow visits by nuclear-powered warships. This failed, and by the mid-1990s the policy was firmly entrenched across the political spectrum.

25. David Lange, *Nuclear Free New Zealand*, New Zealand Government, Wellington, 1986, p.3.

26. Stephen Levine & Paul Spoonley, *Waging Peace : A study of public and parliamentary attitudes towards peace and security issues*, New Zealand Foundation for Peace Studies, Auckland, 1979, 84pp; Lawrence Jones, 'Cracks in the Consensus: Shifting attitudes to New Zealand Defence', in Roderic Alley, *Alternatives to ANZUS*, Foundation for Peace Studies, Auckland, 1984, pp. 35-50.

27. *NZ Herald*, 'N-armed warships strongly opposed', *The Press*, 6 October 1984.

28. *Defence and Security: What New Zealanders Want: Report of the Defence Committee of Enquiry*, Government Printer, Wellington, 1986.

29. David Lange, 'New Zealand Foreign Policy: The nuclear issue and great power - small state relations', Speech to Yale University, 24 April 1989, p. 5.

EVOLUTION OF THE WORLD COURT PROJECT: 1986-92

There is exhilaration in exercising your independence. It builds up a momentum of its own that raises other important questions. ... It also forces the super power to examine its own place in the world. It starts reflection and dialogue.
Professor Richard Falk (1986)³⁰

Ever since the nuclear age began, there have been serious initiatives to outlaw nuclear weapons by a variety of states and citizen groups within the UN, beginning with the very first UN resolution, adopted unanimously, which called for the elimination of nuclear weapons and all other weapons of mass destruction. These have continued, including UN resolutions declaring the threat or use of nuclear weapons illegal, and attempts to include nuclear weapons in the 1949 Geneva Conventions along with chemical and biological weapons. More recently, resolutions have called for a Nuclear Weapons Convention (NWC). Since the beginning of the Cold War, all of these calls were blocked or resisted by the nuclear weapon states using their economic and political power, including their Security Council veto. A paradox exists where they now accept the illegality of chemical and biological weapons while insisting on their sole right to maintain their nuclear arsenals, thereby sustaining a discriminatory, immoral and destabilising position.

Citizen groups in a number of countries including Japan, Germany, the US, UK, Canada and the Netherlands attempted to challenge the legality of nuclear weapons at a state level through local and national courts.³¹ In the early 1980s International Peace Bureau (IPB) President Seán MacBride, the US Lawyers' Committee on Nuclear Policy and others suggested using the World Court advisory opinion route through the UN General Assembly. However, the first concerted effort to convince governments to sponsor a UN resolution to request such an opinion did not begin until 1986, when retired New Zealand magistrate Harold Evans initiated a campaign which became known as the World Court Project (WCP).

Following US Law Professor Richard Falk's lectures in Christchurch on this theme in June 1986, Evans sent a 100-page Open Letter to the Prime Ministers of Australia and AINZ challenging them to sponsor a UN resolution to seek a World Court opinion on 'the legality or otherwise of nuclear weaponry'. Australia rejected the idea, but David Lange showed interest. Evans followed it up with appeals to all 71 UN member states with diplomatic representation in Canberra and Wellington. Some Non-Aligned Movement states and the Soviet Union (with Gorbachev in power) responded positively.

Within A/NZ a dialogue with government and officials ensued, strongly backed

by the newly-formed Public Advisory Committee on Disarmament and Arms Control, whose mandate was to monitor implementation of the Nuclear Free Act. Among its members were Dr Robin Briant, Chair of the International Physicians for the Prevention of Nuclear War (IPPNW) NZ branch, and Kate Dewes. Early in 1988 Evans addressed the IPPNW (NZ) annual general meeting; and later that year it sponsored a resolution supporting the WCP which was adopted at IPPNW's World Congress.

In May 1988, Dewes was one of two citizen advisers to the A/NZ government delegation to the Third UN Special Session on Disarmament in New York. When addressing delegates on behalf of the peace movement, she said:

We strongly urge all nations and peace groups to support a move by jurists in New Zealand and other countries to have the International Court of Justice give an advisory opinion on whether or not nuclear arms are illegal. The symbolic power of such a ruling would be immense...

She shared Evans' Open Letter with the Lawyers' Committee on Nuclear Policy, IPB representatives and key diplomats from India, Mexico, Sweden and Australia. Her meetings with Rikhi Jaipal (former Indian UN Ambassador) and Swedish Disarmament Ambassador Maj Britt Theorin heralded their influential role in the evolution of the WCP. Jaipal advised that Indian Prime Minister Indira Gandhi had considered taking legal action on the illegality question in 1981. Jaipal later gave astute guidance on the text of the WCP resolution, and how to lobby the UN General Assembly.³²

Spurred on by Evans and the Public Advisory Committee, the A/NZ government began 'seriously considering' the merits of the proposal. However, it would not risk 'going it alone' in the UN and directly challenging the fundamental defence policies of its Western allies. A/NZ was already under intense pressure as a result of the nuclear free legislation. The realities of the Cold War mindset meant this type of initiative was probably doomed from the outset. The earlier foray into the World Court had confronted only one state on one aspect of the nuclear issue. Government officials and politicians were wary of exacerbating already tense relationships by pursuing something which might fail, thereby 'damaging the credibility of the ICJ and the greater cause of nuclear disarmament'. Moreover, at the time they were lobbying for a seat on the UN Security Council.

Although disappointed by the government's decision not to proceed in 1989, Evans and others were undeterred. They began mobilizing citizen support among a wide range of groups. Encouraged by the knowledge that other groups were working along similar lines, and advised by key A/NZ politicians to build up international support, they took their cause to Europe.

Evans attended IPB's annual conference in the UK in September 1989, where his strategy was endorsed. A few weeks later it was adopted at the inaugural World Congress of the International Association of Lawyers Against Nuclear Arms (IALANA) at The Hague. On his way back, Evans met supportive doctors and lawyers in Malaysia during the Commonwealth Heads of Government Meeting there. He sent letters to six sympathetic Commonwealth leaders asking them to work together to sponsor a resolution.

At the end of 1990 National won the election and hopes of a New Zealand-led initiative were dashed. However, in March 1991, another Aotearoa citizen arrived in New York, representing citizen groups worldwide opposing the Gulf War. Alyn Ware, then a 29 year-old kindergarten teacher and peace educator, approached several UN missions and found strong support for the WCP idea. Dr Kennedy Graham, a former NZ diplomat who was then Secretary-General of Parliamentarians for Global Action (PGA), gave helpful guidance. Costa Rica began redrafting Evans' earlier UN resolution, with the intention of co-sponsoring it at the 1992 UN General Assembly. PGA printed articles on the WCP by Australian and Swedish politicians in their newsletters, which went to 600 parliamentarians in over 40 countries.

Three months later Dewes and IPB Secretary-General Colin Archer found similar support in Geneva missions. The idea was seen as non-discriminatory and supportive of the UN Decade of International Law; it complemented moves for nuclear free zones in Africa and the Middle East, and would strengthen efforts to secure a Convention on the Prohibition of Use of Nuclear Weapons. However at least 50 states, including some neutral ones, would be needed as co-sponsors to withstand the severe pressure expected from the nuclear weapon states.³³

At the same time, IPB proposed hosting a WCP launch with the other two endorsing international citizen organisations, the doctors (IPPNW) and the lawyers (IALANA), during IPB's centenary in 1992. Encouraged by this growing support among key countries and civil society, Dewes then visited the UK to meet with a network already working on the idea. In October 1991, Robert Green became Chair of WCP (UK), at a follow-up meeting organised in London by Keith Mothersson.

Mothersson pioneered a key aspect of the WCP's success: harnessing the public conscience and the law. IPB published his ideas in a WCP primer *From Hiroshima to The Hague*. He proposed invoking the de Martens clause from the 1907 Hague Convention, which required the World Court to take account of the 'dictates of the public conscience' when deciding any legal question.³⁴

Following its inaugural meeting, WCP(UK) set up a pilot scheme for the collection of individually signed Declarations of Public Conscience to test public reaction, which was positive, even in a nuclear weapon state. The idea quickly spread to countries with active anti-nuclear movements, including Aotearoa, Australia, Canada, France, Germany, Ireland, Japan, the Netherlands, Norway, Sweden and the US. Declarations were translated into nearly 40 languages.

Article 96 of the UN Charter states that, in addition to the General Assembly or Security Council, other UN organs and specialized agencies may also request World Court advisory opinions on legal questions arising within the scope of their activities. In late 1991, Wellington doctor Erich Geiringer began encouraging IPPNW to spearhead a request to the World Health Organisation's (WHO) annual assembly.

During 1991, with the Cold War over, initial support for the WCP had already been secured from several leading members of the Non-Aligned Movement (NAM), a group of 110 governments. At the Geneva launch of the WCP in May 1992, Zimbabwe, as Chair of the NAM, became the first government to announce its support.

At this meeting, an International Steering Committee (ISC) was formed comprising representatives of the three principal co-sponsoring citizen organisations (IPB, IPPNW and IALANA) plus Alyn Ware and the authors. Ware returned to New York as a volunteer with the Lawyers' Committee on Nuclear Policy (LCNP), the US affiliate of IALANA, to coordinate action on the project at the UN. He was later appointed LCNP's Executive Director.

The ISC focused on promoting an empowerment plan to help mobilize groups globally in support of the WCP. It began to compile an international list of endorsing organizations, and to approach prominent individuals for their support. By 1994 over 700 organizations had signed on, including many City Councils, Greenpeace International, and the Anglican Communion of Primates. Over 200,000 individual Declarations of Conscience had been collected, plus letters of support from the former leader of the Soviet Union Mikhail Gorbachev and South African Archbishop Tutu.



30. *The Press*, 20 June 1986.

31. Kate Dewes and Robert Green, 'The World Court Project: How a Citizen Network can Influence the United Nations', *Pacifica Review*, vol.7 no. 2, 1995, pp. 17-37.

32. Letter from Jaipal to Dewes, 18 May 1991.

33. Report of Meetings with Missions by Dewes and Colin Archer, July 1991.

34. Keith Mothersson, *From Hiroshima to The Hague*, IPB, Geneva, 1992, pp. 143-148.



WORLD HEALTH ASSEMBLY REQUESTS AN ADVISORY OPINION: 1992-93

... the whole psychological tide turned in our favour and there was a palpable energy and feeling that we were going to win after that point. She [Hilda Lini] stepped out of the traditional governmental role and spoke from her heart. She was not speaking just for herself, you could feel many people speaking through her- she had that power of conviction.

Michael Christ, IPPNW Director (1994)



By Folke Nordlinder

Just before the May 1992 WCP launch, International Physicians for the Prevention of Nuclear War (IPPNW) masterminded an attempt to introduce a resolution in the annual assembly of the WHO. The move failed because of lack of time to build up government support, and the resolution was not formally on the agenda. However, within weeks IPPNW had attracted 14 co-sponsors for the resolution, and a significant number of Health Ministers indicated interest.

Following the 1992 World Health Assembly (WHA), IPPNW coordinated an intense and well-organised campaign in every country where it had members; visited Health Ministers and advisers in the four former Soviet states and Africa; made 'soundings' within the WHO bureaucracy, and visited over 20 diplomatic missions in Geneva to shore up support from the 1992 co-sponsors and others. This was complemented by Ware coordinating the lobbying in New York, and by members of the other cosponsors visiting Health and Foreign Ministers in their capitals.

They succeeded in attracting 22 co-sponsors from three key regions - Africa, Latin America and the South Pacific - led by the Health Ministers from Zambia, Mexico, Tonga and Vanuatu (some of whom were also IPPNW members). The resolution requested a World Court advisory opinion on the following question:

In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?

IPPNW organised a strong lobbying team for the effort, led by IPPNW's WHO Liaison Officer, Swedish doctor Ann Marie Janson. It also included George Salmond, a former A/NZ Director-General of Health. Over the years they had amassed insights into the WHO processes and knew many of the delegates. They coordinated meetings with the co-sponsoring countries, prepared comprehensive background papers, countered misinformation and answered

questions as they were raised in committees. Arguments by the NATO nuclear weapon states and their allies that the WHO lacked the competence to ask the question were countered by the fact that the WHO had been investigating the health and environmental effects of nuclear weapons since 1981.

Hilda Lini, Vanuatu's Health Minister and WHO Regional Vice President, proved a successful lobbyist on the inside, encouraging the states under heaviest pressure and keeping in close touch with the IPPNW team. Her speech, a powerful mix of passion and facts delivered from the point of view of a South Pacific Island woman and mother, apparently had a significant impact on the female US Surgeon-General. After intense lobbying by the Western states to block the resolution, countered by a successful ploy by the co-sponsors to invoke a secret ballot, on 14 May 1993 the resolution was adopted by 73 votes to 40, with 10 abstentions.

The question was finally received by the Court in September 1993. States were then invited by the Court to make written submissions on the WHO question, by September 1994. Of the 35 submissions received, 22 argued that any nuclear weapon use would be illegal. The nuclear weapon states (except China, which took no part) and some of their allies argued that the case was inadmissible, and/or that the use of nuclear weapons is not necessarily illegal. IALANA and IPPNW drafted model submissions which some states used in the preparation of their cases. Submitting states were then given until June 1995 to comment on submissions by other states.



Drs George Salmond, Ann Marie Janson and Erich Geiringer at the 1992 WHA.

UN GENERAL ASSEMBLY CHALLENGES NUCLEAR DETERRENCE: 1993-94

The most exciting night in the UN for thirty years.

William Epstein, 15 December 1994

A major objection to the WHO resolution by the NATO nuclear states and the Australian and New Zealand governments was that the UN General Assembly (UNGA) was the correct forum for the issue. Following the WHO success, WCP members encouraged a group of governments to consider co-sponsoring a UNGA resolution. Led by Zimbabwe's Foreign Minister, the Non-Aligned Movement (NAM) agreed to table a more ambitious resolution at the 1993 UN General Assembly. This asked the World Court urgently to render its advisory opinion on the following question: *'Is the threat or use of nuclear weapons in any circumstance permitted under international law?'* In broadening and strengthening the WHO question, it directly challenged the legality of nuclear deterrence doctrine and the privileged status of the nuclear weapon states as permanent members of the UN Security Council.

Support for the resolution and the preparation of legal submissions to the Court were coordinated in New York by Alyn Ware, as the WCP's leading UN lobbyist. A colleague commented: 'His ability to slip into his \$5 suit and tie, take the subway uptown from his cramped office and gain the confidence of hard-bitten diplomats in the Delegates' Lounge in the UN, was wonderful to witness.'

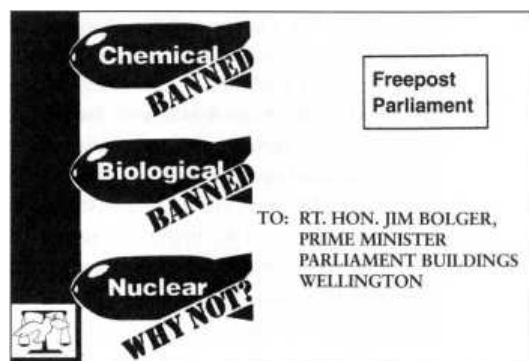
The last week of October 1993 saw a struggle in the UN General Assembly's First Committee. Zimbabwe, backed by a determined group of South Pacific states, lobbied hard. They were helped by a WCP team led by Ware which also included Hilda Lini and Maori elder Pauline Tangiora. The presence of two indigenous women from the South Pacific had a powerful impact on the diplomats of small island states within that region. They treated both women with deep respect because of their senior positions within their tribes.



Hilda Lini

After some crucial lobbying by Vanuatu and others, the resolution was reluctantly introduced by the Chair of the NAM, Indonesia. Peggy Mason, Canada's Disarmament Ambassador, described the reaction: 'Hysteria is not too strong a word to describe the nuclear weapon states' point of view around here.'³⁵ The US, UK and France sent delegations to many NAM capitals threatening cuts to trade and aid if the

resolution was not with drawn. Maj Britt Theorin, a former Swedish Disarmament Ambassador, said: 'During my 20 years experience as a UN delegate, I have never seen such supreme power openly being used as during the fall of 1993.'³⁶ On 19 November, the NAM consensus cracked, and Indonesia announced that action had been deferred. Such action usually signals the death of a resolution - and there was some sentiment to abandon the UN General Assembly approach and concentrate on the WHO question. However the WCP and its key government supporters thought otherwise.



In June 1994, the NAM Foreign Ministers meeting in Cairo were convinced by Zimbabwe to agree not just to re-introduce the 1993 resolution, but to have it put to a vote. The UK and France enlisted Germany, as President of the European Union at the time, to present a broader front of support for their intense opposition to the resolution, and to diffuse accusations of pressure on NAM capitals. The UK claimed that the resolution risked 'being seen as a deliberate attempt to exert pressure over the Court to prejudice its response (to the WHO question) ... (it) can do nothing to further global peace and security.'³⁷ The French showed signs of hysteria: 'It is a blatant violation of the UN Charter. It goes against the law. It goes against reason...'³⁸ - from the government which had authorised the sinking of the *Rainbow Warrior*.

The NAM was not deflected. On 18 November 1994 in the First Committee the resolution was adopted by 77 votes to 33, with 21 abstentions and 53 not voting. Despite being the most radical resolution on the UN's disarmament agenda, China did not vote, Ukraine abstained, and the normally compliant Western caucus of non-nuclear states collapsed. By abstaining, Canada and Norway broke ranks with NATO; Japan and Australia with the US; and Ireland with the European Union along with two prospective neutral non-NATO members Sweden and Austria.

The most serious insubordination, however, was that Aotearoa/New Zealand, despite being led by a conservative government, voted for it - the only Western-allied state to do so. As a Security Council member, this undid at a stroke the progress made by the US to lure the one such state with nuclear free legislation back under Washington's control. The government had been under intense pressure from the peace movement to support the resolution.

Politicians from various parties persisted with parliamentary questions, forced two snap debates and issued press statements. Eight government MPs publicly supported the WCP, while PGA in A/NZ and Australia unanimously supported it. The Minister of Disarmament eventually received over 32,000 Declarations of Public Conscience, Ministers were flooded with letters, faxes and postcards, and many MPs were visited by constituents. Despite strong counter-pressure from the US and UK, including several high-level visits by military and diplomatic personnel, the government upheld the public will, knowing that anything less than their affirmative vote for the resolution could seriously threaten their chances of re-election.

The common theme in this breakdown in Western cohesion was the strength of public support for the WCP. The work to collect Declarations of Public Conscience and other endorsements had borne fruit. However, a decisive factor was probably a carefully focused faxing campaign to capitals of supportive states. In the run-up to the vote, several hundred individual letter-writers worldwide faxed Prime Ministers personally with expressions of gratitude, and encouraged them to withstand any coercion by the nuclear states. In one instance, a South Pacific representative to the UN who had received 'middle level' instructions to abstain was shown a letter from his Prime Minister replying to a WCP correspondent which stated that his government's support for the resolution would stand. On the basis of this the representative not only voted in favour but also spoke, encouraging other countries to support it.

Resolutions adopted by the First Committee are normally confirmed by the General Assembly in a final plenary session, without any noticeable change in votes. However, a UK representative told Ware that NATO intended to 'kill' the resolution. The WCP therefore launched a new faxing campaign, adjusted to capitals of supportive states which had abstained or not voted. In the plenary session on 15 December 1994, there was an attempt to adopt a resolution calling for 'no action', and another trying to remove the word 'urgently'; but both were narrowly defeated. Eventually, the resolution was adopted by 78 votes to 43, with 38 abstentions and 25 not voting, including China.

William Epstein, a distinguished disarmament adviser at the UN, described it as 'the most exciting night in the UN for thirty years'. Yet there was almost no coverage in the major Western newspapers and other news media despite strenuous efforts by the WCP.

Because of the word 'urgently', the World Court received the UN General Assembly resolution within a few days. On 2 February 1995, the Court called for new written submissions by June 1995, and written comments on other states' submissions by September 1995. Eight of the 28 submissions made

were from states which had not responded to the WHO case; this time Aotearoa/New Zealand made a substantive submission, strongly arguing for illegality. The Court then decided to consider the WHO and General Assembly questions separately but simultaneously, with oral presentations during November in The Hague.

Meanwhile, another case on the issue of nuclear weapons had been submitted to the Court, and was heard just prior to the oral presentations on the WHO and UNGA cases.



Prominent endorsers: Mikhail Gorbachev and Pauline Tangiora

35. Mark Schapiro, 'Mutiny on the Nuclear Bounty', *The Nation*, 27 December 1993.
36. Speech by Theorin at a WCP Implications Seminar, New York, 19 April 1995.
37. UK Explanation of Vote on Draft Resolution A/C. 1/49/L.36 'Request for an Advisory Opinion from the ICJ on the Legality of Nuclear Weapons', Agenda Item 62, 18 November 1994.
38. Explanation of Vote by France on Agenda Item 62, 18 November 1994.

FRANCE BACK IN THE DOCK: 1995

...any resumption of nuclear testing in the South Pacific was totally unacceptable and contrary to the legal, environmental, and political developments of the last two decades. Prime Minister Jim Bolger (1996)³⁹

In May 1995, the Non Proliferation Treaty (NPT) was indefinitely extended, following intense lobbying by the Western nuclear states and their allies. Part of the compromise was an agreement by the five nuclear weapon states to complete negotiations on a Comprehensive Test Ban Treaty no later than 1996. Pending its entry into force, the nuclear weapon states agreed to 'exercise utmost restraint'. Also, in line with their commitment to Article VI of the NPT, they would pursue 'systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goal of eliminating those weapons....'

Within two days of the NPT's extension, China resumed testing, and on 13 June 1995 France announced a series of eight nuclear tests. Subsequent to the 1973 World Court case, France had carried out 134 underground tests at Moruroa and Fangataufa. In 1992, both France and China signed the NW and France announced a moratorium on nuclear testing. France justified resuming tests by claiming that, as a permanent member of the Security Council and a nuclear weapon state recognised by the NPT, she had 'special responsibilities, and particularly the right to maintain her deterrent at a credible level ..'⁴⁰ The UK had also cited the NPT as the legal justification for continued possession.⁴¹ This had reinforced Non-Aligned Movement (NAM) concerns that the response of the nuclear weapon states to the NAM's UN resolution revealed 'their true intentions regarding the permanence of nuclear weapons' under an extended NPT.⁴² Yet, the chief US negotiator had stated:

While the NPT reflects the reality that five nuclear-weapon states existed in 1968, it does not legitimize the permanent possession of nuclear weapons.⁴³

As in the early 1970s, South Pacific populations were outraged at the renewed testing, and took every possible action to influence world opinion. Again citizen groups created the climate to allow politicians to act. In July 1995, Greenpeace sent *Rainbow Warrior II* and other boats to France's test site to try to stop the tests. The screams of New Zealander Stephanie Mills, reverberating as French commandos stormed the control room, became a 'wake-up' call to the world. Moreover, this happened on the tenth anniversary of the French bombing of the *Rainbow Warrior* in Auckland. The whole country erupted in strong and creative protests, demanding immediate and radical political action from the government. Within days Prime Minister Jim Bolger, heading a minority government, agreed to send a naval vessel with politicians aboard to Moruroa to accompany an A/NZ

peace flotilla. In addition, he recalled the Ambassador from France and announced a freeze on all military contact, including arms purchases.

Following a unanimous parliamentary resolution condemning the tests, Bolger announced that the government was considering reopening the 1973 World Court contentious case against France. He also indicated that UK Prime Minister John Major would be under pressure at the Commonwealth Heads of Government Meeting in Auckland in October that year because he had refused to criticise France.⁴⁴

Emulating Norman Kirk, Bolger sent letters to over 100 world leaders, and politicians from various parties presented A/NZ's concerns in various international fora, calling strongly for nuclear abolition. Bolger criticised nuclear deterrence and called for a Nuclear Weapons Convention, like the widely-acclaimed enforceable global treaty banning chemical weapons.

Australian Prime Minister Paul Keating was initially scathing about A/NZ's attempt to reopen the Court case, calling it 'cosmetic'. However, following Bastille Day (14 July) marches of 20-30,000 in Sydney, 3,000 in Perth and elsewhere, accompanied by radical actions by trade unions, both he and Foreign Minister Gareth Evans reviewed their positions. Evans had endured a great deal of hostility from the public following his initial statement that 'things could have been worse', indicating that the tests were underground, finite in number and linked to a commitment by France to sign the C1BT once concluded. When polls showed 95% opposed the tests and 61% viewed the government's protests as too weak,⁴⁵ Evans changed his position and on Nagasaki Day (9 August) announced support for A/NZ's World Court case. Keating then declared that Australia would also make 'an oral submission condemning the tests at a separate hearing before the Court into the legality of nuclear weapons'⁴⁶ Elections were due in March 1996, and the government desperately needed the youth and green votes.

The Australasian Prime Ministers explored linking all existing or potential Nuclear Free Zones to create a Southern Hemisphere Nuclear Free Zone,⁴⁷ and coordinated their efforts at the South Pacific Forum in August, where 16 nations drafted a UN resolution condemning the tests. France later responded by offering aid to disgruntled Pacific states, reducing the tests to six, and signing the protocols to the South Pacific Nuclear Free Zone Treaty.

In 1974, the Court had held that 'if the basis of the judgment were to be affected', A/NZ could return and request an 'examination of the situation'. The 1995 case was therefore based on justifiable concerns regarding the environmental risks of ongoing French tests, and appealed for an interim injunction to stop the tests. On 21 August, A/NZ, supported by Australia, the Marshall Islands, the Federated States of Micronesia, Samoa and the Solomon Islands, filed the requests. France replied that the Court had no jurisdiction, but attended oral hearings in

September. On 22 September, the Court rejected the requests by 12 votes to 3 on technical grounds, noting that the 1974 Judgment had dealt exclusively with atmospheric testing.⁴⁸

Although the A/NZ government had known it was unlikely to succeed with the Court case, it took the risk to appease domestic angst and give the issue international prominence. It succeeded in strengthening the resolve of South Pacific states, and provided a preliminary run at the Court. Two months later the Marshall Islands, Samoa and the Solomons again worked closely together, this time coordinating their oral presentations at the public hearings on the WHO and UN General Assembly questions.



Bolger goes to the World Court, August 1995

(Courtesy Laurence Clark and Alexander Turnbull Library D-P244008-H)

39. *New Zealand at the International Court of Justice: French Nuclear Testing in the Pacific: Nuclear Tests Case, New Zealand v. France* (1995), Ministry of Foreign Affairs and Trade, Wellington, 1996, p.7.
40. Letter from the French Ambassador to the UK to George Farebrother, 16 June 1995.
41. Letter from UK Minister David Davis to Austin Mitchell (MP), 11 December 1995.
42. Mark Schapiro, 'Mutiny on the Nuclear Bounty', *The Nation*, 27 December 1993.
43. Statement by Thomas Graham to NPT Preparatory Committee Meeting, Geneva, 1994, published in *Acronym*, no. 4, p.28.
44. Graham Barrett, 'UK eyes nuclear testing in Pacific', *The Age*, 5 July 1993.
45. Reported in Kate Dewes, 'Update from Aotearoa re French Tests', 7 July 1995.
46. *The Press*, Christchurch, 9 August 1995.
47. 'French may cut back on tests', *NZ Herald*, 7 August 1995; 'N-test protest to world court', *NZ Herald*, 7 August 1995.
48. Ministry of Foreign Affairs and Trade, (1996), op. cit.; 'A loss at the World Court', *The Press*, 24 September 1995; 'World Court refuses to reopen French test case', *NZ Herald*, 23 September 1995.

ORAL PROCEEDINGS ON ADVISORY OPINIONS: 1995

At the outset I would like to acknowledge groups and individuals from New Zealand, some of them present here today, who worked so hard and played a major role in bringing this matter before the Court.

Attorney-General Paul East (1995)

For two weeks in October-November 1995, the Peace Palace in The Hague was host to one of the most momentous events in history. The governments of the US, UK, France, Russia, Germany and Italy stood before the 14 World Court judges in an attempt to uphold their 'right' to threaten or use nuclear weapons. They were countered by 14 other governments who condemned such policies as illegal and immoral. The hearings were unprecedented both in terms of government participation and public interest.

Back in 1994, the World Court Registrar had received a citizens' delegation in the Peace Palace representing over 700 citizen groups which had endorsed the WCP. The delegation had presented a unique collection of documents, including over 170,000 Declarations of Public Conscience, a sample of the 100 million signatures to the Hiroshima and Nagasaki Appeal, 11,000 signatures to the MacBride Lawyers' Appeal Against Nuclear Weapons and material surveying 50 years of citizens' opposition to nuclear weapons.



Keith Mothersson and Japanese delegates with 4 million declarations (Photo: M. Dunkerton)



Lijon Ekniliang

Before the Court's public hearings began on 30 October 1995, another citizen delegation presented nearly 4 million more Declarations, over 3 million of them from Japan. A team from IALANA offered on-the-spot legal advice to supportive government delegations. For the first time, citizen witnesses addressed the Court and confronted the judges with the horrific situation of the victims of nuclear weapons. After strong public pressure, the Japanese government allowed the Mayors of Hiroshima and Nagasaki to testify. Their presentation included huge photographs of the effects, and was accompanied by the muted sobs of the *hibakusha* (surviving victims) present. Then Lijon Ekniliang

from the Marshall Islands described the inter-generational effects of the US tests in 1954. Women gave birth to '..."jellyfish" babies: these ... are born with no bones in their bodies and with transparent skin. We can see their brains and hearts beating ...' Dressed in white with a wreath of flowers in her hair, she held the Court spellbound.

The nuclear weapon states argued that the Court should decline to consider the questions asked by the WHO and UNGA as they related to 'political' issues of peace and security, not legal questions. They also argued that, if the Court did consider the merits of the questions, it should affirm that the threat or use of nuclear weapons is no different in legal terms from any other weapon, and that 'all weapons kill and wound'. The UK claimed that nuclear weapons were necessary in order to prevent... subjection to conquest which may be of the most brutal and enslaving character'. The US claimed that '... nuclear deterrence has saved many millions of lives from the scourge of war', and that advocates of illegality were attempting to get the Court to 'recognise phantom legal norms'.

These arguments were soundly countered by states arguing against nuclear weapons, including New Zealand. Most of these states argued that the threat or use of nuclear weapons would violate existing laws. These prohibit the use of weapons or methods of warfare which fail to discriminate between military targets and protected civilians, or which use poisonous materials, violate neutral territory, cause unnecessary suffering, are disproportionate to the provocation, or cause long term damage to the environment.

As the A/NZ government delegation arrived to deliver their oral presentation, they shook hands with WCP supporters holding a huge rainbow banner proclaiming 'Nuclear Free Aotearoa/New Zealand' outside the Court's gates. Attorney-General Paul East began his presentation by acknowledging the role of New Zealand citizens in the WCP. This reflected the partnership which had

developed between government and citizens despite a decade of intense, and at times acrimonious, debate.

The government's firmly anti-nuclear submission on the General Assembly question showed a decisive shift from its WHO submission. This was significant bearing in mind the National government's earlier history of support for nuclear deterrence, efforts to undermine the Nuclear Free Act and resistance to the WCP.

A/NZ claimed that 'we have made every endeavour to make our part of the world nuclear free'. The statement was unequivocal in arguing that the answer to the UNGAs question 'should be no: the threat or use of nuclear weapons should no longer be permitted under international law.' The same government which had earlier welcomed nuclear warships no longer had illusions about nuclear deterrence: 'If ever used, (nuclear weapons) would most likely ensure the destruction, not the maintenance of the security, of the user ... The threat that the weapons represent hangs over the security of the whole international order.'

It concluded by stating that 'a declaration of illegality would serve as a powerful further step to the elimination of nuclear weapons ... The Court needs to play its part in helping to set the scene for that to happen ... The potential consequences of failure, for all humanity, are too great to contemplate.'

A/NZ was supported by very strong written and oral presentations by the Marshall Islands, Samoa and the Solomon Islands. The Marshall Islands demonstrated that the negative effects of the detonation of a nuclear weapon cannot be contained in time and space. The Solomon Islands argued that no existing nuclear weapon could be used without causing unnecessary suffering, indiscriminate effects on civilians and damage to neutral states, any one of which would make such use illegal. Samoa countered the UK's criticism of non-governmental organisation (NGO) involvement in the Court case by asserting that 'the UN



Paul East and Jim Bolger taking France to the World Court, 1995.

(Courtesy Garrick Tremain)



(Courtesy Laurence Clark and Alexander Turnbull Library D-P314007-H)

Charter ... takes NGOs seriously.'

Australia had been the first country to testify, and Foreign Minister Gareth Evans caused a sensation when he challenged Western nuclear doctrine by arguing that not just the threat or use, but every aspect including testing and even possession, of nuclear weapons is inherently illegal.

Apart from French tests, an important reason for both governments' strengthened antinuclear positions was growing awareness of the need to support their neighbours. In particular, Australia was secretly negotiating a security pact with Indonesia, which had been Chair of the NAM when the General Assembly resolution had been put to a vote. Also, 10 states were establishing a South East Asian Nuclear Weapon Free Zone along with creation of a similar zone in Africa, effectively making most of the Southern Hemisphere nuclear free.

UK support for French testing, exemplified by Major's intransigence at the Commonwealth Heads of Government Meeting, and imminent elections were significant factors in both countries. Australia eventually chose to side with its neighbours, despite being host to several important US bases and a leading supplier of raw materials for the nuclear weapons/energy industry from uranium and mineral sands mining.

The WCP played an important part in promoting debate on these issues. It provided a forum for the non-nuclear majority of states to challenge the status quo that had threatened to persist following indefinite extension of the NPT. Also, governments; of the Western nuclear states were forced to defend the legality of their nuclear deterrence policies in a court. The end of the Cold War had initially eased people's concerns about nuclear weapons. The WCP helped to revive public opinion against them. For certain Western non-nuclear states, especially A/NZ and Australia, this made them publicly distance themselves from their nuclear allies.

Through the WCP, a sound working relationship developed between NGOs and other anti-nuclear governments, which was to prove most valuable in follow up to the ICJ decision. Most importantly, it led to an historic decision from the Court which has had considerable impact globally.

THE WORLD COURT'S DECISION: 1996

The Court lived up to its historic challenge by responsibly addressing the momentous question posed by the General Assembly about the legal status of a threat or use of nuclear weapons.... As with other normative projects, such as the abolition of slavery and the repudiation of apartheid, perseverance, struggle and historical circumstance will shape the future with respect to nuclear weaponry, but this process has been pushed forward in a mainly beneficial direction by this milestone decision of the World Court.

Professor Richard Falk⁴⁹

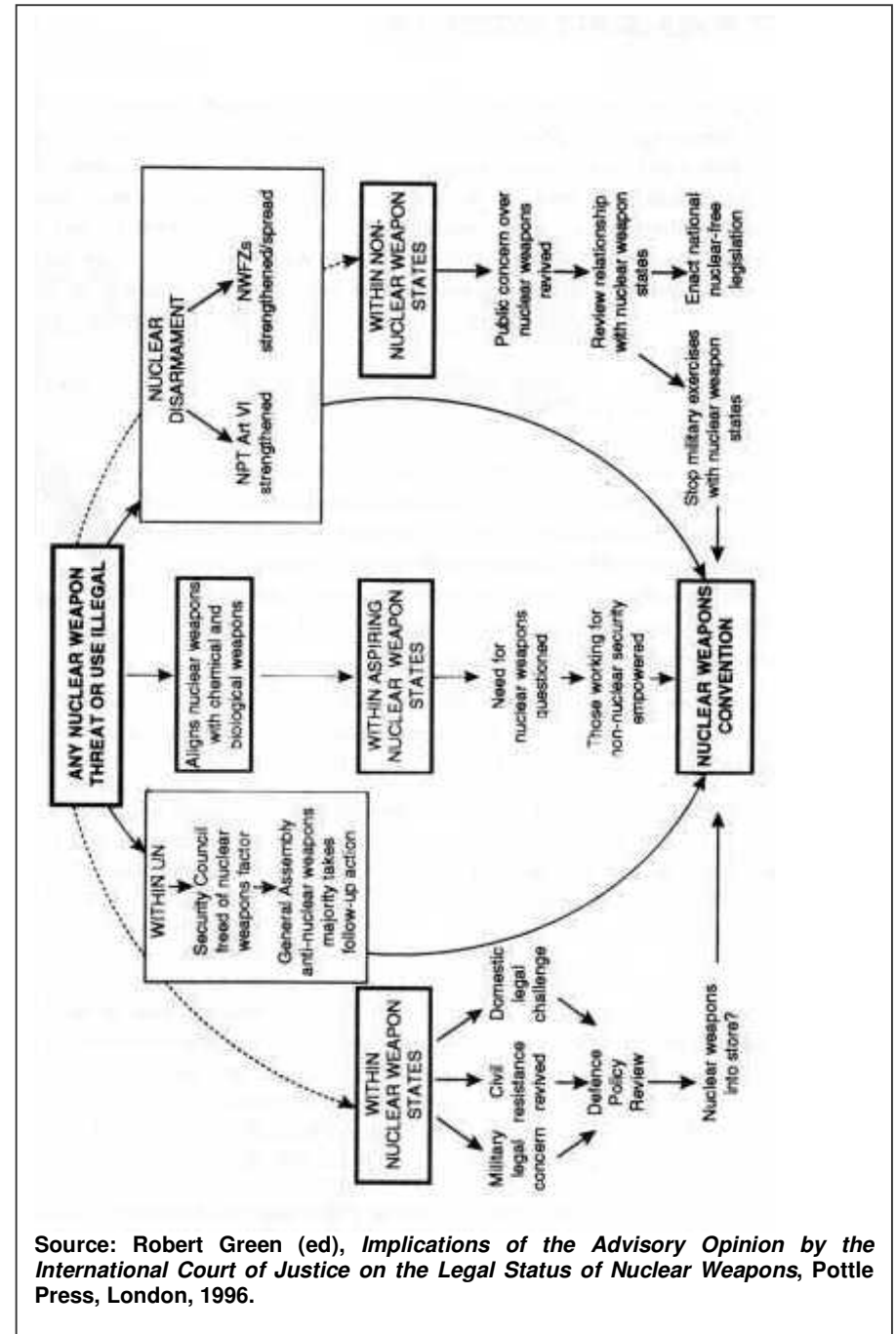
On 8 July 1996, the International Court of Justice delivered its findings on the two questions before it on the legal status of nuclear weapons. The Court did not give an advisory opinion on the WHO question, because it judged that the question did not arise within the scope of the WHO's responsibilities. However, it relied upon the WHO's evidence of the health and environmental effects of nuclear weapons for both questions. Moreover, the WHO's request had prepared the ground for the broader and deeper General Assembly question.

On the latter question, it gave a 34-page main Advisory Opinion followed by over 200 pages of individual statements and dissenting opinions by the 14 judges (one died just before the oral proceedings began).

In a crucial subparagraph, the Court decided that 'a 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.' In doing so, it confirmed that the Nuremberg Principles apply to nuclear weapons.

It added a caveat: 'However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.' Nonetheless, even in such an extreme case, threat or use must comply with the principles and rules of humanitarian law. Also, the Court treated threat and use as a single, indivisible concept.

Finally, the judges unanimously agreed that 'there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.'



Source: Robert Green (ed), *Implications of the Advisory Opinion by the International Court of Justice on the Legal Status of Nuclear Weapons*, Pottle Press, London, 1996.

For such an historic event, media coverage in Western Europe and North America was suspiciously sparse, superficial and, at times, inaccurate. However, in A/NZ and Australia it was reported extensively, reflecting the high level of public interest. The positive responses from the two countries which Harold Evans had approached a decade earlier were in marked contrast to their opposition to the case until 1995. Australia's Foreign Minister Evans claimed the Advisory Opinion would 'drive Australia's push to eliminate the world's nuclear arsenal' and 'help very much the role of the Canberra Commission'.⁵⁰ A/NZ's Prime Minister Bolger hailed it as a 'tremendous victory... a watershed decision... (which) vindicated the anti-nuclear crusade'. Almost immediately he announced strong support for a Fissile Material Cut-Off Treaty. In South Africa on Hiroshima Day 1996, he and Nelson Mandela signed a Disarmament Memorandum including a proposal to establish a Southern Hemisphere Nuclear Free Zone.⁵¹

The Advisory Opinion has become an extremely useful tool for both governments and the peace movement. Following the decision, the UNGA adopted a resolution calling for its implementation through the immediate commencement of negotiations leading to the conclusion of a Nuclear Weapons Convention (NWC), i.e. an internationally verified agreement on the abolition of nuclear weapons. The European Parliament followed with a similar resolution in 1997. A model NWC was subsequently drafted by peace movement experts and has been published and circulated by the UN. The model NWC has been considered by a number of governments at the UN Conference on Disarmament, and submitted to the US Congress in a resolution calling for negotiations to achieve a NWC.

In Western nuclear and allied states, anti-nuclear activists are using the Court's decision in high-profile, ingenious 'civil obedience' campaigns to expose their governments and challenge them to comply with the law. This in turn has helped force debate amongst some NATO states and Japan about how the opinion affects their defence policies. Also a new coalition of influential 'middle-power' states, including AINZ, have referred to the Court's decision in a new initiative at Foreign Minister level calling for the immediate start of serious negotiations to eliminate nuclear weapons and for the implementation of practical steps towards that goal.

49. Richard Falk, 'Nuclear Weapons, International Law and the World Court: a Historic Encounter', *The American Journal of International Law*, vol.91, no.1, January 1997.

50. Alan Attwood, 'Nuclear Arms Ruling helps to make world safer, says Evans', *The Age*, 10 July 1996; 'Australian win in fight to ban bomb', *West Australian*, 10 July 1996.

51. Michael Rentoul, 'PM hails World Court decision: "Tide turns" against N-weapons', *The Press*, 10 July 1996; Simon Kilroy, 'Bolger welcomes nuclear ruling', *The Dominion*, 9 July 1996.

CONCLUSIONS



In outlining the history of New Zealand's use of the World Court to promote nuclear disarmament, it is clear that there are several underlying advantages which A/NZ enjoys. With a population of just over 3 million citizens, it is perhaps the optimum size for a democracy. The relatively small number of parliamentarians are very accessible to the electorate, through regular meetings with constituents and a free mail service to MPs. The 'Kiwī spirit' of individualism and independence was stimulated by NZ's geographical isolation - which in due course meant that, notwithstanding the ANZUS Treaty, it was distanced from the Cold War blocs.

The associated proud tradition of pioneering improvements in civil society provided a fertile ground for new ideas on defence and security issues. This helps to explain the strong public reaction when the facts became known about the health and environmental effects of the nuclear tests in New Zealand's 'backyard'.

New Zealanders tend to have an optimistic, 'fix-it' approach to solving problems, drawn from earlier successes in several important environmental, social and peace campaigns. There is a kind of 'David and Goliath' mentality where both citizens and governments take on seemingly insurmountable odds and persevere to achieve them. Over the years the peace movement has forged close relationships with citizens in Western nuclear and allied states. Their support has helped counter the pressure from their governments on A/NZ.

Last but not least, A/NZ is a relatively wealthy, developed country, so it is less vulnerable to economic coercion than many other small states of comparable population size.

Recourse to the law had a powerful impact on the A/NZ psyche, and underpinned future initiatives by the anti-nuclear movement and government. The 1973 World Court case against French tests put A/NZ's long tradition of promoting the Court into practice, attracted media attention, and helped educate the public about it. The 1984-90 Labour government encouraged unprecedented access to decision makers through the Public Advisory Committee on Disarmament and Arms Control, and inclusion of citizen group representatives in UN government delegations. Ideas flowed both ways, which helped build mutual respect, trust and confidence.

The World Court cases succeeded in implementing New Zealand's early advocacy of both the advisory and contentious routes to the Court. The arrogance of the Western allies in continuing atmospheric and underground nuclear testing in Australia and on small Pacific Islands alienated the peoples of the region. Politicians responded to outraged public opinion and helped create the Comprehensive Test Ban Treaty, regional nuclear free zones and nuclear free state policies. The peace movement, empowered by these successes, mobilised international support behind the World Court Project, which was acknowledged as the most radical disarmament issue within the UN for over thirty years. It embodied the hope of the UN Charter where 'We, the peoples...' could work with their UN representatives to help 'save succeeding generations from the scourge of war', in this case nuclear war.

FURTHER READING

Burroughs, John. *The (Il)legality of Threat or Use of Nuclear Weapons*, Lit Verlag, Munster, 1997.

Clark, Roger S. and Madeleine Sann. *The Case Against the Bomb: Marshall Islands, Samoa, and Solomon Islands before the International Court of Justice in Advisory Proceedings on the Legality of the Threat or Use of Nuclear Weapons*, Rutgers University School of Law, New Jersey, 1996.

Clements, Kevin. *Back from the Brink: The Creation of a Nuclear-Free New Zealand*, Allen & Unwin/ Port Nicholson Press, Wellington, 1988.

Dewes, Kate. 'The World Court Project: The Evolution and Impact of an Effective Citizens' Movement', PhD Thesis, Christchurch, 1998.

Evans, Harold. 'Case for the World Court being an Open Letter to the Prime Ministers of New Zealand and Australia', Christchurch, March 1987.

Ginger, Ann Fagan (ed). *Nuclear Weapons Are Illegal: The historic opinion of the World Court and how it will be enforced*, The Apex Press, New York, 1998.

Graham, Kennedy. *National Security Concepts of States: New Zealand*, Taylor and Francis, New York, 1989.

Green, Robert. *Fast Track to Zero Nuclear Weapons*, The Middle Powers Initiative, Massachusetts, 1998.

Green, Robert (ed). *Implications of the Advisory Opinion by the International Court of Justice on the Legal Status of Nuclear Weapons*, Pottle Press, London, 1996.

Grief, Nicholas. *The World Court Project on Nuclear Weapons and International Law*, Aletheia Press, Massachusetts, 1992.

Landais-Stamp, Paul and Paul Rogers. *Rocking the Boat: New Zealand, the United States and the Nuclear-free Zone Controversy in the 1980s*, Berg, Oxford, 1989.

Lange, David. *Nuclear Free -The New Zealand Way*, Penguin, Auckland, 1990.
 Locke, Elsie. *Peace People: A History of Peace Activities in New Zealand*, Hazard Press, Christchurch, 1992.



(Courtesy Tom Scott and Alexander Turnbull Library. D-P374027-H)

Mothersson, Keith. *From Hiroshima to The Hague: A Guide to the World Court Project*, International Peace Bureau, Geneva, 1992.

Nanda, Ved P. and David Krieger. *Nuclear Weapons and the World Court*, Transnational Publishers, Ardsley, New York, 1998.

Newnham, Tom. *Peace Squadron*, Graphic Publications, Auckland, 1986.

New Zealand Ministry of Foreign Affairs. *French Nuclear Testing in the Pacific: International Court of Justice Nuclear Tests Case, New Zealand v France*, Wellington, 1973.

New Zealand Ministry of Foreign Affairs. *New Zealand at the International Court of Justice: French Nuclear Testing in the Pacific: Nuclear Tests Case, New Zealand v France* (1995), Wellington, 1996.

Szabo, Michael. *Making Waves: The Greenpeace New Zealand Story*, Reed, Auckland, 1991.

ACRONYMS

A/NZ	Aotearoa/New Zealand
ANZUS	Australia, New Zealand, United States (military alliance)
CND	Campaign for Nuclear Disarmament
CTBT	Comprehensive (Nuclear) Test Ban Treaty
IALANA	International Association of Lawyers Against Nuclear Arms
ICJ	International Court of Justice
IPB	International Peace Bureau
IPPNW	International Physicians for the Prevention of Nuclear War
ISC	International Steering Committee (WCP)
LCNP	Lawyers' Committee on Nuclear Policy
NAM	Non-Aligned Movement
NATO	North Atlantic Treaty Organisation
NGO	Non Governmental Organisation
NPT	(Nuclear) Non Proliferation Treaty
NWC	Nuclear Weapons Convention
PGA	Parliamentarians for Global Action
SHNFZ	Southern Hemisphere Nuclear Free Zone
SPNFZ	South Pacific Nuclear Free Zone
UNGA	United Nations General Assembly
WCP	World Court Project
WHA	World Health Assembly
WHO	World Health Organisation

*New Zealanders yearn for a world which is secure,
peaceful and self-sustaining.*

*This publication is a record of the passion felt by a peaceful
people who trusted in the rule of law and the eventual
triumph of reason. It is a tale of commitment by ordinary
people who persuaded governments of both major political
parties to pursue the cause before the World Court.
It should give us hope.*

Former Prime Minister David Lange



\$1.80 "KIWIS TAKING ON THE WORLD"
NEW ZEALAND