

Roger Clark: Peter Weiss Tribute 2 April 2014 (Law's Imperative: A World Free of Nuclear Weapons)

The Model Nuclear Weapons Convention

I am delighted to participate in this love fest for Peter Weiss. As I was preparing, someone asked me how long I had known Peter, especially as he appeared to be an even older geezer than I. I had to confess that I do not remember ever having met him for the first time. There are some people in one's life that we feel we have always known, or at least would like to think we have always known, such has been the influence of their thinking on our own. And Peter's work on nuclear weapons and with the Center for Constitutional Rights has made a big impression on me.

But I do remember the first time I worked with him on a project. I was honored to be part of a group that was convened by the Lawyers Committee on Nuclear Policy in 1994 to work with Peter on the Model Memorial for the Advisory Proceedings in the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons. Subsequently, when I was asked by the Government of Samoa to assist in representing it in those proceedings, I admit to shamelessly plagiarizing the material in that Model Memorial in both our written and our oral submissions. When the hearing was taking place in The Hague in 1995, I had numerous useful conversations with Peter about the shape of the arguments. He was there officially as counsel to the Government of Malaysia, unofficially, as is his wont, as counsel to anyone who would listen, and to some who would rather not.

I speak today about another of Peter's pet projects, the Model Nuclear Weapons Convention, most recently circulated at the United Nations by Costa Rica and Malaysia early in 2008 as UN Doc. A/62/650. More precisely, that Model is entitled "Convention on the Prohibition of the Development, Testing, Production, Stockpiling, Transfer, Use and Threat of Use of Nuclear Weapons and on Their

Elimination.” A summary from the Model is included in the package of materials for today’s event. The Model describes itself as “prepared by a consortium of scientists, lawyers, disarmament experts, academics and officials as a discussion document to assist in deliberations and possible negotiations leading to the prohibition and elimination of nuclear weapons.” The drafters affirm their belief that “this Model demonstrates the feasibility and practicality of nuclear disarmament.” The Model has special contemporary resonance.

As Peter pointed out in his Op-Ed on “Nuclear Disarmament, the State of Play”, the two Conferences on the Humanitarian Impact of Nuclear Weapons, held in Norway in 2013 and in Mexico this February, are to be followed later this year by a further event in Vienna, hosted by Austria. Oslo and Nyarit concentrated on a fact-based approach to the scourge of nuclear weapons. The Chair’s summary from Mexico says it all:

It is a fact that no State or international organization has the capacity to address or provide the short and long term humanitarian assistance and protection needed in case of a nuclear weapon explosion. Moreover, it would not be possible to establish such capacities, even if attempted.

These are the stark truths and they are strikingly similar to the World Health Organization material urged on the Court in 1995, and on which Jonathan Schell, whose recent death we mourn, was at pains to inform us. It is good that there is a new emphasis on such material. The facts critically undermine the legitimacy of nuclear weapons. What comes next is the law and its imperative: abolition. That is what should be addressed in Vienna, even if only tentatively. Again, I quote from the Mexico Chair’s summary:

The broad-based and comprehensive discussions on the humanitarian impact of nuclear weapons should lead to the commitment of States and civil society to reach new international standards and norms, through a legally binding instrument.

I have suggested in the short talk on the “International Criminal Court and Nuclear Weapons”, which has also been included in your package, some ways in which humanitarian law, the criminal law of armed conflict, may be brought to bear on those who dare to use nuclear weapons in armed conflict. Important as the criminal law is, however, it applies after the event, if we have a world left to countenance prosecution. So, whether we characterize the matter of nuclear weapons as one of criminal law or of public health, we must think about prevention. Here the Model Convention comes into its own. It flags basic drafting possibilities for a legally binding instrument, a treaty. Time does not permit a blow-by-blow account of the whole Model, but allow me to mention a few points.

First, the Model contains stringent obligations on states, including a phased requirement that those possessing nuclear weapons destroy them over a period of years, acting in lockstep with other possessors.

Secondly, the draft would create a new international organization, the Agency for the Prohibition of Nuclear Weapons (based on the model of the Organization for the Prohibition of Chemical Weapons which has been in the forefront in Syria). It would have very broad monitoring powers, and a powerful inspection regime.

Thirdly, the obligations on states would be accompanied by criminal enforcement requirements that apply both to natural persons and to legal or juridical persons. Draft provisions on the *per se* criminality of the use of nuclear weapons in armed conflict were presented during the drafting of the Rome Statute of the International Criminal Court. Because of adamant minority opposition, largely from nuclear powers and members of NATO, it was not possible to include such provisions in the final treaty. So the crimes in my ICC paper are generic ones, applicable to all weaponry, not just the nuclear kind. The Model Convention goes much further. It is specific to nuclear weapons and its criminal provisions are not limited to the use of them in armed conflict. Instead they include engaging in or aiding and

abetting or otherwise assisting anyone to engage in any of the activities prohibited to states under the Convention. This broad-based criminalization of the acts proscribed in the Model is reminiscent of the proscriptions in the New Zealand Nuclear Free Zone, Disarmament and Arms Control, Act 1987.

Is brevity or detail what is now required – or feasible? What, indeed, is required by the obligation in Article VI of the Non-Proliferation Treaty (and, according to the ICJ, customary international law) to “pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control”? How much detail do we need? The 1925 Geneva Protocol for the Prohibition on the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare was about half a page in length; not much longer than its title; the Model Convention is 122 times as long, since it endeavors to set out a very precise regime for abolition in all its aspects.

Notice again the list of nouns that the Model would prohibit: development, testing, production, stockpiling, transfer, use and threat of use, and elimination. How do we generate the political will to negotiate on all of these, as I believe we must? A daunting task, but one on which the survival of our Spaceship Earth depends.