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Is *The Butter Battle Book*'s Bitsy Big-Boy
Boomeroo Banned? What Has International
Law to Say About Weapons of Mass
Destruction?

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IS THE BUTTER BATTLE BOOK'S BITSY BIG-BOY BOOMEROO BANNED?

The Butter Battle Book, published in 1984, tells the story of two peoples, the Yooks and the Zooks—city-states perhaps—who live separated by a wall.¹ What divides them spiritually is bread and butter.² The Yooks eat their bread with the butter side up. The Zooks eat theirs with the butter side down. Many adults find this part of the story unbelievable. How could you prepare and then eat bread and butter upside down? Children suspend disbelief from the outset and understand intuitively that the issue is not the practicalities of butter-spreading, but the pointlessness of many adult disputes. For the Yooks, eating bread with the butter side down means that a Zook “has kinks in his soul.”³ No doubt the Zooks also perceive the fundamental justice of their cause.⁴ Overtones of just war ring loud and separation by the ever-rising wall is not enough. A Border Patrol becomes necessary to prevent the infiltration of The Others, or worse, their dangerous ideas. So begins an escalating arms race, as some characters known as “The Boys in the Back Room” employ their talents to create increasingly fearsome weapons, both offensive and defensive.⁵ The Yooks patrol for a while with a defensive prickly Snick-Berry Switch, which does fine until the Zooks take it out with an offensive slingshot. The weapons and defenses grow more sophisticated until both sides develop the ultimate weapon: the Bitsy Big-Boy Boomeroo—an evident game-changer with dramatic offensive and defensive capacities. It is the quintessential weapon of mass destruction.⁶

1. The image of the wall no doubt invokes other historic efforts, mostly futile, to keep “them” on the other side. Consider, in particular: Hadrian’s Wall, to keep the Scots and other barbarians out of Roman Britain; the Great Wall of China, to deter the Mongols and other nomads; the Berlin Wall, aimed at keeping the East Germans in, and subversive ideas (like how to butter bread) out; and of course, the Israel/Palestine wall (or “security fence” depending on your point of view) which is designed to keep the Palestinians in their place. For further discussion of the role walls play in both the Yook-Zook and real-world conflicts, see John Hursh’s article in this issue of the *New York Law School Law Review: International Law, Armed Conflict, and the Construction of Otherness: A Critical Reading of Dr. Seuss’s The Butter Battle Book and a Renewed Call for Global Citizenship*, 58 N.Y.L. SCH. L. REV. 617, 636–41 (2013–2014).
2. One commentator describes this as a problem of “normative hubris.” Tanya Jeffcoat, *From There to Here, from Here to There, Diversity Is Everywhere*, in DR. SEUSS AND PHILOSOPHY: OH THE THINKS YOU CAN THINK! 93, 94 (Jacob M. Held ed., 2011). Such differences are at the heart of many intractable disputes. “Each group assumes that the other is somehow inferior for having made a different cultural choice.” *Id.*
3. DR. SEUSS, *THE BUTTER BATTLE BOOK* (1984).
4. One way in which international law, both that dealing with state responsibility and that with individual criminal responsibility, tries to deal with such situations is to define who is an aggressor and then apply that definition to the particular situation. See, e.g., Jennifer Trahan, *Is Complementarity the Right Approach for the International Criminal Court’s Crime of Aggression? Considering the Problem of “Overzealous” National Court Prosecutions*, 45 CORNELL INT’L L.J. 569, 586–88 (2012). Seuss hardly gives us enough material to determine who is to blame in this instance. There seems to be ample blame to go around. No doubt both sides believe that they are acting in self-defense and that they are acting perfectly rationally to protect butter-eating habits which are fundamental to their culture.
5. See *THE BUTTER BATTLE BOOK*, *supra* note 3.
6. The very first resolution adopted by the United Nations created an Atomic Energy Commission, whose major task was to draw up proposals “for the elimination from national armaments of atomic weapons and of all other weapons adaptable to mass destruction.” G.A. Res. 1(I), U.N. Doc. A/RES/1/1 (Jan. 24, 1946).

The narrator, a small Yook boy, accompanies his grandfather, who bears the Boomeroo, to the wall. There they meet Grandpa's old antagonist, VanItch. The two old geezers square off on the wall as the narrator looks on. Grandpa screams "Here's the end of that terrible town full of Zooks who eat bread with the butter side down." VanItch yells that he will "[b]low you . . . into pork and wee beans. I'll butter-side-up you to small smithereens." Meanwhile, the rest of the Yooks are obeying the Chief Yookeroo's command to "stay safe underground."⁷ The book ends (unsatisfactorily?⁸) with the narrator's question, "Who's going to drop it? Will *you* . . . Or will *he* . . . ?" And Grandpa's response: "Be patient . . . We'll see. We will see . . ."⁹ Is it all a bluff? Will they see the light and back off, negotiate even? Is the end of the world nigh?

The Butter Battle Book thus captures the arms race and the development of weapons of war. It does not say anything specific about law, or even about diplomacy; there is no dialogue going on between the parties. But it is surely an invitation to imagine how law might be used to get out of such situations in the future. Surely the law, which seems to deal fairly effectively with such mundane issues as defective widgets and the like, can be brought to bear on weapons of mass destruction. The law is a great engine, in some situations, for promoting dialogue, and this one—with

7. THE BUTTER BATTLE BOOK, *supra* note 3.

8. Professor Tunstall, who regards the book as "a protest of the Reagan administration's escalation of the nuclear arms race with the former Soviet Union," suggests that "[w]e can interpret the cliffhanger ending . . . as being Seuss's means of getting people to question the legitimacy and even sanity of the Reagan administration's nuclear deterrence policy." Dwayne Tunstall, *Dr. Seuss Meets Philosophical Aesthetics*, in DR. SEUSS AND PHILOSOPHY: OH THE THINKS YOU CAN THINK!, *supra* note 2, at 219, 229. An early reviewer of the book commented:

But dear Dr. Seuss, we want to protest—you can't leave us hanging like this. Can't the Boys in the Back Room come up with some equally clever peace machines, or the Cat in the Hat come back to save the day, if not the world? No use. Our concerned doctor—much like the real Dr. Spock—offers no placebos this time. He wants his children to know what the adults are up to, and that in devising bigger and more destructive armaments neither the Yooks nor the Zooks know which side their bread is buttered on.

Betty Jean Lifton, *The Butter Battle Book*, by Dr. Seuss, N.Y. TIMES BOOK REV., Feb. 26, 1984, available at <http://www.nytimes.com/1984/02/26/books/children-s-books-252187.html>. A reviewer in the right-leaning *National Review* accused Seuss of abject failure for presenting a perfect vindication of the policy of Mutually Assured Destruction:

Children, in particular, are not likely to conclude from the story that the whole dispute is senseless—Seuss's books are always ridiculous, after all. Children will conclude, instead, that the Yooks are lucky they invented the bomb, so that the Zooks dare not attack them first.

The Butter Battle Book, NAT'L REV., July 27, 1984, at 16. The Yooks are blue, the Zooks are red. Do I remember correctly the phrase from the days of my Cold War youth: "Better Dead than Red"? Or was it: "Better Red than Dead"? English professor and Seuss biographer Donald Pease notes: "His editors at Random House told Geisel that children would get freaked out by the inconclusive ending . . . A copy editor urged him to write an ending that would reassure children that the Yooks and the Zooks would not destroy each other, 'an illusion that I think children are entitled to.'" DONALD E. PEASE, THEODOR SEUSS GEISEL 144–45 (2010). (When did copy editors stop offering substantive advice like that?) My totally unscientific study of my children, grandchildren, and foster grandchild revealed not a single freak-out.

9. THE BUTTER BATTLE BOOK, *supra* note 3.

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such high stakes—must be one of those situations. International law has a role in matters of war and peace, and in mitigating the worst effects of war should efforts to prevent it fail.

For the lawyer, the book's message implicates fundamental problems of substance and procedure. Throughout my professional life, I have been involved in efforts to use international law to rid the world of the other ultimate weapon—the nuclear one—for which the Boomeroo is no doubt a metaphor. I have never given up the conviction that law has something useful to say in this endeavor. But the older I get, the more impatient I get. Is the law just an irritant Snick-Berry Switch (the Yooks' first puny weapon)? Or is it the conceptual Boomeroo we can use to save our Spaceship Earth? In pondering such questions, this article offers a rather personal perspective on three projects concerning nuclear weapons that I have been involved with over the years: 1) efforts to prevent the testing of nuclear weapons by France in the Pacific;¹⁰ 2) efforts to have the International Court of Justice (ICJ) declare the use or threat of use of nuclear weapons illegal;¹¹ and 3) efforts to articulate the criminality of nuclear weapons as weapons of war in negotiating the Rome Statute of the International Criminal Court.¹² How do Dr. Seuss and Grandpa speak to these matters, or they to them?

Before turning to these experiences, it is important to put them, and *The Butter Battle Book*, in historical context. Children see their books as speaking directly to them and the child in me has always taken *The Butter Battle Book* quite personally. The book struck such a chord with me when it came out in 1984 (which was also Seuss's eightieth birthday). Something Orwellian about the timing! While its message is timeless, I suspect Seuss was well aware of the context he was writing in. It was a time when many people the world over, especially organizations of doctors and lawyers, were groping their way toward the massive civil society effort that led eventually to the advisory proceedings on nuclear weapons being brought through the World Health Organization (WHO) and the U.N. General Assembly.¹³ Mutually Assured Destruction (MAD) was not an invention of the "Raygun" administration, then in charge in Washington when the book came out, but it was a concept that the administration ran with as it sought to outdo the "Evil Empire." Remember those dreadful Commies with kinks in their atheist souls, who, I now realize, must have eaten their awful, stale, rationed, black bread butter side down? Indeed, Ronnie the Raygun himself sought to make MAD obsolete—at least for the United States—by his "Star Wars" project. That would destroy the bad guy's missiles in the air.¹⁴ Seuss

10. See *infra* pp. 659–65.

11. See *infra* pp. 666–69.

12. See *infra* pp. 669–71.

13. See KATE DEWES, *THE WORLD COURT PROJECT: THE EVOLUTION AND IMPACT OF AN EFFECTIVE CITIZENS' MOVEMENT* (Disarmament & Sec. Ctr. 1999).

14. Note this archive material:

On March 23, 1983, in a nationally televised address on national security, President Ronald Reagan proposed the development of the technology to intercept enemy nuclear

might have made a little more of *Star Wars* than he did. He notes it in passing: the Zooks invent the Jigger-Rock Snatchem which flings rocks “right back just as fast as we catch ‘em.” Alas, poor Ronnie’s toy was never up to the task of catching, let alone flinging back! Nor did Ronnie invent bomb shelters,¹⁵ but Seuss’s characters still put great faith in them. I confess that, had I been a Yook, I would not have had much faith in the Chief Yookeroo’s command to go down that hole for my country and Right-Side-Up Butter. “Lemming madness” might be a Seussian way to describe that. I would assume, although Seuss does not tell us, that the Zooks had invented survival holes in the ground also.

With that, I turn to my personal experiences in trying to rid the world of nuclear weapons.

French Tests in the Pacific

The Butter Battle Book’s Boys in the Back Room who develop all that weaponry come to mind when I think back on my first encounter with the law and weapons of mass destruction. In 1964 and 1965, on behalf of the New Zealand University Students Association, a group of us tried to persuade the New Zealand government to contest the legality of impending French nuclear tests in the Pacific.¹⁶ (I was a graduate student and law lecturer, and on the executive board of the Association at the time.) Our legal theories were twofold.¹⁷ One was to stress the need to protect

missiles. The plan, called the Strategic Defense Initiative, or S.D.I., was dubbed “*Star Wars*” by its critics. The *New York Times* reported: ‘In effect, Mr. Reagan proposed to make obsolete the current United States policy of relying on massive retaliation by its ballistic missiles to counter the threat of a Soviet nuclear attack.’

March 23, 1983: Reagan Proposes ‘Star Wars’ Missile Defense System, N.Y. TIMES LEARNING NETWORK (Mar. 23, 2013), <http://learning.blogs.nytimes.com/2012/03/23/march-23-1983-reagan-proposes-star-wars-missile-defense-system/>.

15. My search for a footnote to support this proposition led to the obituary page of the *New York Times* for February 18, 2013:

Steuart Pittman, a Washington lawyer who was appointed by President John F. Kennedy in 1961 to create enough fallout shelters to protect every American in the event of a nuclear attack, and who resigned in frustration three years later amid heated debates over the feasibility, the cost and even the ethics of such a program, died on Feb. 10 at his family farm in Davidsonville, Md. He was 93. The apparent cause was a stroke, said his wife, Barbara.

Paul Vitello, *Steuart Pittman, Head of Fallout Shelter Program, Dies at 93*, N.Y. TIMES (Feb. 18, 2013), <http://nyti.ms/ZoHHXm>.

16. France had conducted earlier tests in the Algerian Sahara. With Algerian independence in 1962, another site was in order and the French chose to conduct further tests, which ultimately lasted between 1966 and 1996, in French Polynesia, then described in French law as an Overseas Territory of France and by Pacific islanders as a French colony. Just this year, the U.N. General Assembly voted to re-inscribe the territory on the Assembly’s list of non-self-governing territories. See G.A. Res. 67/265, U.N. Doc. A/RES/67/265 (May 17, 2013). It had been unilaterally removed from the list by France in the late 1940s.
17. There was a third argument that became clearer once the French plans firmed up—freedom of the high seas, since the French declared a “security” zone over a portion of the Pacific Ocean, warning ships to keep out.

the environment from potential pollution from radioactive fallout, relying on principles that were just developing as the nascent field of international environmental law. The other was to seize on an early nuclear arms control effort, the 1963 Partial Test Ban Treaty (PTBT),¹⁸ which aimed to inhibit research, development, and testing of this particular form of dangerous weaponry.¹⁹ If the Boys in the Back Room are not permitted to test the Boomeroo, there is a chance that the odds of its use will slowly wither away.

International environmental law was a little thin in those days,²⁰ but we thought that there might be some mileage in the well-known *Trail Smelter* case, the original acid rain litigation between Canada and the United States.²¹ In considering an award

18. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, *opened for signature* Aug. 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43 (entered into force Oct. 10, 1963) [hereinafter Partial Nuclear Test Ban Treaty]. The preamble to the treaty contains some inspiring (and still unfulfilled) goals. It has the parties:

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

Seeking to achieve the discontinuance of all test explosions of nuclear weapons for all time, determined to continue negotiations to this end, and desiring to put an end to the contamination of man's environment by radioactive substances

19. There are various processes involved with objectionable weaponry and a comprehensive prohibition might need to address each of them. Thus, Costa Rica and Malaysia have circulated a document drafted by a group of non-governmental organizations entitled Convention on the Prohibition of the Development, Testing, Production, Stockpiling, Transfer, Use and Threat of Use of Nuclear Weapons and on their Elimination. *See* U.N. Doc. NPT/CONF.2010/PC.1/WP.17 (May 1, 2007). An earlier draft was circulated by Costa Rica as U.N. Doc. A/C.1/52/7 (Nov. 17, 1997). On this initiative, see MERAV DATAN, FELICITY HILL, JURGEN SCHEFFRAN & ALYN WARE, SECURING OUR SURVIVAL (SOS): THE CASE FOR A NUCLEAR WEAPONS CONVENTION (2007). On abolition, see DAVID KRIEGER, ZERO: THE CASE FOR NUCLEAR WEAPONS ABOLITION (2013). *See also* MARIE ISABELLE CHEVRIER, ARMS CONTROL POLICY: A GUIDE TO THE ISSUES (2012).

20. Its burgeoning began with the U.N. Conference on the Human Environment that met in Stockholm in June 1972. Principle 6 of the Conference's Declaration is especially apposite to weapons of mass destruction:

The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems. The just struggle of the peoples of all countries against pollution should be supported.

U.N. Conference on the Human Environment, Stockholm, Swed., June 5–16, 1972, *Declaration of the United Nations Conference on the Human Environment*, Princ. 6, U.N. Doc. A/ CONF.48/14/Rev.1 (June 16, 1972). Seuss was just ahead of the curve in agitating for sustainable development: his wildly popular fable on corporate greed and the trees, *The Lorax*, was published in 1971.

21. *Trail Smelter Arbitration* (U.S. v. Can.), 3 R.I.A.A. 1905 (1938). Ironically, we usually think of acid rain as a U.S. export across our northern border; in fact, as these proceedings demonstrated early on, it is a two-way trade. *See Acid Rain*, ENV'T CAN. (July 17, 2013), <http://www.ec.gc.ca/eau-water/default.asp?lang=En&cn=FD30C16-1> ("About half the wet sulphate deposition in eastern Canada is estimated to come from the United States, while about ten percent of the deposition in the northeastern United

for past damages and developing a regime to minimize future damages, the arbitration tribunal examined a number of (mostly American) authorities and concluded:

The Tribunal, therefore, finds the above decisions, taken as a whole, constitute an adequate basis for its conclusions, namely, that, under the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.²²

There was also some useful language for a case against France in the decision of the ICJ in the *Corfu Channel* case,²³ which involved the state responsibility of Albania when mines in its waters exploded causing damage to British warships proceeding lawfully through the waters. The court found that Albania had knowledge of the mines' presence and held that Albania was at least obligated to warn the ships of approaching danger:

Such obligations are based . . . on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.²⁴

Then there was an argument based on the 1963 Partial Test Ban Treaty.²⁵ Article I of the treaty provides, in relevant part:

1. Each of the Parties to this Treaty undertakes to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control:
 - (a) in the atmosphere; beyond its limits, including outer space; or under water, including territorial waters or high seas; or

States comes from Canada.”). It is also ironic that during World War II, the Trail plant “became involved in producing heavy water for the development of nuclear bombs in the Manhattan Project.” See *Consolidated Mining and Smelting Company, Ltd.*, THE MANHATTAN PROJECT HERITAGE PRESERVATION ASS'N, INC. (Aug. 3, 2005), <http://www.mphpa.org/classic/CP/Canada/CM&S/CM&S-01.htm>.

22. *Trail Smelter*, 3 R.I.A.A. at 1965.

23. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).

24. *Id.* at 22. Principle 21 of the Stockholm Declaration would later pick up this theme:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

See *Declaration of the United Nations Conference on the Human Environment*, *supra* note 20, Princ. 21.

25. Partial Nuclear Test Ban Treaty, *supra* note 18.

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(b) in any other environment if such explosion causes radioactive debris to be present outside the territorial limits of the State under whose jurisdiction or control such explosion is conducted. It is understood in this connection that the provisions of this subparagraph are without prejudice to the conclusion of a Treaty resulting in the permanent banning of all nuclear test explosions, including all such explosions underground, the conclusion of which, as the Parties have stated in the Preamble to this Treaty, they seek to achieve.²⁶

The treaty's language deals both with tests conducted in the atmosphere and with those in another environment (underground, especially) which release radioactive debris. This was great language, but there was a problem: while the United States, Great Britain, and the USSR (to say nothing of little New Zealand) were parties to the PTBT, France was not.²⁷ We therefore had to make the argument that, due to the overwhelming support for the treaty, it had entered into the domain of customary law and was binding on parties and non-parties alike. We were fairly sure that the ICJ would agree that the obligations and rights in multilateral treaties could transform into customary law. However, we also feared that the ICJ would take a fairly conservative approach when determining whether such a transformation had occurred.²⁸

Then there was the "tiny" matter of procedure. There are two ways in which cases can come before the ICJ: "contentious" proceedings and "advisory" proceedings. Contentious proceedings require all of the contending parties to accept the jurisdiction of the tribunal. Advisory proceedings rely on a request for "advice" emanating from the major U.N. organs (such as the General Assembly) or from agencies in the U.N. family (which are so authorized by the General Assembly).

Article 36 of the Statute of the International Court of Justice deals with contentious proceedings. It provides, in relevant part:

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specifically provided for in the Charter of the United Nations or in treaties in force.
2. The states parties to the present Statute may at any time declare that they recognize as compulsory and without any special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
 - a. the interpretation of a treaty;

26. *Id.* art. I(1). For the relevant preambular paragraph, see *id.* pmb1.

27. France never became a party. Unlike the United States, however, France is a party to the Comprehensive Nuclear-Test-Ban Treaty (CTBT) adopted by the U.N. General Assembly on September 10, 1996, but not yet implemented. See G.A. Res. 50/245, U.N. Doc. A/RES/50/245 (Sept. 17, 1996). The CTBT, which prohibits nuclear weapons tests in all environments, awaits ratification by several nuclear and nuclear-capable powers. See *Status of Signature and Ratification*, PREPARATORY COMM'N FOR THE COMPREHENSIVE NUCLEAR-TEST-BAN TREATY ORG., <http://www.ctbto.org/the-treaty/status-of-signature-and-ratification/> (last visited Mar. 13, 2014).

28. These fears were realized in the North Sea Continental Shelf Cases (Ger. v. Den.; Ger. v. Neth.), 1969 I.C.J. 3 (Feb. 20).

- b. any question of international law;
 - c. the existence of any fact which, if established, would constitute a breach of an international obligation;
 - d. the nature or extent of the reparation to be made for the breach of an international obligation.
3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time²⁹

Paragraph 1 contemplates situations where the parties agree to take a case jointly to the court, or where the matter is “specifically provided for in the United Nations Charter or in treaties in force.”³⁰ It seemed unlikely that France would happily agree with New Zealand to take the case to the court, and the U.N. Charter and other treaties failed to provide any insight on the matter. Other possibilities existed under paragraph 2, the “compulsory” clause of the Article. New Zealand had made a fairly general declaration accepting the “compulsory” jurisdiction of the ICJ.³¹ France’s acceptance was, however, less forthcoming.³² Its then-current declaration, dated July 10, 1959 excepted from its acceptance of jurisdiction “disputes relating to questions which by international law fall exclusively within domestic jurisdiction.”³³ France also excepted, more ominously, “disputes arising out of any war or international hostilities and disputes arising out of a crisis affecting the national security or out of any measure or action relating thereto.”³⁴ It was surely a little difficult for France to

29. Statute of the International Court of Justice art. (36)(1)-(3), *opened for signature* June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (entered into force Oct. 24, 1945) [hereinafter ICJ Statute].

30. *Id.* art. 36(1).

31. *See id.* art. 36(2). The New Zealand declaration essentially tracked Article 36, paragraph 2 and contained minor exceptions which had no relevance to a prospective case against France. The declaration, made originally on April 1, 1940 in respect of the Permanent Court of International Justice, was continued in effect for the ICJ pursuant to Article 36, paragraph 5 of the ICJ Statute. *See* 1 Int’l Ct. Just. Y.B. 214 (1946-47), <http://www.icj-cij.org/documents/?p1=4&p2=2&p3=0>.

32. Declaration Recognizing as Compulsory the Jurisdiction of the ICJ, in Conformity with Article 36, Paragraph 2, of the Statute of the Court, Paris, 10 July 1959, 337 U.N.T.S. 65.

33. Things could have been worse with this exception. An earlier version of the French acceptance of the jurisdiction, echoing the United States’ so-called “Connally Amendment,” had insisted that the determination of whether something was “domestic” would be made by France itself and not the court. In *Certain Norwegian Loans (Fr. v. Nor.)*, 1957 I.C.J. 9 (July 6), the court decided that in the case of such a reservation, the other party to a dispute could claim the same reservation as a matter of reciprocity. Having been bashed by its own bitsy boomerang, France apparently decided to back off a bit. It is interesting to speculate whether, if the original exception remained, France would have had the gall (pun intended) to claim that what it did in its colony half a world away was “domestic.”

34. In 1966, France added the words “and disputes concerning activities connected with national defence” to the second of these exceptions. *See* France: Declaration Recognizing as Compulsory the Jurisdiction of the International Court of Justice, in Conformity with Article 36, Paragraph 2 of the Statute of the Court, Paris, 16 May 1966, 562 U.N.T.S. 73. The addition must surely have been aimed at making life difficult for any state trying to take France to task over its nuclear testing.

argue that testing dangerous weapons in the atmosphere, with ample opportunity for radioactive fallout over many other countries, was “exclusively within the domestic jurisdiction of the State.”³⁵ The national security exception, though, was an obvious argument for France to make, and a little more difficult to counter. But at least we could make the argument that France’s nuclear weapons testing was not about security related to a specific threat; rather, it was really about pride or hubris.³⁶

Another way to seize the court of the problem was to persuade the U.N. General Assembly to request an advisory opinion from the court, pursuant to Article 96 of the U.N. Charter,³⁷ on the legality of the French plan to test. Article 96 provides that: “The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.” An advisory proceeding might have an advantage over a contentious proceeding, especially before the testing started, because in a contentious proceeding New Zealand might have had to establish that it had suffered actual damage from the fallout. Although there was plenty of potential for actual damage, there was none at that time.³⁸ Unlike in contentious proceedings, the theoretical possibilities about the risk of actual damage can be explored in advisory proceedings.

In any event, we wrote to New Zealand’s Minister of Foreign Affairs, making a pitch along these two main lines. He wrote back that it was one of the dumbest, stupidest ideas he had ever heard. His legal people at the Ministry explained in greater detail how foolish we were—our idea was bad on substance, bad on procedure. Ouch! That sling-shotted our Snick-Berry Switch! On substance, the Ministry agreed that *Trail Smelter* was the best argument we had, but they *thought that it was not much*. The Ministry suggested *Trail Smelter* was not a big national security case, but rather a mundane trans-border nuisance case where any references to international law were mere window dressing—the case was really decided under U.S. law pursuant to the parties’ arbitration agreement.³⁹ A big jump would be required to get to nuclear weapons. The argument that the PTBT had become part of customary law was a stretch, especially as applied to the French. France had decided not to ratify it and was probably a “persistent objector” so far as any emerging custom might be

35. *Certain Norwegian Loans*, 1957 I.C.J. at 53.

36. Jeffcoat, *supra* note 2.

37. U.N. Charter art. 96.

38. Note *Trail Smelter’s* insistence on damage. See *supra* text accompanying note 22.

39. Article IV of the agreement to arbitrate in *Trail Smelter* provided that “The Tribunal shall apply the law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice, and shall give consideration to the desire of the high contracting parties to reach a solution just to all parties concerned.” *Trail Smelter Arbitration* (U.S. v. Can.), 3 R.I.A.A. 1905, 1908 (1938). A leading commentary on the case by John Read, legal adviser to Canada at the relevant time, and later the only Canadian to serve as a judge on the ICJ, suggested that the reference to U.S. law came about because the U.S. nuisance cases were more balanced between the two parties than were the Canadian rules. See John E. Read, *The Trail Smelter Dispute*, 1 CAN. Y.B. INT’L L. 213, 227 (1963). It is fair to comment that the arbitration award does not contain any extended discussion of customary international law or even of general principles of law applicable to cross-boundary pollution.

concerned.⁴⁰ As for procedure, the French “national security” exception was a major problem, as was New Zealand’s standing—there was not yet any damage that it could show. Finally, the Ministry suggested that seeking an advisory opinion was not so crazy in principle. But did we really think that New Zealand could muster the votes to obtain the necessary majority⁴¹ in the General Assembly for referring the question to the court? After all, France would line up all its client states on the “NO” side, as would the United States, the United Kingdom, and the Soviets Oops! The Students Association proposal sank without trace.

The minister’s successor took a different view and New Zealand, along with Australia, eventually gave proceedings a run for the money in the ICJ.⁴² Those proceedings at least helped drive the French tests underground, thus limiting the fallout. They were ultimately dismissed as moot, though, following what the court (generously) interpreted as France’s promise not to test above ground again. France continued testing until 1996, but underground.⁴³ The Boys in the Back Room continued to hold sway.

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40. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. d. (1987) (“Although customary law may be built by the acquiescence as well as by the actions of states . . . and become generally binding on all states, in principle a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures.”). Such a dissenter is often referred to as a “persistent objector,” although how much persistence is needed is, like the general proposition itself, mysterious. For some skepticism about the principle, see generally Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT’L L. 1 (1985).
41. There is nothing specific in the charter about the size of the majority required; probably a simple majority is enough, although there is an argument that at least some requests might relate to “important” questions and thus require a two-thirds majority under Article 18, paragraph 2 of the U.N. Charter. See KENNETH JAMES KEITH, *THE EXTENT OF THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE* 45–46 (1971).
42. See *Nuclear Tests (N.Z. v. Fr.)*, 1974 I.C.J. 457 (Dec. 20); see also *Nuclear Tests (Austl. v. Fr.)* 1974 I.C.J. 253 (Dec. 20) (discovering a jurisdictional theory that we had missed, a League of Nations multilateral treaty, the General Act for the Pacific Settlement of International Disputes, signed on September 26, 1928, 93 L.N.T.S. 344, that appeared to remain in force between Australia, New Zealand and France; but France contended that the pact had expired with the League in 1946 and ultimately denounced it to make absolutely sure that nobody relied on it against France in the future).
43. In the sequel, New Zealand endeavored to revive the proceedings in 1995 when there appeared to be increased risk of a significant release of the radioactive material accumulated underground. In its 1974 Judgment, paragraph 63, the court had “observe[d] that if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute.” *Nuclear Tests (N.Z. v. Fr.)*, 1974 I.C.J. at 477 ¶ 63. The majority of the 1995 court, perversely in my view, and over a strong dissent, interpreted the original case as relating only to atmospheric testing and declined to re-open the proceedings. See *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests Case (N.Z. v. Fr.)*, 1995 I.C.J. 288 (Sept. 22); N.Z. MINISTRY OF FOREIGN AFFAIRS, *NEW ZEALAND AT THE INTERNATIONAL COURT OF JUSTICE: FRENCH NUCLEAR TESTING IN THE PACIFIC* (1996). New Zealanders were (and remain) averse to all nuclear weapons, not only French ones. Early in 1985, just as *The Butter Battle Book* hit the bookstores Down Under, New Zealand found itself in a spat with the Raygun administration over its refusal to allow U.S. (or any other) nuclear-armed or powered ships entry to its ports. President Reagan placed a moratorium on trade deals with New Zealand just as representatives of the New Zealand Dairy Board (which markets butter and cheese) were in Washington. Sympathetic women’s organizations in the United States participated in a “girlcott” campaign aimed at

The Use or Threat of Use of Nuclear Weapons

From 1995 to 1996, some thirty years after the experience with the French tests, I was privileged to represent Samoa (the independent state closest to the French tests that were still continuing at the time) in the ICJ's advisory proceedings on the *Legality of the Threat or Use of Nuclear Weapons*.⁴⁴ That case was a frontal attack on the legitimacy of the weapons themselves, as opposed to their testing. The proceedings originated in the WHO and the U.N. General Assembly. The basic question was whether such weapons were per se illegal. We almost got there. Three of the fourteen judges thought nuclear weapons were illegal, but the court⁴⁵ held more modestly that "the threat or use of nuclear weapons would *generally* be contrary to the rules of international law applicable in armed conflict."⁴⁶ Oh, that little word "generally"!

The court added that "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-defense, in which the very survival of a State would be at stake."⁴⁷ This is a very narrow exception, stated very tentatively. Nevertheless, the court unanimously insisted that a "threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons."⁴⁸ The court was also unanimous in supporting the proposition that "[t]here 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."⁴⁹

encouraging purchases of New Zealand dairy and other products. Wiser heads prevailed and New Zealand butter exports increased. E-mails from Alyn Ware, World Future Council, and Katie Dewes, World Court Project Aotearoa/New Zealand, to author (Oct. 10, 2013) (on file with the author).

44. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8). *See 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* (Roger S. Clark & Madeleine Sann eds., Rutgers Univ. Sch. of Law 1996) [hereinafter *THE CASE AGAINST THE BOMB*]; JOHN BURROUGHS, *THE (IL)LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS: A GUIDE TO THE HISTORIC OPINION OF THE INTERNATIONAL COURT OF JUSTICE* (1997).
45. On this aspect of the case, the fourteen judges who participated in the proceedings were split seven to seven. The tie was broken, as the court's rules permit, by the president of the court exercising his right to cast a second tie-breaking vote. The seven-judge "dissent" comprised two diametrically opposite groups. Three judges voted against it because they believed that the existing law supports the per se illegality of the weapons; thus, the statement did not go far enough. The other four thought that the statement went too far. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226.
46. *Id.* ¶ 105(2)(E) (emphasis added).
47. *Id.*
48. *Id.* ¶ 105(2)(D).
49. *Id.* ¶ 105(2)(F). This obligation is founded on Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, which provides that:

The arguments ranged over four main bodies of law: the law of armed conflict, environmental law (which had developed significantly since the 1960s), human rights law, and the constitutional documents of the United Nations and the WHO—the U.N. Charter and the WHO Constitution.⁵⁰ States opposed to nuclear weapons argued that each of these bodies of law points toward the illegality of nuclear weapons. The nuclear powers argued, in essence, that none of these bodies of law speaks expressly to nuclear weapons and that consequently there is nothing to prohibit their use or threat of use. Moreover, the nuclear bloc claimed, the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) of 1968⁵¹ legitimated possession (by them) of nuclear weapons and thus, implicitly, the use (by them) of such weapons. In response, anti-nuclear states contended that, while the NPT might recognize the undoubted fact that the nuclear states had such weapons pending the promised negotiation to dispose of them,⁵² this hardly meant that their actual *use* was “legal.”

Each of the Parties to the Treaty undertakes 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.

Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970). As espoused by the court, the obligation now appears to be one of customary law, binding not only on the parties to the NPT but also on the few remaining non-parties (Cook Islands, Democratic Republic of Korea, India, Israel, Niue, and Pakistan). For even earlier sentiments similar to those in Article VI, see the preamble to the Partial Nuclear Test Ban Treaty, *supra* note 18.

50. Article 1 of the WHO Constitution describes the “objective” of the organization as “the attainment by all peoples of the highest possible level of health,” and the preamble to the constitution insists that “health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.” The premise of the WHO’s request for an advisory opinion was that it is impossible to plan adequately for the utterly devastating effects of a nuclear war. Thus a “public health” strategy has to be established. Just as smallpox, domestic violence and drug trafficking can be characterized as public health issues, so too can nuclear weapons. And one way to attack the prevention problem is by questioning the legality of the weaponry. The WHO asked: “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?” A majority of the court held ultimately that the legality issue was beyond the competence of the WHO, but it was one to which it was appropriate for the United Nations to address itself. *See* Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66 (June 6). So the court answered the General Assembly’s question, namely: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?” For a recent reiteration of the impossibility of planning adequately for the aftermath of nuclear conflict, see generally *No Way to Deliver Assistance in the Event of a Nuclear Explosion*, INT’L COMM. OF THE RED CROSS (Apr. 3, 2013), <http://www.icrc.org/eng/resources/documents/interview/2013/03-04-nuclear-weapons-humanitarian-assistance.htm>.
51. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 49. The treaty distinguished between a “nuclear-weapon State” (one which has manufactured and exploded a nuclear weapon prior to January 1, 1967) and a “non-nuclear-weapon State.” The former promised not to transfer weapons to the latter.
52. *See id.* In response to a question from Judge Schwebel, Marshall Islands, Samoa and Solomon Islands commented:

In our view, the existence of nuclear weapons is a fact which international law is seeking to alter, given the recognition in the preamble to the 1968 NPT of “the devastation that would be visited upon all of mankind by a nuclear war.” The international community’s

IS *THE BUTTER BATTLE BOOK*'S BITSY BIG-BOY BOOMEROO BANNED?

There was also the argument based on the law of armed conflict, which is the most compelling one in the context. The law of armed conflict, or humanitarian law, regulates destroying and killing when there is recourse to arms. Some ways of destroying and killing have been absolutely forbidden, and other ways only conditionally forbidden.⁵³ The ICJ's advisory opinion notes two "cardinal principles":

The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering.⁵⁴

Alongside such lofty principles, however, some narrow rules have emerged. (Horton hatches a very small egg?).⁵⁵ Thus, a rousing early statement of the second principle about useless aggravation in the preamble of the 1868 Declaration of St. Petersburg⁵⁶ led to a ban on any projectile weighing less than four hundred grams which was explosive or charged with fulminating or inflammable substances.⁵⁷ Similarly, expanding bullets, poison and poisoned weapons, asphyxiating gases, and

commitment to rid the world of nuclear weapons, as reflected in Article VI and elsewhere, cannot be taken to imply the right to use nuclear weapons.

THE CASE AGAINST THE BOMB, *supra* note 44, at 301–02.

53. These rules apply to aggressor and victim alike. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 244 ¶ 39 (July 8).

54. *Id.* ¶ 78.

55. The allusion is to another classic. *See* DR. SEUSS, *HORTON HATCHES THE EGG* (1940).

56. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grams Weight, Saint Petersburg, 29 November/11 December 1868 [hereinafter St. Petersburg Declaration]. The preamble declaims:

Considering:

That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;

That the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity. . . .

57. *See id.* ("The Contracting Parties engage mutually to renounce, in case of war among themselves, the employment by their military or naval troops of any projectile of a weight below 400 grams, which is either explosive or charged with fulminating or inflammable substances."). It is all right to use large shells that fulminate over a lot of people, but not to use little ones that cause agony in only one?

biological weapons—and even barbed lances—have been outlawed.⁵⁸ If using one poisoned arrow or one barbed lance to kill one person, or using a poison gas container to kill scores, is a war crime, why is it not a war crime to use a nuclear weapon or a Bitsy Big-Boy Boomeroo which can kill hundreds of thousands? But I fear that both the Yooks and the Zooks would argue for the legality of the Boomeroo. The shelters will ensure that there is an acceptable amount of collateral damage as far as the citizenry is concerned. Employing the same sophistry as the nuclear powers,⁵⁹ they would contend that the mysterious Moo-Lacka-Moo with which the Boomeroo is filled does not poison or asphyxiate the adversary—it merely blows the enemy clear to Sala-ma-goo. An immediate and painless death, for soldiers and civilians alike; nothing nasty like being poisoned or asphyxiated.

The Rome Statute of the International Criminal Court

From 1995 to 1998, I represented Samoa in the negotiations to create the International Criminal Court. Many participants in the process tried desperately to include the use of nuclear weapons, both in international and non-international armed conflict, as crimes within the jurisdiction of the court.⁶⁰ In fact, if somebody had forced a vote on the issue, I believe that there was about a 70% majority in Rome in favor of including such a proposition. Alas, it became clear that for the five permanent members of the U.N. Security Council, and most of the NATO allies of three of them, this was a deal-breaker which would result in a failed negotiation. So we had to back off. In the end, the only explicit prohibitions on particular weapons deal with “[e]mploying poison or poisoned weapons,”⁶¹ “[e]mploying asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices,”⁶² and

58. See 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, RULES, at 243–44, 251, 256, 259, 261, 268 (Cambridge Univ. Press 3d prtg. 2007), available at <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> (listing examples of weapons which cause “superfluous injury or unnecessary suffering,” and explaining the specific customary prohibitions on each).

59. The ICJ summarizes the argument as follows:

The terms [poisonous and asphyxiating] have been understood, in the practice of States, in their ordinary sense as covering weapons whose primary, or even exclusive, effect is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons.

Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. at 248 ¶ 55.

60. Roger S. Clark, *The Rome Statute of the International Criminal Court and Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering, or Which Are Inherently Indiscriminate*, in INTERNATIONAL HUMANITARIAN LAW: CHALLENGES 259 (John Carey, William V. Dunlap & R. John Pritchard eds., 2004). Some of the supporters of these proposals accepted the position of the three dissenting judges in the *Nuclear Weapons* advisory proceedings that existing law supports a per se ban on the use of nuclear weapons. Others took the position that whatever existing law might be, the Rome Statute would have only prospective effect, so that it was entirely appropriate to create new rules for the future.

61. Rome Statute of the International Criminal Court art. 8(2)(b)(xvii), *opened for signature* July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002).

62. *Id.* art. 8(2)(b) (xxviii).

“[e]mploying bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.”⁶³ In the original version of the Rome Statute, these prohibitions apply only to international armed conflict, but a 2010 amendment to the treaty extends, for those who become a party to the amendment, these prohibitions to non-international armed conflict.⁶⁴ A further provision speaks to the future. It would prohibit:

Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123.⁶⁵

Some beautiful language here, but the substantive result is even more anti-climactic than the substantive prohibition of the Declaration of Saint Petersburg⁶⁶: “Zilch!” as Seuss might say. The “annex” is an imaginary, even imaginative, but empty, vessel awaiting content that the parties to the treaty are in no apparent hurry to supply.

The Rome Statute was very disappointing, then, on criminalizing weapons by means of a *per se* approach. But there is some language in the Statute that is supportive of the “generally” forbidden approach of the *Nuclear Weapons* advisory opinion.⁶⁷ If the Zooks don’t have shelters, and perhaps even if they do, then the general language of the Statute surely applies. It is a war crime to engage in:

63. *Id.* art. 8(2)(b)(ix). On the one hand, I believe that in general international law and in the Rome Statute the prohibition of poisons and of asphyxiating gases and the like is absolute; they can never be used in armed conflict under any circumstances. On the other hand, even some enlightened militaries such as the Dutch, the Belgians and the Canadians are apparently armed with a small supply of expanding bullets that may be used, for example, where troops are seeking to rescue hostages taken in the conflict. A regular bullet may go through an enemy participant and hit an innocent person—especially a hostage. An element of the crime captures the point this way: it is only a crime if “[t]he perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect.” It is not “useless” if it is necessary to keep the bullet in the enemy’s body. See Roger S. Clark, *Amendments to the Rome Statute of the International Criminal Court Considered at the First Review Conference on the Court, Kampala, 31 May–11 June 2010*, 2 GOETTINGEN J. INT’L L. 689, 708 (2010).

64. Res. 6/ICC/RC (June 11, 2010). For a discussion of some existing proposals to extend the weapons prohibitions to other items, see Roger S. Clark, *Building on Article 8 (2) (b) (xx) of the Rome Statute of the International Criminal Court: Weapons and Methods of Warfare*, 12 NEW CRIM. L. REV. 366 (2009). The differences between the rules in international and in non-international armed conflict are slowly being collapsed, but even the Rome Statute contains more prohibitions in international than in non-international conflict. See generally James G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 85 INT’L REV. RED CROSS 313 (2003).

65. Rome Statute of the International Criminal Court, *supra* note 61, art. 8(2)(b)(xx).

66. St. Petersburg Declaration, *supra* note 56.

67. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.⁶⁸

And to engage in:

Intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects, or widespread, long-term and severe damage to the natural environment that would be clearly excessive in relation to the concrete and direct military advantage anticipated.⁶⁹

Aside from war crimes, it is possible under the Statute to prosecute those responsible for genocide. Article 6 of the Statute, echoing the Genocide Convention,⁷⁰ defines genocide as engaging in one or more of a set of “acts” that include “[k]illing members of the group” when this is “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”⁷¹ Zooks or Yooks, as the case may be, appear to fit one or more of these categories and their “intent” seems to be to destroy the other “as such.” In the *Nuclear Weapons* advisory proceedings, some of the anti-nuclear states argued “that the number of deaths occasioned by the use of nuclear weapons would be enormous; [and] that the victims could, in certain cases, include persons of a particular national, ethnic, racial or religious group.”⁷² They argued, moreover, “that the intention to destroy such groups could be inferred from the fact that the user of the nuclear weapon would have omitted to take into account the well-known effects of the use of such weapons.”⁷³ The court responded, cautiously:

The Court would point out in that regard that the prohibition of genocide would be pertinent in this case if the recourse to nuclear weapons did indeed entail the element of intent, towards a group as such, required by [the Genocide Convention]. In the view of the Court, it would only be possible to arrive at such a conclusion after having taken due account of the circumstances specific to each case.⁷⁴

The “circumstances specific” here in *The Butter Battle Book* shriek “intent”!⁷⁵

68. Rome Statute of the International Criminal Court, *supra* note 61, art. 8(2)(b)(i).

69. *Id.* art. 8(2)(b)(iv).

70. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

71. Rome Statute of the International Court, *supra* note 61, art. 6.

72. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. at 240 ¶ 26.

73. *Id.*

74. *Id.*

75. Without wishing to belabor the criminality point, I note that use of the Boomeroo surely entails some issues under the Rome Statute’s definition of crimes against humanity, the threshold element of which requires a “widespread or systematic attack directed against any civilian population, with knowledge of the attack.” Rome Statute of the International Criminal Court, *supra* note 61, art. 7(1). As I have noted elsewhere, genocide and crimes against humanity are “weapons neutral.” “They can be effected with simple tools like guns and machetes, or with sophisticated ones like atomic bombs or asphyxiating gas.” Roger S. Clark, *Weapons of Mass Destruction*, in 3 ENCYCLOPEDIA OF GENOCIDE & CRIMES AGAINST

Conclusion

But who will be around to prosecute the likes of Chief Yookeroo, and even Grandpa the General, if the threat comes to fruition? It is time to put in a plug for treaty-making. We can probably not negotiate the best place for butter on bread, so we have to live with those differences.⁷⁶ But can't we agree to disarm together? There would, of course, be a "peace bonus" that we could spend on health care—encouraging the breeding of cows that produce low cholesterol butter for example. Disarmament has been a goal since the beginning of the United Nations.⁷⁷ And Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, as the ICJ reminded us,⁷⁸ contains that striking but unfulfilled promise: "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and on nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."⁷⁹

Many proponents of the *Nuclear Weapons* advisory proceedings hoped that undermining the legitimacy of the bomb would jump-start the stalled negotiations under Article VI, thereby providing a space for the law to function as dialogue.⁸⁰ Alas, not yet. Was it Seuss's hope too that the Yooks and the Zooks would come to their senses?⁸¹ As he concludes: "Be patient," said Grandpa. "We'll see. We will see" Like me, Professor Donald Pease sees some hope in this ending:

HUMANITY 1151 (Dinah L. Shelton ed., Thomson Gale 2005). I have also toyed with the notion that, in taking his grandson to the wall, Grandpa was in breach of Article 8(2)(b)(xxvi) of the Rome Statute for the war crime of "[c]onscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities." For a discussion of what it means to "participate actively," see the court's first conviction in Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, ¶¶ 619–31 (Mar. 14, 2012).

76. Seuss was, I believe, in general favor of cultural relativism and of tolerating the differences of others. See Jacob M. Held & Eric N. Wilson, *What Would You Do if Your Mother Asked You? A Brief Introduction to Ethics*, in DR. SEUSS AND PHILOSOPHY: OH THE THINKS YOU CAN THINK!, *supra* note 2, at 103–4. There are some limits on cultural relativism, although I do not believe they apply here:

Should we tolerate Sour Kangaroo's desire to boil the *Whos*, or the Sneetches' discriminatory social structure? Should we sit back and watch, refusing to judge the Once-ler as he destroys the environment or Yertle as he oppresses the turtles in his pond?

Id. at 105. There is the further question of whether to bring the likes of sour kangaroo, the Sneetches, the Once-ler, or Yertle into line by the use of military force, but that is for another essay.

77. U.N. Charter art. 11, para. 1 (power of General Assembly to consider "principles governing disarmament and the regulation of armaments"); G.A. Res. 1(I), *supra* note 6, ¶5. Note the recent adoption by the General Assembly of the Arms Trade Treaty—the NRA be damned! See G.A. Res. 67/234, ¶ 1, U.N. Doc. A/RES/67/234 (Apr. 2, 2013).

78. See *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. at 265 ¶ 105(2)(f).

79. *Id.*

80. *Id.*

81. I like to read him that way to the kids. But others are not so kind. A school librarian took him to task:

But this story ends without the slightest glimmer of hope that a solution to the standoff will be found, and as such can only contribute to a child's sense of helplessness. On this

The child sees what the reader does, namely that the situation his grandfather wants him to inherit is hopeless. The art of the story turns on Dr. Seuss's representation of the difference in the time orientations of the grandfather and his grandson. The grandson recounts his grandfather's story as if it took place in the past, "ten hours before Fall." . . . [T]he blank page with which the book ends is not an open ending; it is the site where a new history can begin after the child turns the page on the grandfather's story.⁸²

Let us turn that page. This grandpa is a little impatient that general and complete disarmament is not yet with us!

issue [nuclear disarmament], perhaps above all others, it is critical to communicate to children the possibility of finding solutions beyond those immediately visible.

Anne L. Okie, *Dr. Seuss, The Butter Battle Book*, SCH. LIBR. J. 72 (1984).

82. PEASE, *supra* note 8, at 147. I find this reading true to Seuss: "[I]f the book solved the issue, it would be false. The next generation must realize that THEY are going to have to solve this problem made by their parents and grandparents." *Id.* An article by Professor Pease appears in this issue of the *New York Law School Law Review: Dr. Seuss's (Un)Civil Imaginaries*, 58 N.Y.L. SCH. L. REV. 509 (2013–2014).