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The CADMUS Journal

The acronym of the South-East European Division of The World Academy of Art and Science – SEED – prompted us to initiate a journal devoted to seed ideas - to leadership in thought that leads to action. Cadmus (or Kadmos in Greek and Phoenician mythology) was a son of King Agenor and Queen Telephassa of Tyre, and brother of Cilix, Phoenix and Europa. Cadmus is credited with introducing the original alphabet – the Phoenician alphabet, with “the invention” of agriculture, and with founding the city of Thebes. His marriage with Harmonia represents the symbolic coupling of Eastern learning and Western love of beauty. The youngest son of Cadmus and Harmonia is Illyrius. The city of Zagreb, which is the formal seat of SEED, was once a part of Illyria, a region including what is today referred to as the Western Balkans and even more. Cadmus will be a journal for fresh thinking and new perspectives that integrate knowledge from all fields of science, art and humanities to address real-life issues, inform policy and decision-making, and enhance our collective response to the challenges and opportunities facing the world today.

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The Risk Institute - Istituto del Rischio

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E-mail:

editor@cadmusjournal.org

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Simulated ICJ Judgment: Revisiting the Lawfulness of the Threat or Use of Nuclear Weapons

Winston P. Nagan

Member of the Board of Trustees, World Academy of Art and Science;
Director, Institute for Human Rights, Peace and Development, University of Florida

Abstract

The author prepared this simulated judgment at the request of Cadmus editors to demonstrate that there is ample ground for revisiting and revising the landmark 1996 advisory opinion of the ICJ on the legality of nuclear weapons. The ICJ failed to anticipate the proliferation of nuclear weapons, which expands the evolution of the concept of sovereignty, the potential cataclysmic impact of nuclear war on climate change, the multiplication of nuclear-weapon-free zones as evidence of a widespread rejection, mounting evidence regarding the physical and psychological harm, and unwillingness of the nuclear weapons states to fulfill their obligations under the NPT. This article challenges the notion that a few sovereign states should be the sole arbiters of international law and affirms the legitimate claim of the global community of protection from the existential threat posed by nuclear weapons. The use or threat of use undermines foundational values of the international legal system and the specific rules of self-defense and humanitarian law. The contribution seeks to give an accentuated role for the explicit use of the fundamental values of international legal order, in crafting an innovative methodology for the formulation of the judgment. The very existence of these weapons undermines the rights of all of humanity. The ICJ should be moved to categorically declare the use and possession of nuclear weapons a crime against humanity.

1. Summary of Findings of 1996 Rulings

The principal findings of the Court in its 1996 advisory opinion are as follows:

1. By a vote of 14-0 the Court found that “There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons”;
2. By a vote of 11-3 the Court found that “There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such”;
3. By a vote of 14-0 the Court found that “A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful”;
4. By a vote of 14-0 the Court found 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 humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons”;

5. By a vote of 7-7 the Court found that “The 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; 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”;
6. By a vote of 14-0 the Court found 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”.

“Law should reflect the basic values and sense of public conscience which emerge from evolving expectations.”

2. Rationale for Review of the 1996 Judgment

The Court is subject to a request to review its own findings of its earlier advisory opinion issued in 1996.* The Court has determined that it has the jurisdiction to proceed with this question. The court also determines, as it did in 1996, that this question raises matters of a distinctively legal character and therefore it is appropriate for the Court to discharge its obligation to provide advisory opinion on a legal question. Finally, the Court has discretion whether to provide an advisory opinion or not.

In a fundamental sense, law should reflect the basic values and sense of public conscience which emerge from evolving expectations responding to changes in perceptions, attitudes and shared subjectivities of society at large. Law in our time emerges during a very turbulent period. In the aftermath of the Cold War, the prevailing perceptions and attitudes were inevitably colored by the five-decade-long arms race in which the salience of nuclear weapons in national defense strategy was unassailable and a perspective encompassing the security needs of humanity as a whole had yet to emerge. Furthermore, facts and circumstances impacting on an assessment of this issue have changed substantially since our earlier judgment.

“The Court did not adequately consider that its own response may serve as a justification or stimulus for the further proliferation of nuclear weapons.”

1. The vitality and relevance of law are tied to its sensitivity and the responsibility it generates for its impacts on humanity and its social consequences. In our earlier judgment, the Court did not adequately consider that its own response may serve as a justification or stimulus for the further proliferation of nuclear weapons. Since then at

* Legality of the Threat or Use of Nuclear Weapons, ICJ Advisory Opinion (8 July 1996).

least three other countries – India, Pakistan and North Korea – have acquired possession of nuclear weapons, substantially escalating the dangers of an intentional detonation of nuclear weapons. According to testimony of the IAEA, a fourth nation, Iran, may be close to doing so. Studies by respected institutions indicate the likelihood that a continuation of the legal status quo could encourage or provide compelling justification for other nations to acquire nuclear weapons.

2. Recent disclosures regarding accidents relating to nuclear weapons and materials in the USA and the former USSR – both during and since the end of the Cold War – make clearer the magnitude of the danger of a nuclear accident. Evidence has come to light which suggests that the Court may not have sufficiently considered the possible unintended dangers arising from its judgment, since it considered only the question of intended usage. Recent studies tracking fallout from the Fukushima nuclear accident in 2011 indicate that thousands of citizens in other countries around the world may have lost their lives or incurred serious illness as a result of the fallout from the accident. If there is a probability that any action, whether it be erection of a nuclear power plant or possession of nuclear weapons, may lead to unintended consequences that impact on other claimants, then those claimants have a right to seek reasonable protection under law from such actions and the Court has an obligation to examine the issue from this perspective as well.
3. Both of these factors acquire even greater significance in the light of the rising levels of international terrorism over the past two decades, which have plagued and continue to plague the international community since the attack on the World Trade Center in September 2001. While the 1996 judgment directly concerned only the usage of nuclear weapons, sanctioning possible usage necessarily implies a sanction for the possession of nuclear weapons. In doing so, therefore, the Court may have inadvertently undermined the rights of other nation-states and the world community to protection from victimization, as a result of weapons stolen from nuclear weapon states.
4. With the end of the Cold War, it appeared in 1996 that the world may well be nearing the end of its long history of war. Yet, since then, two major destabilizing wars have flared up in Afghanistan and Iraq and spread waves of violence to a neighboring nuclear weapons state, Pakistan. The recent change of leadership in North Korea, also a nuclear weapons state, has heightened tensions and threat levels.
5. While the presumption of earlier testimony before the Court was that the use of nuclear weapons might possibly be required as a last resort for self-defense, since then several nuclear weapon states including the USA and USSR have actually enhanced the status of nuclear weapons as part of their overall defense strategies, including the possibility of first use. This suggests that the Court's earlier judgment was not sufficiently clear in its pronouncement on the inherent illegality of these weapons.
6. Perhaps, most significant of all, our earlier judgment was made before there was widespread understanding regarding the threat posed by climate change to the security of the entire human race and the potentially devastating impact of nuclear war on global warming, a threat to humanity that could well overshadow all other considerations.

7. Our earlier judgment was predicated around the issue of whether sovereign states had the right to possess and possibly to use nuclear weapons. It did not sufficiently take into account the rights of other non-belligerent states to protection from the possible intended or unintended consequences of possession or use of these weapons.
8. Earlier, the Court acted under the assumption that sovereign states were the sole legitimate participants in the creation and interpretation of law related to nuclear weapons. It now becomes evident that the security and welfare of the entire world community may be directly and very powerfully influenced by the question whether use of nuclear weapons is considered legal under any circumstances. From this perspective, it is necessary to reconsider whether an act by one party in self-defense may be justified when there is a possibility that it may have consequences for the entire world community. Can self-defense of the part be justified if it endangers the security of the whole?
9. The concept of national sovereignty has evolved from the notion of state absolutism to a concern that sovereignty derives its authority from the people, whose interests are reflected in the emergence of norms of good governance which require transparency, accountability, responsibility and a fundamental regard for the human rights and dignity of the people, protected by the rule of law. Sovereign authority does not come from the barrel of a gun but from the individual components of the body politic. There are grounds to question whether the Court's earlier judgment was founded upon an interpretation of the rights of nation-states which may be at variance with recent developments in international rule of law, which significantly change assumptions of state sovereign absolutism.
10. This issue raises fundamental questions regarding the rightful claimants in this case. Resolutions in the UN General Assembly, efforts to establish regional nuclear-free zones, studies and opinion polls measuring global public opinion in both nuclear and non-nuclear weapon states all indicate a growing abhorrence and rejection of the legitimacy of these weapons. The 2011 resolution of the UN General Assembly calling for a convention to prohibit the use of nuclear weapons was approved by 117 nations. While it is true that the ICJ was originally established by an international treaty signed by nation-states, the ultimate sovereignty and authority of these states must necessarily arise from and rest with their citizens. In recent years, the UN Security Council has recognized the right of the international community to intervene in countries such as Libya when it became evident that national governments were acting in contravention of the will of the majority of their own people. If it be found that the vast majority of the world's citizens reject the legality of nuclear weapons, then it may be that the legality of prevailing national laws and international treaties is subject to question. Therefore, this issue compels the Court to consider whether in fact claimants other than nation-states may under certain circumstances have legitimate interests that should be accounted for in the expression of international rights and obligations on this important issue.
11. Finally, the Court's earlier judgment was predicated on the explicit premise that the nuclear weapons powers would pursue and conclude good-faith negotiations leading to complete nuclear disarmament as they are legally bound to do under article VI of the Treaty on the Non-Proliferation of Nuclear Weapons. Events subsequent to the Court's

earlier judgment have not borne out this premise. On the contrary, not only have at least three additional states acquired nuclear weapons, but in addition several of the largest nuclear weapons powers have actually upgraded the salience of nuclear weapons in their military strategies, a move directly counter to their obligations under the Treaty.

In view of the salience of these issues for the future of international law and the future of global society, the Court holds that it lies within its sound discretion to revisit its earlier ruling and to provide a clear and precise legal appraisal of the issue.

3. Evolution of the Concept of Sovereignty

In 1996 we provided an important clarification concerning the unique characteristics of nuclear weapons and the scope of the applicable International Law. This approach rejected the arguments of nuclear-enabled states which argued that there was no specific rule of customary international law or treaty law that specifically held the threat or use of nuclear weapons to be illegal or that there was no international prohibition on its face that the threat or use of nuclear weapons was incompatible with international law. This proposition was based on the *Lotus Case* decided by the PCIJ in 1926.*

The case involved a collision on the high seas between a French and a Turkish ship in peace time. Turkey had sought to prosecute the Officer of the Watch on the French ship for criminal negligence. The Court ruled in favor of France. Essentially, Turkey could point to no international treaty or customary rule that gave it jurisdiction over French personnel with regard to an accident occurring on the high seas. In short, the Court ruled that since there was no specific rule of international law to which the parties had consented, there could be no restraint based on International Law imposed on a sovereign State. The context of this case did not emerge under the shadow of the laws of war or contemporary human rights obligations. As a consequence, the precedent provides no guidance for the current problem. Additionally implicit in the *Lotus Case* is a strong version of sovereignty, a version significantly modified by the expanded scope of international obligation under the UN Charter.

The concept of sovereignty and the implication of state absolutism have been considerably modified by the UN Charter and state practice since WWII. For example, the Preamble of the UN Charter begins with the phrase “We the peoples of the United Nations determine...” While it is true that membership in the UNO is confined to Sovereign states, those states condition UN membership on agreeing to subordinate sovereignty to the major purposes of the UN Charter. These include the values of peace and security, friendship between nations, the value of humanitarian and human rights law, which implicate universal dignity, and a commitment to the rule of law. Additionally, the post-war period has emerged with a principle of universal jurisdiction for certain crimes against humanity, grave violations of human rights and genocide. Additionally, the international system has developed a class of obligations known as obligations *erga omnes*, obligations which trump sovereignty. In addition, international law has developed the principle of peremptory norms of international law, *jus cogens*, which is also a principle which trumps sovereign absolutism. Finally, there is emerging, in international law, a further limitation on the notion of sovereign absolutism.

* S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7)

This is the emergence of the abuse of the idea of sovereignty which is specifically designed to diminish sovereign absolutism when significant or serious violations of human rights happen.

The doctrinal basis of sovereignty gives preference to the legal personality of the state but has historically had the consequence of viewing the individual as not a subject of international law, but an object of it. This extinguishes individual identity and correspondingly the individual as an articulator of individuated interests in the international legal system. This is an outgrowth of objective positivism, which seeks to base law solely on external fact and explicit agreement ignoring the subjective reality of human aspirations, inalienable rights and universal human values. The state is viewed as an entity apart, something separate from the individuals who constitute its members, an objective reality in its own right, even its right to impose itself on its own people. It bases itself on faith in a mechanical process of ordering and organization which may fail to perceive or honor the subjective aspirations and values of those it seeks to govern. The subjective reality is based on the developing self-consciousness of humanity and its quest for self-realization.

“The individual, the nation-state and the global community all have a legitimate claim for protection and freedom, and justice necessitates evolution of a rule of law that recognizes, harmonizes and reconciles rather than merely balances and compromises the claims of all three.”

As indicated, a condition of membership in the UN is that a State is able and willing to honor the obligations codified in the UN Charter itself. Moreover, judicial method has itself evolved in the exposition of law. The idea of law as a set of narrowly formulated rules to be mechanistically followed is incompatible with the fundamental principle embedded in the UN Charter that law should be construed in the light of the major object, purposes and values of that instrument. In short, in the absence of specific rules it is completely unnecessary, and possibly irresponsible, to consign vitally important aspects of human conduct to a legal vacuum in our global social and legal process. To this end, modern law brings to legal discourse more than simply “rules”; it brings to the discourse higher level principles, standards, doctrines and fundamental legal values for the complete and careful discharge of the judicial function. More than that, adjudication, be it advisory or contentious, must understand the problem before the Court in its appropriate context. It must be alert to the possible value of a multidisciplinary perspective, it must keep in mind the basic values which are ultimately the foundation of the law itself and must see law as an important expression of authoritative and controlling responses in the common interest of all mankind.

As national law is ultimately founded on the fundamental rights of individual human beings, the true basis of international law cannot be relegated solely to the rights of national entities represented by their governments, but must be ultimately founded on the rights of all human beings. So too, it must not only recognize the existence and rights of sovereign nation-states to protect their territory and freedom to determine their way of life, but also and equally the existence and rights of the global human community to protect the global commons and freedom from compulsions dictated by smaller collectives. Prevailing international law is

based on the need to control the egoism of individual nation-states, but this is an insufficient basis for the evolution of global governance. Sovereignty is not a matter of supremacy of the nation-state over its own people or freedom from binding obligation to humanity. The individual, the nation-state and the global community all have a legitimate claim for protection and freedom, and justice necessitates evolution of a rule of law that recognizes, harmonizes and reconciles rather than merely balances and compromises the claims of all three.

4. Foundations of the 1996 ICJ Judgment

In our 1996 judgment, even the dissenting Justice Weeramantry conceded that we had advanced and clarified the discourse about the legal aspect of the control and regulation of nuclear weapons in terms of either threat or use. However, we believe that our opinion should be improved upon. Our exposition could be more explicit and rational about our methods of reasoning so as to provide greater clarity and guidance to the leaders in the world community about the actual status of nuclear weapons as well as guidelines to assure their eventual abolition. Ultimately, the concern with the limitations of our 1996 opinion was the position we took on the question of nuclear weapons, self-defense and survival of the State. It is appropriate to quote the relevant portion of that judgment in full:

“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 a stake.”

In 2012 we may confidently state that the current state of international law today is not unclear or uncertain. Indeed, in reviewing the opinions of the dissenters it may even be stated that the law was clear on this question in 1996. The Court had indicated in 1996 that the current elements of fact available to the Court did not provide a basis for a definitive conclusion. It is our contention that the facts available then, as well as contemporary elements of fact today, remove all doubt about the information available to the Court to reach a definitive conclusion. In order to sustain the opinion of the Court today we approach the task by changing and modernizing the method of judicial exposition and analysis. We start our analysis with the problem which the Court was and is now confronted with – the unique nature of nuclear weapons.

5. The Unique Nature of Nuclear Weapons

Nuclear weapons are weapons of mass destruction. Indeed, the nuclear arsenals distributed among nuclear empowered States are such that there is no necessity for delivery systems because detonating a critical number of thermonuclear weapons could trigger the destruction of all human life on planet Earth. In 1945 the United States completed the testing of its nuclear bomb and President Truman authorized its use on the Empire of Japan which was still at war with the US. These atom bombs were rather miniscule when compared with thermonuclear weapons that are in nuclear arsenals today. For example, one megaton bomb would represent the destructive capacity of 70 Hiroshima bombs. A 15 megaton bomb would be the equivalent of 1,000 megaton bombs. A one megaton bomb is the equivalent of a

million tons of TNT. These statistics are mind-boggling when it is considered that there are a multitude of 20+ megaton bombs kept in readiness for the threat or use in terms of sovereign interest. What distinguishes nuclear and thermonuclear weapons from conventional weapons is explained by the United States Atomic Energy Commission:

“it differs from other bombs in three important respects: first, the amount of energy released by an atomic bomb is a thousand or more times as great as that produced by most powerful TNT bombs; secondly, the explosion of the bomb is accompanied by highly penetrating and deleterious invisible rays, in addition to intense heat and light; and, thirdly, the substances which remain after the explosion are radioactive, emitting radiations capable of producing harmful consequences in living organisms”.

6. The Nuclear Threat to a Viable Eco-System – Nuclear Winter

Life, including human life, depends upon environmental integrity. To destroy environmental integrity is to destroy life as we know it. This is one of the most important and unique threats that nuclear arsenals pose for survival. Consider the following statement of the World Commission on the Environment and Development:

“The likely consequences of nuclear war make other threats to the environment pale into insignificance. Nuclear weapons represent a qualitatively new step in the development of warfare. One thermonuclear bomb can have an explosive power greater than all the explosives used in wars since the invention of gunpowder. In addition to the destructive effects of blast and heat, immensely magnified by these weapons, they introduce a new lethal agent – ionizing radiation – that extends lethal effects over both space and time.”

Such is the potential destructive capacity of already deployed nuclear arsenals that the capacity inheres in these weapons to destroy life on this planet many times over. On the assumption that, unlikely as it is, some forms of humanity may survive, the byproducts of a nuclear explosion, take plutonium 239 for instance, will last for 20,000 years retaining its lethality for human habitation. The principal radioactive elements that result from the detonation of nuclear weapons are as follows:

Table 1: Half-life of Radioactive Nuclides

Nuclide	Half-life
Cesium 137	30.2 years
Strontium 90	28.6 years
Plutonium 239	24,100 years
Plutonium 240	6,570 years
Plutonium 241	14.4 years
Americium 241	432 years

Table 1 underscores the lethal multigenerational effects of radiation. In short, we are not dealing simply with contemporaneous extinction but an extinction that ensures no future generation any survivability. If the scope of destruction is more limited there will still be catastrophic effects on the Earth-space eco-system.

The environmental and human consequences of nuclear weapons violate the laws of armed conflict in important ways, particularly in light of the new scientific certainty regarding the after-effects of a nuclear conflict, both through death and injury to non-combatant nations, as well as the long term degradation of food stocks and arable land which would devastate human civilization.¹ One of the possible aftereffects of a massive nuclear exchange would be the emergence of a nuclear winter. A smoke cloud and the debris generated from a multitude of explosions would block out sunlight. There would be crop failures and global starvation.² Climatic changes resulting from nuclear conflict would occur many thousands of times faster and thus would likely be far more catastrophic than the ones predicted as a result of global warming. The rapidity of the war-induced changes, appearing in a matter of days and weeks, would give human populations and the whole plant and animal kingdoms no time to adapt.

Historical evidence indicates that radical long term climate change occurred in the past due to a single volcanic eruption. Recent research by Alan Robock utilizing a model designed by NASA's Goddard Institute for Space Studies, which was used to produce results of the Intergovernmental Panel on Climate Change (IPCC), indicates that the smoke from burning cities generated by even a limited nuclear war would have devastating impact on global agriculture and result in billions of deaths from famine.³ Robock likens the impact to that caused by the eruption of Mount Tambora in Indonesia in 1815, the largest such event on record. The resulting cloud of ash spread around the world and caused crops to fail the following year in North America and Europe, resulting in the worst famine of the century.

A relatively immediate consequence of such an exchange could be the triggering of a nuclear winter. The darkness resulting from a large scale nuclear war could destroy all agriculture on earth, threatening the extinction of all humanity.⁴ The threat or use of nuclear weapons represents existentially the most absolute form of alienation of humanity from itself. It is this consequence that poses the most important challenge to the defense of the foundational values of humanity and law which is the challenge before this Court.

The limits of acceptable collateral damage are explicitly delineated in military manuals which treat Nuclear Weapons usage. The USAF Intelligence Targeting Guide explicitly states that collateral damage must be limited so that friendly troops and populations have a 99% safety factor. In light of the new scientific evidence regarding the long term consequences of nuclear weapons, no use of nuclear weapons would fall within the parameters of acceptable collateral damage in the use of nuclear weapons.⁵ As Justice Weeramantry observed in his dissenting opinion, "no credible legal system could contain a rule within itself which rendered legitimate an act which could destroy the entire civilization of which that legal system formed a part."

7. Medical Appraisal of the Nuclear Threat

The two "mini" atom bombs dropped on Hiroshima and Nagasaki resulted in 140,000 and 74,000 deaths respectively. The World Health Organization (WHO) estimated that the use

of a single nuclear weapon or one involving multiple weapons would cause deaths varying from 1 million to 1 billion. A similar number would be seriously injured with burns as well as radiation poisoning. It was also estimated that if India and Pakistan had actually exchanged nuclear weapons several years ago, the lucky victims would be those who were killed. The possibility of a nuclear exchange triggering a nuclear winter, which could result in the mass extinction of humanity, is one that includes the termination of all human existence. This factual contingency anticipates its own condemnation and repudiation. In short, a nuclear winter outcome involves not only a repudiation of the idea of law or the fundamental values behind law but a repudiation of humanity itself.

In the event of an exchange of nuclear arsenals on or near population centers it may be anticipated that, apart from the massive extermination of human beings, there will be thousands upon thousands who have survived and suffered massive burns, and who would be left without any medical response. In short, if the entire world community had mobilized its medical burn unit resources, it would be completely insufficient to even present a token element of medical intervention. Moreover, there are no medical responses for the survivors of a nuclear exchange. When the atomic bomb was used in Japan, there was little evidence that thought was given to the effects of the weapon on human survivors. According to Judge Weeramantry:

“The death toll from lingering death by radiation is still adding to the numbers. Over 320,000 people who survived but were affected by radiation suffer from various malignant tumors caused by radiation, including leukemia, thyroid cancer, breast cancer, lung cancer, gastric cancer, cataracts and a variety of other after-effects more than half a century later, according to statistics given to the Court by the representative of Japan. With nuclear weapons presently in the world’s arsenals of several multiples of the power of those explosions, the scale of damage expands exponentially.”

The incredible damage caused by the heat and the blast, apart from the destruction of the physical structure of a city or community provides immense destructive force.*

In this context the specific issue which implicates international concern in part is whether the effects of a nuclear exchange or detonation can be confined within the territorial boundaries of conflicting States. Scientific studies indicate that the fallout from such detonations will extend for hundreds of kilometers and gamma-ray exposure from the fallout will contaminate human beings across the borders of States. In short, the effect of the use of nuclear weapons will be transnational and therefore trigger an important level of international legal concern. We might therefore conclude this portion of our opinion by stressing the potential of nuclear arsenals to destroy human civilization, culture, communication systems, nuclear reactors, food productivity and more. Nobel Laureate Professor Rotblat had the following statement,

* As human beings are vaporized, or simply torn apart with body parts flying around like missiles in all different directions. The radiation effects are both immediate and long term and have destructive effects on human genetics. A witness from the Marshall Islands described the genetic abnormalities experienced by islanders contaminated by thermonuclear testing:
 “Marshallese women give birth, not to children as we like to think of them, but to things we could only describe as ‘octopuses’, ‘apples’, ‘turtles’, and other things in our experience. We do not have Marshallese words for these kind of babies because they were never born before the radiation came. Women on Rongelap, Likiep, Ailuk and other atolls in the Marshall Islands have give birth to these ‘monster babies’ ... One women in Likiep gave birth to a child with two heads ... There is a young girl on Ailuk today with no knees, three toes on each foot and a missing arm ...
 The most common birth defects on Rongelap and nearby islands have been ‘jellyfish’ babies. These babies are born with no bones in their bodies and with transparent skin. We can see their brains and hearts beating ... Many women die from abnormal pregnancies and those who survive give birth to what looks like purple grapes which we quickly hideaway and bury...”

which was to be presented to the Court in 1996. That statement was relevant then as it is now:

"I have read the written pleadings prepared by the United Kingdom and the United States. Their view of the legality of the use of nuclear weapons is premised on three assumptions: (a) that they would not necessarily cause unnecessary suffering; (b) that they would not necessarily have indiscriminate effects on civilians; (c) that they would not necessarily have effects on territories of third States. It is my professional opinion – set out above and in the WHO reports referred to – that on any reasonable set of assumptions their argument is unsustainable on all three points."

One central fact emerges from the above material. From the point of view of conventional medicine, the idea of preparing a credible medical response after an exchange of nuclear weapons, which was the assumption of the profession, has been repudiated by a number of professional medical associations globally. Indeed, the consensus of the profession is that the delivery of any credible medical response after a nuclear exchange is quite simply an illusion. Hence, development within the medical profession of a determined focus on the prevention of nuclear war is seen as the best form of medical intervention. According to the Physicians for Social Responsibility,

*"Since it is impossible to prepare adequately for every type of nuclear attack, the physician's responsibility goes beyond mere disaster planning. Physicians, charged with the responsibility for the lives of their patients and the health of their communities, must also explore a new era of preventive medicine, the prevention of thermonuclear war."*⁶

The International Physicians for the Prevention of Nuclear War received the Nobel Prize in 1995. Receiving the Prize on behalf of the organization, Dr. Bernard Lown made the following pertinent point about the threat that nuclear arsenals pose to the survival of humanity:

*"We physicians who shepherd human life from birth to death have a moral imperative to resist with all our being the drift toward the brink. The threatened inhabitants on this fragile planet must speak out for those yet unborn, for posterity has no lobby with politicians... We physicians have focused on the nuclear threat as the singular issue of our era. We are not indifferent to other human rights and hard-won civil liberties. But we must be able to bequeath to our children the most fundamental of all rights, which preconditions all others: the right to survival."*⁷

In 1962, the New England Journal of Medicine, one the most prestigious professional medical journals, published a series of articles focused on the medical consequences of thermonuclear war. The potential health effects of nuclear explosions were described in professional clinical detail. These included considerations of multitudes of massive traumatic injuries, massive burns and life-threatening radiation exposure. The authors concluded that attempted responses by health professionals after nuclear weapons had been exploded would be "almost entirely futile." These early studies have been supplemented by continued research into this issue and confirm the conclusion that there is no medical response of any credibility in the aftermath of an exchange of nuclear explosions.⁸ In the context of the conflict between India and Pakistan, noises were made about the possibility of a nuclear exchange. A multitude

of sources including those from the medical fraternity raised the question of medical responses in the aftermath of a nuclear exchange. It became clear that the resources of the entire planet involving burn specialists using skin grafts and related medical technologies were vastly insufficient even if mobilized on a global basis to respond to the crisis. In short, such an exchange would leave hundreds of thousands of survivors with no medical assistance.⁹ Roy Farrell, President of the Physicians for Social Responsibility, stated quite bluntly that “there is no effective medical response to a nuclear explosion.”¹⁰

The conclusion, which may be drawn from the possibility of the use of a nuclear explosive device as an act of war, is that it would slaughter untold numbers of combatants and civilians, and the survivors would have no expectation of medical relief, which suggests unconscionable suffering on a massive scale. The further consequences of such an exchange involve effects of radiation and its long-term effects on human and ecological survival.

“The problem posed by nuclear arsenals reposes basically in the challenge they present to the basic values upon which the international legal system is founded.”

8. Factual Problem of the Threat or Use of Nuclear Arsenals in the Context of the Foundational Values of the International Legal System

The problem posed by nuclear arsenals reposes basically in the challenge they present to the basic values upon which the international legal system is founded. To understand the nature of the challenge and why these weapons represent a potential repudiation of the most basic values of international social and legal coexistence, it is important that the problem itself be clarified in terms of the challenges to these values that it represents.

Judge Weeramantry in his dissent has insightfully drawn attention to what he describes as six keynote precepts that are the foundation of the UN Charter. We may go further and consider these precepts the most fundamental values upon which the UN Charter and modern international law are founded. As an approach to legal exposition and discourse, juxtaposing the problem in terms of its value challenges would appear to be the clearest possible way to present these issues to the professional culture of law, as well as to the larger political culture of the world community. The six keynote precepts or values are:

- a. *Principle of Humanity:* The very first words in the Charter recognize that it is based on “We the people of the United Nations”. This means that every individual human being on the planet is a part of “we the peoples” and has a vital interest in promoting and defending the values of survival and progress of “we the peoples of the planet”. Moreover, in the context of the law of war the interest of the peoples is expressed in terms of the “principles of humanity” and the “dictates of public conscience”.
- b. *Rights of Future Generations:* Determination of the peoples to save the succeeding generations from the scourge of war. Clearly, this would be meaningless if it precluded war using nuclear weapons. Peace is a foundational people’s value.
- c. *Dignity and worth of the individual human being:* The mass slaughter of vast human aggregates or indeed the entire corpus of humanity is a thorough denial of this value.

- d. *Rights of human aggregates in large or small States*: Clearly, the concentration of nuclear weapons in large States erodes the equality of human aggregates in small States.
- e. *Other Sources of International Law*: The fifth keynote precept or value insists on the respect for maintaining obligations arising from international agreements as well as “other sources of international law”. We should note here that the legality of nuclear weapons is in fact challenged by these “other sources of international law”.
- f. *Promotion of Social Progress*: The sixth keynote precept or value describes as a fundamental Charter expectation the promotion of social progress and improved standards of life.

These weapons, if used, have the capacity to move humanity, if it is fortunate, into the stone ages and less fortunately carries the capacity to completely destroy humanity, thereby extinguishing social progress and improved living standards. Keeping these values in full view of our discourse, we can now begin to look beyond the claims of nuclear empowered states that there must be a specific international agreement giving the consent of the State to nuclear abolition. We may see this narrow and astigmatic rule-centered approach as in effect a repudiation and denial of the most foundational values behind international law, in effect a repudiation of the very idea of international law itself. It is indeed a repudiation of the values which are the reason for the very existence of this Court.

If we are to be faithful to the foundational values of the international legal system, it is important that we consider other sources of law that are relevant to an appraisal from a legal point of view of the question put to the Court for its advisory opinion. These sources include the following; (1) the law of arm conflicts, which refers to the *jus ad bellum* and *jus in bello*; (2) the relevant *lex specialis* implicating agreements which create expectations about nuclear weapons and related weapons of mass destruction; (3) the entire corpus of international law, which establishes the idea of international obligation constraining sovereignty, establishing rights and duties such as, for example, human rights law, which may have a radiating effect on nuclear weapons policy.

9. The Jus In Bello

The *jus in bello* refers to both custom, tradition as well as specific agreements that impose humanitarian restraints on the conduct of war. It is widely recognized that all major civilizations have recognized and often insisted that humanitarian considerations in armed conflict be respected. These traditions have significantly influenced the development of modern law in this area. An early codification of humanitarian law and principles emerged in the St. Petersburg Declaration of 1868. This document suggested that humanitarian law was designed to “conciliate the necessities of war with the laws of humanity”. The modernization of warfare provided a necessary impetus to radically develop and codify humanitarian law principles which are reflected in the Geneva Conventions and related protocols. After WWII, the Nuremberg Tribunal applied an as yet undeveloped idea of crimes against humanity. The related idea of “elementary considerations of humanity” as part of the evolving developments of humanitarian law from antiquity is evident in the Hindu, Buddhist, Christian and Islamic traditions. In the Indian Epics, the *Ramayana* and the *Mahabharata*, there is evidence of

these principles. For example, in the *Ramayana*, Rama's brother Lakshmana indicates that a weapon of war has become available that would destroy the entire race of the enemy including non-combatants. Rama indicates that this weapon should not be used in war because such destruction *en masse* was forbidden by the ancient laws of war, even though Ravana was fighting an unjust war with an unrighteous objective. In the *Mahabharata*, there emerges the principle which forbids the use of hyper-destructive weapons:

"Arjuna, observing the laws of war, refrained from using the 'pasupathastra', a hyper-destructive weapon, because when the fight was restricted to ordinary conventional weapons, the use of extraordinary or unconventional types was not even moral, let alone in conformity with religion or the recognized laws of warfare."

The Buddhist tradition is avowedly anti-war and passivist. It does not believe that taking life, inflicting pain, enslaving others, taking their goods or lands are ever justified. Correspondingly, Buddhism even rejects the idea of just war:

"According to Buddhism there is nothing that can be called a 'just war' – which is only a false term coined and put in circulation to justify and excuse hatred, cruelty, violence and massacre. Who decides what is just and unjust? The mighty and the victorious are 'just', and the weak and the defeated are 'unjust'. Our war is always 'just', and your war is always 'unjust'. Buddhism does not accept this position."

Islam contains many principles which affirm the traditions of conscience and humanitarian concern. The same theme permeates the ethical foundations of the Christian tradition, principles which deeply influenced the father of modern international law, Grotius.

In the 19th Century, US President Lincoln directed Professor Lieber to prepare instructions for the armies of the Union. These instructions were referenced in the 1899 Peace Conference in The Hague as well. One of the most important outcomes of this conference which sought to codify humanitarian principles was the famous Marten's Clause. Essentially, this was put into The Hague Convention because of the recognition that the drafters could not specify every possible contingency that implicated humanitarian values. The Martens Clause states:

"Rule of law must ultimately be founded on fundamental laws of humanity which are a codification of the public conscience."

"Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

The Martens Clause is a vital antidote to excessive legalism in approaching the appraisal of the status of nuclear weapons in international law. It is based on the premise that rule of law

must ultimately be founded on fundamental laws of humanity which are a codification of the public conscience. Although a great deal of humanitarian law has been codified, they do not specifically address hyper-destructive weapons such as nuclear arsenals. Excessive legalism would then hold that since there is no specific rule addressing the destructive capacity of nuclear arsenals, the issue would fall into a legal vacuum and be left to the anarchic impulses of sovereign State elites. This would create the anomalous situation in which a weapon vastly destructive of humanitarian values and a negation of the foundational values of international law would be precluded from review and careful legal analysis. This therefore underlines the importance of reshaping the judicial craft in such a way as to understand the problem realistically, understand it in terms of the foundational values that it compromises and promote the idea that legal precepts not only emerge in rules but in the framework of principles, standards, doctrines and foundational legal values. And all these tools should be deployed as the essence of judicial craft skills to reach a rational result that communicates clearly and unequivocally to the relevant target audience, in this case, humanity at large.

The Martens Clause may be read in the light of keynote Charter values as well as Article 22 of the Hague Regulations of 1907, which stipulates that “the right of belligerents to adopt the means of injuring the enemy is not unlimited.” This may not be a rule, but it is a principle and gets meaning from being read in the light of the standard represented in the Martens Clause, as well as the foundational legal values of the international system that we summarized earlier. The Martens Clause has been affirmed in judicial practice and multiple resolutions of the General Assembly have referred to the incompatibility of nuclear weapons with the dictates of public conscience. Our analysis and description of the unique character of nuclear weapons make it abundantly clear that nuclear weapons with their effects on the environment, human life and its genetic effects, and survival are incompatible with the dictates of public conscience.

Table 2: Nuclear-Weapons-Free Zones¹¹

Treaty	Region	Land Km²	States	Date in Force
Antarctic	Antarctica	14,000,000		1961-06-23
Space	Outer Space			1967-10-10
Tlatelolco	Latin America Caribbean	21,069,501	33	1969-04-25
Seabed	Seabed			1972-05-18
Rarotonga	South Pacific	9,008,458	13	1986-12-11
Bangkok	ASEAN	4,465,501	10	1997-03-28
MNWFS	Mongolia	1,564,116	1	2000-02-28
Semei	Central Asia	4,003,451	5	2009-03-21
Pelindaba	Africa	31,221,532	53	2009-07-15
All NWFZs Combined		84,000,000	115	39% world pop
Nuclear Weapons States		41,400,000	9	47% world pop
Neither NWS nor NWFZ		24,000,000	68	14% world pop

As Judge Shi observed in his declaration to the 1996 Advisory Opinion of the Court, the structure of the community of States is built on the principle of sovereign equality. Any undue emphasis on the practice of materially powerful nuclear weapons States, constituting a fraction of the membership of the community of States, would be contrary to the principle of sovereign equality of States.

The Court earlier agreed that regional treaties prohibiting nuclear weapons in Latin America and the South Pacific “*testify to the growing awareness of the need to liberate the community of States and the international public from the dangers resulting from the existence of nuclear weapons...however, it does not view these elements as amounting to a comprehensive and universal conventional prohibition of the use, or the threat of use, of those weapons.*”^{*} Reference to these treaties omitted consideration of the treaties banning these weapons in Antarctica and the seabed. 46 countries were covered by nuclear-free zones at the time of the Court’s earlier opinion; since then, the area of the globe covered by nuclear-weapons-free zones has grown substantially. Table 2 provides evidence that 115 nations representing 60% of all states and 56% of the earth’s landmass now reside in nuclear-weapons-free zones.[†]

Earlier the Court came to the conclusion that there was insufficient evidence that the possession of nuclear weapons had come to be universally regarded as illegal. However, the absence of such specific prohibition does not in itself confirm their legality. In recognition of that fact, the Court agreed that there were parts of customary international law that would also apply to the use of nuclear weapons, but decided not to pronounce on the matter.

10. The Specific Rules of Humanitarian Law at War

The most important international law rules governing humanitarian law include the following:

- a) the prohibition against causing unnecessary suffering;
- b) the principle of proportionality;
- c) the principle of discrimination between combatants and non-combatants;
- d) the obligation to respect the territorial sovereignty of non-belligerent States;
- e) the prohibition against genocide and crimes against humanity;
- f) the prohibition against causing lasting and severe damage to the environment;
- g) human rights law.

It would be apparent in the light of our description of the unique nature of nuclear weapons and the way they are incompatible with the foundational values of the international legal system, that the specific rules of that system mean, when understood in terms of the values they are meant to defend and enhance, that the threat or use of nuclear weapons cannot be compatible with the specific rules of the humanitarian law of war. It is in the nature of the

* Para 63 of ICJ opinion

† South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga); See also *SEANWFZ Enters Into Force; U.S. Considers Signing Protocol Arms Control Association* (April 1997); See also *Nuclear free zone in Central Asia enters into force Saturday*, The Earth Times (20 March 2009); Resolution 3472 – Comprehensive study of the question of nuclear-weapon-free zones in all its aspects; Resolutions adopted on the reports of the First Committee, United Nations General Assembly 30th session, 2437th plenary meeting (11 December 1975); A/RES/64/26 - Establishment of a nuclear-weapon-free zone in the region of the Middle East United Nations General Assembly Sixty-fourth session (14 January 2010); “Speech: Robson - Arctic Nuclear Weapons Free Zone,” Scoop News (12 August 2009)

weapon that it causes unlimited destruction and perforce must cause unnecessary suffering. A weapon of such unlimited destructive capacity cannot be constrained by the principle of proportionality; cannot distinguish between combatants and non-combatants; its effects are invariably transnational and compromise the sovereignty of non-belligerent States; the capacity for mass extinction of human beings implicates both genocide and crimes against humanity; radiation and other effects cause lasting and severe ecological destruction; and ultimately its contemplated use is completely incompatible with human rights law.

The importance in humanitarian law of the dictates of conscience is in part answered in the section that deals with the medical effects of a nuclear war. However, we may follow the lead of Judge Weeramantry in his dissenting opinion in 1996 when he posed the question about the dictates of public conscience and the consequences of the use of nuclear weapons on humanity's conscience. The following is a list of the questions that he expresses for the purpose of underscoring the importance of this principle for a specific application of the law:

"Is it lawful for the purposes of war to induce cancers, keloid growths or leukemias in large numbers of the enemy population?"

Is it lawful for the purposes of war to inflict congenital deformities and mental retardation on unborn children of the enemy population?"

Is it lawful for the purposes of war to poison the food supplies of the enemy population?"

Is it lawful for the purposes of war to inflict any of the above types of damage on the population of countries that have nothing to do with the quarrel leading to the nuclear war?"

We might finally conclude this section by referring to the foundational values which inform the United Nations Charter and constitute the value foundations of the concept of international obligation binding in all States. This reference makes clear that the contemplated threats and possible uses of nuclear weapons are completely incompatible with the *jus in bello* and the rules of humanitarianism and public conscience characteristic of this body of law. When this orientation is applied to the specific rules of international law about the conduct of war we find that every articulated rule that has been codified and is clearly as attainable as a source of positive law is subject to violation by the threat or use of nuclear weapons. We briefly summarized these issues. The law prohibits the idea of conducting war which results in cruel and unnecessary suffering. These principles have long been codified in modern law such as the Lieber Code of 1863, Declaration of St. Petersburg in 1868, Hague Conventions in 1899 and 1907, Hague Rules of Air Warfare in 1923, The Nuremberg Charter in 1945 and Four Geneva Conventions in 1949. Regarding the principle of proportionality, the well-accepted principle that the strategies and tactics of war are not unlimited, is another matter that is violated by a war based on nuclear weapons. The observations of two American Statesmen are pertinent. According to Robert McNamara:

"It is inconceivable to me, as it has been to the others who have studied the matter, that 'limited' nuclear wars would remain limited – any decision to use nuclear weapons would imply a high probability of the same cataclysmic consequences as a total nuclear exchange."

According to Henry Kissinger;

“Limited war is not simply a matter of appropriate military forces and doctrines. It also places heavy demands on the discipline and subtlety of the political leadership and on the confidence of the society in it. For limited war is psychologically a much more complex problem than all-out war... An all-out war will in all likelihood be decided so rapidly – if it is possible to speak of decision in such a war – and the suffering it entails will be so vast as to obscure disputes over the nuances of policy.”

“Limited nuclear war is not only impossible, according to this line of reasoning, but also undesirable. For one thing, it would cause devastation in the combat zone approaching that of thermonuclear war in severity. We would, therefore, be destroying the very people we are seeking to protect.”

Nuclear weapons cannot distinguish between combatants and non-combatants and therefore represent another transgression of humanitarian law. They cannot have their effects confined to a single jurisdiction and will invariably implicate and damage non-belligerent States. To the extent that they have the capacity to exterminate whole human aggregates it is very probable that a targeted human aggregate will be a protected class under the convention that outlaws genocide. With regard to human rights values, virtually every human rights convention, declaration or resolution is subject to violation by the use of nuclear weapons.

11. Law of Self-Defense and Nuclear Weapons

It is well established in customary international law and the law of the UN Charter that a State has a right to self-defense. However, once the State invokes this right its conduct is governed by the *jus in bello* which includes humanitarian law. Clearly, under conventional international law a State has a right to use force in self-defense. However well established this right is, it is quite different from the next proposition which seems to be sanctioned by the opinion

“*The fact that international law validates the right to self-defense does not mean that it validates the right to self-defense with nuclear weapons.*”

of the Court in 1996 that a State may use nuclear weapons in self-defense. The fact that international law validates the right to self-defense does not mean that it validates the right to self-defense with nuclear weapons. Essentially, the form of self-defense available to a State is constrained by the fundamental values of the system and, in particular, the basic rules which govern humanitarian law. These principles, to restate them, include: avoiding unnecessary suffering, the principle of proportionality, discrimination, non-belligerent States, genocide, environmental damage and human rights. The use of nuclear weapons to either initiate coercion or to respond in self-defense with nuclear weapons means that either way the weapons themselves will violate the values of the system and the specific principles that govern the conduct of war. It, therefore, would be a logical conclusion that either we have to discard the values of the system and the time-tested rules of humanitarian law in order to justify a form of

coercion centered on nuclear weapons or must limit the form of war to conventional weapons and retain the integrity of the values and the rules of the international system.

From this perspective the answer suggests itself. Nuclear weapons cannot be used either to initiate coercion or to respond in self-defense because in either case there would be a clear violation of the principles of humanitarian law and outright repudiation of the foundational values of international law and society. Former Secretary of Defense, Robert McNamara, provided a scenario implicating nuclear exchanges between nuclear weapon states. The scenario he gave, which he believed was realistic, is a frightening one. It is one that this Court should judicially acknowledge. According to McNamara,

“But under such circumstances, leaders on both sides would be under unimaginable pressure to avenge their losses and secure the interests being challenged. And each would fear that the opponent might launch a larger attack at any moment. Moreover, they would both be operating with only partial information because of the disruption to communications caused by the chaos on the battlefield (to say nothing of possible strikes against communication facilities). Under such conditions, it is highly likely that rather than surrender, each side would launch a larger attack, hoping that this step would bring the action to a halt by causing the opponent to capitulate.”

In sum, invocation of the use of force in self-defense does not absolve the self-defense responder of the obligation to respond within the restraints of the law of war. A nuclear response will generate unnecessary suffering, be incapable of being expressed in terms of the principle of proportionality, be unable to deploy the discrimination necessary to distinguish combatants from non-combatants, be unable to use its weapons without compromising the rights of non-belligerent States, run the risk of committing genocide in the cause of self-defense, inflict enormous catastrophic environmental damage on the eco-system of the target community, and, finally, inflict grave and horrendous human rights violations on the target group. It is therefore clear that invocation of the right to use nuclear weapons based on a right of self-defense, which runs the risk of the extinction of the most basic values which underlie international legal and social order and which repudiates the specific rules that have evolved from those values, represents a claim to competence that cannot be justified under any circumstances under the current facts as this Court understands them and the current framework of legal order that binds this Court.

This Court therefore concludes that the statement of law in Judge Weeramantry’s dissenting opinion in 1996 more accurately reflects the conditions of fact that shape world order and reflects as well an accurate application of law and its basic values to the problem posed by the threat or use of nuclear weapons.

12. Deterrence: Threat of Use

The concept of deterrence is in general one of the reasons given by sovereign states as to why they develop and deploy nuclear weapons. The logic of deterrence led to an assumption that mutually assured destruction was the foundation of deterrence. This implication appeared to undermine the restrained nature of the deterrence concept. In our time, the military policy of some nuclear weapon states includes a statement of conditions under which nuclear weapons may be used in future. These statements when made public constitute a policy of

deterrence intended to prevent acts of aggression by other states. Indeed, both American and Russian defense policies include statements of conditions under which first use or unilateral use of these weapons might still be an option. However, Pakistan openly asserts a first use nuclear policy that it might include use of these weapons even in a conventional war with India initiated by it. North Korea has repeatedly made similar threats in recent years. This necessitates examination of whether even the threat of use constitutes a violation of the human and humanitarian rights of civilian populations around the world. This suggests that the coherence of the deterrence justification continues to be deteriorating in state practice. Indeed, Jonathan Granoff concludes that “deterrence is too dangerous. Even under the best of circumstances, mistakes can be made.” In support of this he cites General Lee Butler, U.S. Commander of Strategic Nuclear Forces. According to Butler, after a study of nuclear incidents and accidents, these events are “more chilling than anything one can imagine.” He refers to missiles blowing up in their silos which ejected their warheads, B-52 aircraft colliding with tankers and spreading nuclear weapons. The General gives many more chilling illustrations.¹²

When we examine the development and deployment of nuclear arsenals in the light of the alleged constraints of deterrence, other social and humanitarian deficits become obvious. Numerous studies conducted during the height of the Cold War documented the negative impact of the perceived danger of nuclear weapons on the psychological health of the population, especially anxiety, cynicism, fear and apathy in children, adolescents and the unemployed.¹³ More recent studies link anxiety and mental health disorders with the broader spectrum of physical disorders. These concerns are still very real and widespread among communities around the world, as evidenced by the extensive and growing level of public protests and organized voluntary campaigning for the eradication of nuclear weapons. After the Fukushima nuclear accident, the incidence of severe mental disorders rose by 50% and milder disorders by 100%.¹⁴ Nuclear arsenals, even with deterrence, therefore generate high levels of personal insecurity, anxiety and even mental illness for large segments of humanity.

The legality of even threat of use under some circumstances is very questionable. Law prohibits making threats under circumstances when the very act of threatening may constitute harm to the party so threatened. Blackmail, the threat of disclosure of information, is illegal in all countries, even when it is based on information that is found to be true, because the act of threatening is itself a form of forceful intimidation and harm to the party. Deterrence depends on intimidation and, at least psychological coercion.

13. Right to Possession of Nuclear Weapons

The Court earlier examined the legality of possession of nuclear weapons as well as their use or threat of use. Declaring the threat or use of nuclear weapons to be unlawful does not necessarily mean that the possession of nuclear weapons without a threat or possible use is on its face unlawful. The earlier ICJ judgment notes that there is no specific language in the UN Charter or other treaties specifically forbidding possession of nuclear weapons. We now observe that the mere absence of a specific prohibition is insufficient grounds for declaring possession as legal. If law is founded upon basic values implicated in the public conscience and where an issue clearly and abundantly contradicts the dictates of laws, basic values and public conscience, it may be found deficient on an inadequate basis for determining legality.

The mere fact that nuclear weapons are not specifically prohibited by the Second Hague Convention of 1899 or the 1925 Protocol regarding chemical weapons cannot be deemed relevant since nuclear weapons did not even exist at the time.

However, the inextricable linkage between possession and use necessitates that the Court also reflect on the legality of possession. In recent years ample evidence has come to light indicating that the very existence and possession of nuclear weapons constitute a grave risk to possible use, either intentional or accidental.* The risk from accidental detonation or radioactive contamination, even of weapons in the possession of the countries with the most sophisticated command and control systems, is well documented.¹⁵

“Therefore, the very possession of nuclear weapons violates the fundamental human rights of the citizens of the world and must be regarded as illegal.”

Apart from this, the very existence of these weapons poses a constant threat that they may fall into the possession of either states or non-state actors who have no regard for international law and would be willing to contravene all the statutes and principles set forth in this judgment in the pursuit of their own political or ideological ends. Should even a single weapon be stolen and used in such a manner, the physical devastation and contravention of humanitarian international law would be incalculable. Under such circumstances, the state that lost control of the weapons would undoubtedly plead innocence on the grounds that it did not intend either the theft or use of weapons. But the very possession of these weapons necessitates an acceptance of responsibility for all possible events, including the extremely improbable occurrence of the earthquake and tsunami of historically unprecedented proportions which resulted in the Fukushima accident in 2011.

International law must take into consideration the possibility and consequences of such eventualities. There are ample instances of domestic law regarding the practice of medicine, sale of drugs, safety provisions on cars and airplanes and many other instances based on the responsibility of law to foresee and prevent the possibility of extreme occurrences.

The evidence indicates that the very existence of nuclear weapons, as well as the accepted military doctrines supporting their possible use, infringe on the rights of large sections of the world population at the present time and will continue to do so as long as these weapons are in existence. Therefore, the Court is compelled to conclude that the very possession of nuclear weapons violates the fundamental human rights of the citizens of the world and must be regarded as illegal.

* See also Jonathan Granoff, *Supra*

14. Beyond Objectivism

There is a more fundamental principle at issue here, a principle which pervades the entire gamut of international law, but which is presented more forcefully with regard to the issue of nuclear weapons. Current perspectives of international law are founded on principles of objectivism which view the state as an entity apart, something fundamentally separate and different from the many individual members of the state community who have their own rights and this includes a claimed right to impose its will on its own people. The current view of international law gives a nod to objectivism and collectivism by regarding law merely as the external machinery for ordering and controlling the activities of States. No doubt it recognizes the rights of individuals to protection, but it accords a secondary status to their values, aspirations, and quest for self-affirmation. International law seeks to protect the individual against excessive interference from the State, but fails to recognize the individual as the ultimate unit of legal analysis and concern under law. Indeed it fails to provide even a mechanism for the individual or collective humanity to stake a claim in the arena of international law, an arena dominated by enormous national collectives purporting to represent the interests and will of all humanity.

The nation-state is in reality an intermediate aggregate between the individuals of which it is composed and the collective sum of all human beings of which it is a part. The rightful basis and purpose of international law is not merely to control the egoism of nation-states, but one which accords a vital status and consideration to the fundamental right to development of all human beings, indeed, of all humanity. In this light, no law can be considered authoritative if it generates the potential for exterminating the rights of countless human beings, no matter what the consequences may be for that objective abstraction described as the nation-state. In short, a focus on the shared subjectivities of all participants in global society will provide a foundation of realism in seeking to secure and promote the foundational values of global law and social process.¹⁶

15. Conclusion

This Court, therefore, unanimously concludes that the use or threat of the use of nuclear weapons is unlawful in all circumstances and without exception. The Court further believes that stating the matter in a vigorous and forthright manner and grounding its opinion in the fundamental values underlying the organization of global society and international law as well as the growth of the idea of the legal obligation to respect the rule of law requires that sovereigns subordinate unilateral assertions of interest to the global inclusive interests and concerns for the survival of humanity, the survival of the human prospect, the universal expansion of peace and security, and the expectations of dignity under the UN Charter.

The obligation that States have embraced in the Non-Proliferation Treaty requires that they work towards a world completely free of nuclear arsenals. Our opinion must therefore be read in the light of the supplemental meanings given by this provision of the Treaty. We add that there is complexity about the science and administrative practices that go with the decommissioning of nuclear arsenals. The fundamental principle of interpretation that accompanies international law and the stipulations in this advisory opinion is that the States must act reasonably in developing their policies and practices for the elimination of nuclear arsenals and coordinating them. In this context, reasonably means the obligation to act with

deliberate speed to achieve the objectives of the complete elimination of nuclear arsenals from the planet.

Author Contact Information

Email : nagan@law.ufl.edu

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At the root of the current crisis are not subprime mortgages, credit rating agencies, financial institutions or central banks. It is the Great Divorce between finance and economy, which is a subset of the widening precipice between economy and human welfare.

The Great Divorce: Finance and Economy

The Limits to Growth proved the inherent limitations of the existing industrial model of economic growth, not any inherent limits to growth itself.

Garry Jacobs & Ivo Šlaus, From Limits to Growth to Limitless Growth

Focusing on growth of the part without reference to its impact on the whole is a formula for social disease.

Economic Crisis and the Science of Economics

The idea of nuclear deterrence is a dangerous fallacy, and that the development of military systems based on nuclear weapons has been a terrible mistake, a false step that needs to be reversed.

John Scales Avery, Flaws in the Concept of Nuclear Deterrence

The first step into the direction of a world parliament would be the establishment of a Parliamentary Assembly at the United Nations.

Andreas Bummel, Social Evolution, Global Governance & a World Parliament

The evolution from physical violence to social power to authorized competence and higher values is an affirmation of the value basis of law.

Winston P. Nagan & Garry Jacobs, New Paradigm for Global Rule of Law

We propose that a new organisation be set up, perhaps called the 'World Community for Food Reserves'.

John McClintock, From European Union to World Union

A proper and well accepted definition of (forms of) misconduct, reliable means of identification, and effective corrective actions deserve a high priority on the agenda of research institutes, universities, academies and funding organs.

Pieter J. D. Drenth, Research Integrity

The clearing house should encourage thinking ahead so that law and governance can attempt to accommodate the numerous challenges of globalization, many new technologies, and the emerging Anthropocene Era.

Michael Marien, Law in Transition Biblioessay

The economics of growth must be replaced by equilibrium economics, where considerations of ecology, carrying capacity, and sustainability are given proper weight, and where the quality of life of future generations has as much importance as present profits.

John Scales Avery, Entropy & Economics

A strong and strategic knowledge system is essential for identifying, formulating, planning and implementing policy-driven actions while maintaining the necessary economic growth rate.

Jyoti Parikh, Dinoj Kumar Upadhyay & Tanu Singh,

Gender Perspectives on Climate Change & Human Security in India

The very possession of nuclear weapons violates the fundamental human rights of the citizens of the world and must be regarded as illegal.

Winston P. Nagan, Simulated ICJ Judgment

The emerging individual is less deferential to the past and more insistent on his or her rights; less willing to conform to regimentation, more insistent on freedom and more tolerant of diversity.

Evolution from Violence to Law to Social Justice

It is more rational to argue that developing countries cannot afford unemployment and underemployment, than to suppose that they cannot afford full employment.

Jesus Felipe, Inclusive Growth

The tremendously wasteful underutilization of precious human resources and productive capacity is Greece's most serious problem and also its greatest opportunity.

Immediate Solution for the Greek Financial Crisis

The Original thinker seeks not just ideas but original ideas which are called in Philosophy Real-Ideas. Cadmus Journal refers to them as Seed-Ideas. Ideas, sooner or later, lead to action. Pregnant ideas have the dynamism to lead to action. Real-Ideas are capable of self-effectuation, as knowledge and will are integrated in them.

Ashok Natarajan, Original Thinking

Given the remarkable progress of humanity over the past two centuries, the persistence of poverty might not be so alarming, were it not for the persistent poverty of new ideas and fresh thinking on how to eliminate the recurring crises, rectify the blatant injustices and replace unsustainable patterns with a new paradigm capable of addressing the deep flaws in the current paradigm.

Great Transformations

Our global systems can be resilient if they are based not only on efficient markets that can cope with future crises, but on principles that also allow for the projection of civic will and preference onto the global level. Stability and resilience are laudable goals but they need to be achieved in all three dimensions, the financial, the economic and the social, in a participatory fashion.

Patrick M. Liedtke, Getting Risks Right

Continued . . .
