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NUCLEAR WEAPONS AND THE RIGHT TO SURVIVAL, PEACE AND DEVELOPMENT

Nuclear Weapons and the Right to Survival, Peace and Development: an Introduction

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I.

The post-cold-war era offers an opportune time to discuss legal aspects of nuclear weapons in the context of human rights, especially the right to survival, peace and development. There is, however, one major hurdle: the end of cold war is likely to be perceived by many as bringing to a close the chapter on the threat of nuclear weapons to mankind. Consequently, other challenges facing humanity, such as degradation of the environment, over-population, international economic problems, and regional and intrastate ethnic conflicts are likely to take center stage for world attention.

All these challenges and several others that the world community faces are immensely important and of immediate concern. The fact remains, however, that this is not the time for complacency on the issue of nuclear weapons. The threat of nuclear extinction is still very real. To illustrate, notwithstanding the ongoing negotiations between the superpowers for reduction of strategic weapons and the prospect of further conventions to bring about a reduction of nuclear arms, there still exist about 50,000 deadly nuclear devices, each one of which can inflict thousands of casualties and devastating destruction. What is equally important is that there seems to be no end in sight. The world keeps spending over \$100 million an hour and more than \$2.5 billion a day on armament. The only logical conclusion one can draw is that we cannot afford to take lightly the threat of nuclear war.

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II.

Among various professional groups engaged in a serious discussion of nuclear weapons, the International Association of Lawyers Against Nuclear Arms (IALANA), a group of lawyers with affiliate national associations in many countries, met in September, 1989, at the Hague in the Netherlands to discuss legal aspects of nuclear arms. Over 200 lawyers attended this first world congress. In plenary sessions and working groups they discussed the right to survival, the right to peace, the right to development, the hierarchy of treaties, nuclear arms and ecology, common security, and neutrality and nuclear-free zones. Over two dozen speakers from several continents addressed the congress. These included the three co-presidents of IALANA, Stig Gustaffson from Sweden, Alexander Sukharev from the Soviet Union and Peter Weiss from the United States; IALANA Secretary P. van den Biesen from the Netherlands; and the two co-chairs of IALANA's academic council, Richard Falk from the United States and Rein Müllerson from the Soviet Union.

The central theme of the congress was the relation between nuclear arms and international law, and the thrust was to explore means for strengthening international law and the international legal order. In their deliberations over a period of three days, participants identified critical issues, discussed the prevailing trends, and explored political and legal policy options which would contribute to the maintenance of international peace and security. In his closing remarks, Peter Weiss urged the delegates to remind themselves of both the "efficiency and limitations of the law" and to "spread the gospel of illegality to those who share our goal of a nuclear-weapons free world, but are seeking to achieve it through other means."¹ He identified IALANA's immediate task to expose the "myth of nuclear deterrence, on military, economic and environmental grounds, for so long as people believe in the paradox of nuclear weapons as peacekeepers, so long would the world continue to live in the shadow of nuclear destruction."²

On September 24, 1989, the IALANA General Assembly adopted the Hague Declaration³ which affirmed that "the use or threat of use of nuclear weapons is a war crime and a crime against humanity, as well as a gross violation of other norms of international customary and treaty law," and envisioned "as an urgent task the total outlawing of nuclear weapons, including their research, manufacture and possession."⁴ Stressing the primacy of international law, it invited "lawyers throughout the world to sensitize 'the public conscience' to the incompatibility of nuclear weapons with international law and to utilize their respective legal processes to

1. See IALANA, *NUCLEAR ARMS AND THE LAW* 21 (1990).

2. *Id.*

3. See *id.* at 23.

4. *Id.*

build up a body of law dealing with various aspects of the problem,"⁵ and appealed to the U.N. members "to take immediate steps towards obtaining a resolution by the United Nations Assembly under article 96 of the United Nations Charter, requesting the International Court of Justice to render an advisory opinion on the illegality of the use of nuclear weapons."⁶

In other operative parts of the Hague Declaration, IALANA decided to reexamine "the myth of nuclear deterrence as keeper of the peace," and supported the "movement toward the establishment of nuclear-free zones and the right of the people at all levels, municipal, national and regional, to establish such zones."⁷ Furthermore, expressing its belief that "disarmament negotiations must not only deal with existing weapons, but must focus on stopping the development and introduction of new arms technologies relating to all weapons of mass destruction,"⁸ and considering that, "quite apart from the legal, moral, strategic and political aspects of nuclear weapons, the harmful consequences of their production are incompatible with the people's right to health and to a clean environment," it requested "nuclear weapons states to adhere to the Nuclear Non-proliferation Treaty."⁹

The General Assembly also adopted IALANA's policy plan, outlining its main tasks for the next two-year period.¹⁰ These include: disseminating the message of illegality to policy makers, academicians and public opinion shapers; stimulating a debate on all aspects — legal, political, economic, strategic — of the doctrine of deterrence; making the connection between the illegality of nuclear weapons and the environmental hazards of their production; and reminding people that "despite INF, despite glasnost and perestroika, despite a gentler and kinder — or at least a less combative — administration in Washington, the danger of a nuclear holocaust remains alive as long as nuclear weapons are in the arsenals of the major, as well as an increasing number of minor powers."¹¹

Delegates at the IALANA congress rejected the argument that since international law does not explicitly prohibit nuclear weapons, therefore, the use or the threat of nuclear weapons has met the test of validity. This, however, is not an appropriate setting to discuss the question of the legality of nuclear weapons.¹² In the United States, the Lawyers' Commit-

5. *Id.* at 24.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *See id.*

11. *Id.* at 26.

12. On the debate, *see generally* LAWYERS AND THE NUCLEAR DEBATE (M. Cohen & M. Gouin eds. 1988); Falk, *Toward a Legal Regime for Nuclear Weapons*, 28 MCGILL L.J. 519 (1983); Falk, Meyerowitz & Sanderson, *Nuclear Weapons and International Law*, 20 INDIAN J. INT'L L. 541 (1980); Green, *Nuclear Weapons and the Law of Armed Conflict*, 17 DEN. J. INT'L L. POL'Y (1988); Meyerowitz, *The Opinions of Legal Scholars on the Legal Status of*

tee on Nuclear Weapons, which is an affiliate of IALANA, has formulated certain rules in its study, "Statement on the Illegality of Nuclear Weapons."¹³ These include:

Rule 1. It is prohibited to use weapons or tactics that cause unnecessary or aggravated devastation or suffering.

Rule 2. It is prohibited to use weapons or tactics that cause indiscriminate harm as between combatants and non-combatants, military and civilian personnel.

Rule 3. It is prohibited to use weapons or tactics which violate the neutral jurisdiction of non-participating states.

Rule 4. It is prohibited to use asphyxiating, poisonous or other gas, and all analogous liquids, materials and devices, including bacteriological methods of warfare.

Rule 5. It is prohibited to use weapons or tactics that cause widespread, long-term and severe damage to the natural environment.

Rule 6. It is prohibited to effect reprisals that are disproportionate to their antecedent provocation or to legitimate military objectives, or disrespectful of persons, institutions or resources otherwise protected by the laws of war.¹⁴

It will suffice to say that notwithstanding these formulations, the superpowers, as well as the other nuclear powers — U.K., China and France — and several other countries which have either already joined the nuclear club or are very close to doing so, continue to conduct research on nuclear technology. Nuclear states also continue to manufacture more deadly and refined nuclear weapons, adding further devices to their existing nuclear arsenals.

III.

This symposium is a collection of seven papers, selected from over two dozen presentations at the IALANA congress. In the lead essay, Professor Christopher Weeramantry analyzes law and nuclear weapons in the context of "the real world," and concludes that there exists sufficient rules of international law pointing to the illegality of nuclear weapons. He sets the stage for his insightful analysis by noting "a few of the varying dimensions of reality that become pertinent to the problem." These include the political realities "in the midst of which we live;" physical reali-

Nuclear Weapons, 24 STAN. J. INT'L L. 111 (1988); Boyle, *The Relevance of International Law to the "Paradox" of Nuclear Deterrence*, 80 NW. U.L. REV. 1407 (1986); Weston, *Nuclear Weapons Versus International Law: A Contextual Reassessment*, 28 MCGILL L.J. 542 (1983); Goldblat, *Nuclear War Cannot Be Conducted with Obedience to the Rules of International Law*, 13 BULL. OF PEACE PROPOSALS 317 (1982).

13. LAWYERS' COMMITTEE ON NUCLEAR POLICY, STATEMENT ON THE ILLEGALITY OF NUCLEAR WEAPONS (1989).

14. IALANA, NUCLEAR ARMS AND THE LAW 13-14 (1990).

ties which condition our existence; economic realities, such as the diversion of the world's resources into nuclear and other deadly arms; social realities, "the driving forces of power, profit and prestige;" and the nuclear reality.

Professor Weeramantry cogently argues that we must not lose sight of the real world of nuclear danger, despite some progress made in nuclear weapons treaties, and notwithstanding assertions that there should be no transfer of nuclear weapons or assistance in weapons technology between states and that the high seas are to be used only for peaceful purposes. He, however, points to several "factors in the real world [which would] operate to bring closer the prospect that the international community will hold itself bound by international law in relation to nuclear weapons." He includes among these hopeful aspects of political reality the recent Soviet initiatives, erosion of the concept of sovereignty, the decline of the superpowers, the confluence of global perils, universal popular movements, the growing authority of international law and an enhanced use of domestic legal systems.

In his concluding section, Professor Weeramantry demonstrates how principles of conventional and customary international law can be invoked "to establish the illegality and indeed criminality of nuclear war." He recommends that the International Court of Justice be asked to give an advisory opinion on the illegality of nuclear war. He challenges the world's legal profession "to rise to their responsibilities" and use legal weapons in the next round of the battle against nuclear weapons.

Concurring with the critics of the states which justify the nuclear arms race because of their reliance on the policy of nuclear deterrence, Professor Müllerson recommends that NGOs, especially lawyers, should be actively engaged in working toward the elimination of nuclear arms. He suggests that such efforts should be accompanied by a "radical restructuring of international relations." Toward this end, he focuses his inquiry on the implementation of the individual's "right to life" which is embodied in the International Covenant on Political and Civil Rights. This right is predicated upon the survival of humanity. He notes a promising development: international treaties and conventions on nuclear weapons and the environment show growth in this still embryonic area of human rights.

Professor Müllerson argues that the post-nuclear world should not be based on the model of the pre-nuclear world which was not peaceful. He contends that states should accept international mechanisms, including effective preventive diplomacy and obligatory procedures, for peaceful resolution of conflicts. He appropriately concludes that such an international regime is in the interest of states, NGOs and individuals, and they must all work toward the end of nuclear arms.

Mr. J. Dhanapala, Director, United Nations Institute for Disarmament, discusses the role of treaties in achieving arms control. Instead of studying the hierarchy of disarmament treaties, he prefers to discuss such

control agreements according to the obligations assumed by states. Thus, such agreements could be conveniently categorized by reference to restrictions on nuclear weapons testing; strategic arms limitation; non-proliferation of nuclear weapons; prohibition of non-nuclear weapons of mass destruction; demilitarization, denuclearization and other restrained measures in certain geographic areas; prevention of war; and humanitarian laws of war. Also, treaties could be classified into global, regional and bilateral agreements. He, however, finds the most helpful distinction is to divide agreements into nuclear and non-nuclear categories.

Among the treaties he discusses are the 1988 INF Treaty, the 1974 Threshold Test Ban Treaty, the 1963 Partial Test Ban Treaty, the 1968 Treaty on the Non-Proliferation of Nuclear Weapons, the 1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil thereof, the 1959 Antarctic Treaty, the 1967 Treaty of Tlatelolco, the 1985 Treaty of Raotonga, the 1967 Outer Space Treaty, several bilateral treaties, and several treaties in the non-nuclear category, such as the 1925 Geneva Protocol, the 1972 Treaty on Biological Weapons, the 1977 ENMOD Convention, and treaties on confidence-building measures.

He concludes his comprehensive survey with the warning that despite all these treaties and agreements "the arms race both nuclear and non-nuclear continues and threatens to enter outer space as well." He recommends a steady expansion of the body of treaties to achieve disarmament and implementation of the existing agreements.

Next, Professor Theo Van Boven focuses his inquiry on human rights. Noting the improved climate of U.S.-U.S.S.R. relations, he suggests that several recent studies and statements adopted at international conferences, such as the 1988 Maastricht-Utrecht statement adopted on the occasion of the 40th anniversary of the U.N. Declaration of Human Rights, have demonstrated a new understanding of human rights, which includes freedom from threats to humanity such as excessive armaments, destruction of the environment, and economic and political injustices, among others. This new atmosphere is the result of more willingness on the part of states to cooperate through multilateral channels. Further, there is a developing notion that obligations and entitlements of international law pertain to peoples and individuals as well as to states.

Professor Van Boven challenges lawyers to play a key role in the development of "the furtherance of international peace and human dignity," by: (1) the creation of structures for international cooperation; (2) elaboration of norms of behavior; and (3) monitoring compliance of those norms. He notes that the rights to survival, to peace, and to development are the three most important norms of international behavior and, if taken seriously by states and individuals, are broad enough to encompass the eradication of the above-mentioned dangers to humanity. Transparency in democratic processes (which for example is counter to the prevalent practice of military secrecy) is the most important means of

monitoring compliance with international norms. He concludes that as lawyers and as responsible and concerned citizens "we cannot be indifferent to the question of liberties and democratic processes within our countries. We face here an essential human rights issue which is worth defending."

In an insightful attempt to marshal the law of human rights against nuclear destruction, Justice Bhagwati vividly describes the human tragedy of the arms race through illustrations involving children, schools and illiteracy, medical assistance, food, water, disease and sanitation. He stresses that the arms race poses a threat to the continuation of humanity and represents a violation of the internationally recognized rights to life, peace and development. "The nuclear arms race," Bhagwati writes, "negates these rights, or at least, creates serious obstacles in the promotion of these rights."

Bhagwati begins by tracing the development of the right to life under various United Nations instruments. In doing so, he asserts and offers strong support for the proposition that the right to life is a "collective right," one justifiably owed by the international community to all humans, not simply as individuals but as peoples and nations, and one which the entire international community is bound to uphold. In a similar fashion, Bhagwati next focuses on the right to peace, which he rightly claims, "is also gravely threatened by nuclear weapons." The author explicitly recognizes this right's close interrelationship to other human rights. "The main function of the right to peace," he says, "is the promotion and protection of the right to life" through eliminating nuclear weapons and improving the peace process. Bhagwati then calls attention to the international right to development, pointing to the fact that "peace, both nationally and internationally, is essential for development." He traces the U.N. statements despairing the arms race as an absolute "waste of resources" and a threat to every effort toward achieving democratic and economic progress.

Bhagwati invokes the pertinent provisions of humanitarian law to suggest that it is necessary "to evolve norms of international law for insuring the right to life under these conditions and this requires consolidation of a provision declaring that the manufacture, possession and deployment of nuclear weapons is a crime against humanity and against peace and is therefore illegal under international law." He concludes by wondering what the fate of our species will be if this step is not taken soon.

Next, in "Law, the Path to Justice: Justice, the Road to Peace," John J. Gilligan deftly illuminates the exaggerated military calculations and misdirected energies of the enduring arms race. Throughout his compelling argument, Gilligan stresses the ludicrous irony of making and living with nuclear weapons, and the historical proclivity of leaders and powerful nations to adopt illogic and casuistries such as "peace through strength" in order to justify plunging the world toward what seems a guaranteed demise. He states: "The fact is that in overwhelming numbers the people of the United States and the people of Europe reject the no-

tion that the prospect of Soviet tanks rolling westward, or the launching of a preemptive Soviet nuclear strike, has anything to do with the reality of the world today." Our leaders' constant struggle to identify, deter and dominate declared and undeclared enemies, he writes, does not obscure "the fundamental fact that these instruments of destruction are not weapons . . . because we dare not use them." This is without doubt the greatest irony of them all. In the words of Professor Gilligan: "This situation is referred to as the balance of terror, and declared to be a state of peace. Cold war is not peace, it is war."

Gilligan then spells out emphatically that the real threats to our security and well-being are not war, but the ongoing starvation, disease and ecological destruction we are causing our world to experience. These terrible realities are only eclipsed by the madness of nuclear weapons and also, as Gilligan points out, by "a similar myopia" among scholars and others now concerned with the arms race, "which may have led us to ignore other threats which represent an equally great menace to the survival and security of the human species."

"[D]ealing effectively with these problems, protecting the common good of all humanity, and of generations unborn," notes Gilligan, "is going to require a new recognition of the role of law and legal process in the affairs" of people. This task, concludes the author, is within the special province of lawyers in American and elsewhere:

[I]t is more widely recognized than you might believe that ultimate success in this struggle for the future security and well being of humanity will be rendered virtually impossible without your continued dedication and zeal, and the commitment of your talents and energies to the building of the kind of world we all want for all of our children, and for generations yet to come.

Finally, in "Nuclear Weapons and the Ecology: Is International Law Helpless to Address the Problem?," Ved Nanda and Jeffery Lowe call attention to the threat posed to the earth's ecology, prosperity and future by the continued production and deployment of nuclear weapons. They argue that the processing of nuclear materials over the years and the resulting build-up of nuclear wastes without a system of transboundary liability based on state responsibility threatens the safety and well-being of innocent individuals and nations the world over. They point to the 1986 nuclear reactor explosion at Chernobyl in the Soviet Union as an apt illustration of uncompensated harm. In that instance, nuclear waste originating at the explosion site spread all over northern Europe and beyond, causing widespread damage in its wake. Yet, because it did not feel legally compelled, the Soviet government neither offered nor paid any material compensation to victims or countries affected.

The authors suggest that there are no quick fixes for filling this need nor any easy answers to the questions it raises, for perceived national interests pose formidable barriers to international cooperation, especially the type of cooperation needed to address issues of liability for trans-

boundary harm. However, as with industrial and numerous other hazardous pollutants threatening the international ecology today, they envisage a special role for lawyers at the national and international levels to work toward viable solutions. In the case of transboundary nuclear accidents, one task consists of establishing a system of liability capable of ensuring compensation to innocent victims across national boundaries. They conclude:

Strict liability of states is arguably a part of general international law. Although states have traditionally resisted the idea of strict liability, present-day conditions have effected a change of attitude, and the principle appears to be gaining support among governments. The time is ripe for the international community to codify this emerging standard in the form of a multilateral convention.

IV.

Ever since the introduction of weapons based on nuclear technology and capable of literally eradicating life as we know it, there has never been a more propitious time than today, in light of the events of the past year, to address the issue of the eradication of nuclear weapons. Eastern Europe and the Soviet Union have embarked on a new course. It is a course full of uncertainty and hesitations, and it may take years to complete. But to the world's relief, the cold war, which was without doubt the costliest war in history, is apparently over.

Finally closing the cover on the most obvious threats of the cold war, however, does not end the unrelenting horror story. Unfortunately for all concerned, the costs of the cold war and its effects still linger. The weapons continue to be produced. Nuclear weapons and nuclear waste dumps continue to litter the landscape of the United States, Europe, the Soviet Union and elsewhere. Their presence is a vivid reminder that humanity still faces an ongoing threat to peace and life. Moreover, a lack of understanding and willingness on the part of many world leaders to confront the hazards posed by nuclear by-products and accidental releases of radiation suggest that the end of the cold war must be accompanied by vigorous efforts to curb nuclear weapons and harness nuclear technology. I concur with IALANA that nuclear war is the ultimate negation of the rule of law, and consequently, "lawyers have a special responsibility to prevent nuclear war and to enforce, develop and strengthen the international legal order."¹⁵

15. From the Preamble to IALANA's statute.

