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The Law, Nuclear Weapons and the Real World

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The Law, Nuclear Weapons and the Real World

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The topic on which I am addressing you goes to the very heart of the paradox which faces our generation. How is it that in this age when the world of knowledge has at its service more power for good than ever before in human history, the real world is closer to destroying itself and its environment than it has ever been?

One would have thought that knowledge was the road to an improvement of the human condition and that technology, which knowledge produced, was the prime tool for this purpose. The real world in which we live presents the opposite picture — that knowledge is showing the road to a slide towards destruction and that technology in the form of nuclear weapons is the prime tool that knowledge has fashioned for this purpose.

Where does the law come into this paradoxical relationship between the theory that knowledge is a bounteous provider and the reality that it has become the ultimate destroyer?

Law is the great reconciler, harnessing, to the service of justice and human welfare, power which might otherwise careen uncontrolled. It polices the departures from such norms. It reaches all departments of human life and no sector, however powerful, is above the law. Is nuclear power so powerful that it is above the law? Is there no law that regulates it, or if there is, are nuclear weapons too powerful for that law? If there is no law that regulates them, is it because this dimension of power is so awesome that the law in this instance recoils from its habitual role and admits its incapacity?

This is the challenge with which the International Association of Lawyers Against Nuclear Arms (IALANA) is confronted. It is for IALANA to demonstrate that the law does exist in this awesome field, that it is powerful enough to cope with nuclear weapons, and that there are personnel, institutions, concepts and procedures adequate to the task.

We have throughout the ages been familiar with the maxim that no person is above the law. Emperors and kings have been reminded from time to time by lawyers, religious teachers and the sheer force of historical events that those who seek to override the law do so at their peril. For our problem, the proposition must be restated in the form that no power is above the law. It may be power so great as to be able to destroy our planet. Yet the law is more powerful than that power, and if it is not

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already, we must inquire why it is not and must make it so.

In the field of nuclear weapons more than in almost any other field, there is a powerful collision between theory and reality, and that is perhaps the reason why the organizers of this conference, in their wisdom, have placed this particular topic on our agenda.

Where then is the law that in this real world dominated by materialistic forces can surmount such power and tame it to the social purposes of humanity?

Unperceived by most citizens, that law is found everywhere, both within national legal systems and on the international plane. It is found in the realm of substantive law and in the realm of procedure. Its conceptual roots can be traced in the most ancient legal philosophies and its practical justifications in the most modern scientific researches.

The fault is not in the law but perhaps in ourselves that we are not sufficiently conscious of its presence or, indeed, of its power. If one were to pursue this question of fault even further, one would find the finger of accusation pointing in a special way to those who are the custodians of the law — lawyers and judges. They have perhaps immersed themselves so deeply in the real world of profits and power as to lose sight of the greater realities confronting our age. Indeed, the legality (or otherwise) of nuclear weapons is perhaps the greatest legal question confronting our age, and yet for a quarter century after the first use of nuclear weapons in war there was a singular dearth of legal discussion of this all-important question. There were notable exceptions such as Schwarzenberger's, *The Legality of Nuclear Weapons*,¹ and Nagendra Singh's, *Nuclear Weapons and International Law*,² but on the whole, there was a neglect of this problem.

A central theme of this paper will be that the law is already there, waiting to be acknowledged and to be applied. It is our task at this world symposium to exhibit it to view so that both the legal fraternity and others — scientists, politicians and ordinary citizens — can use it more purposefully, annexing nuclear power to its domain in the same way as great events of the past, such as the Magna Carta³ and the Declaration on the Rights of Man,⁴ have annexed the domains of kings within the law's empire.

My task of analyzing law and nuclear weapons in the context of the real world requires me, preliminarily, to note in general terms a few of the varying dimensions of reality that become pertinent to the problem. We have realities at the level of the politician — the *political* realities, national and international, in the midst of which we live. We also have

1. G. SCHWARZENBERGER, *THE LEGALITY OF NUCLEAR WEAPONS* (1958).

2. N. SINGH, *NUCLEAR WEAPONS AND INTERNATIONAL LAW* (1959).

3. See generally A. PALLISTER, *MAGNA CARTA: THE HERITAGE OF LIBERTY* (1971).

4. See generally G. JELLINEK, *THE DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS: A CONTRIBUTION TO MODERN CONSTITUTIONAL HISTORY* (1979).

physical realities which condition our very existence on this planet — of which political realities sometimes lose sight. These are assuming dimensions in our age which were never known before. *Economic* realities, such as money spent on armaments which diverts wealth and resources from the problem of poverty, are also particularly pertinent to the nuclear problem. While poverty is in the process of destroying hundreds of millions of lives on this planet, we have spent and are preparing to spend trillions of dollars on nuclear arms. We need also to consider what may be described as *nuclear* reality (i.e., the contrast between the mundane realities driving the nuclear weapons enterprise today and the idealism which gave it birth). Finally, *social* realities — the driving forces of power, profit, and prestige — must be addressed.

At all these levels of reality, nuclear weapons make a very real impact. Our comprehension of each one of them would be vastly different depending on whether we contemplate them in the context of a nuclear or a non-nuclear world.

After some general observations in regard to each of these levels of reality, I shall observe some notable contrasts between the world of theory and the world of reality in some selected areas especially pertinent to nuclear weapons.

I. A PRELIMINARY SURVEY

A. *Political Reality*

The world of *realpolitik* has always been concerned with the sheer pursuit of power. In the world of *realpolitik* people, the principal actors, lay aside their humanity and play the game of power as a chess player plays the game of chess. Victory is the only objective. Participants can be sacrificed for they are no more than chessmen who can be given away if need be, en masse, if only one's opponent's king can be checkmated. Armies on the battlefield are not very different from inanimate weaponry such as cannons and tanks. They are all tallied up in a common ledger, the humans dehumanized, the weapons anthropomorphized into living realities which are the equivalent of thousands of humans.

Checkmating your opponent's king has enormous advantages. Your opponent is wiped off the map. Your own forces may be decimated but you are left sovereign over the field of battle, free to order it thereafter without let or hindrance from the enemy. The model of the chessboard translates very easily into the model of the battlefield. Your legions may have been cut to pieces, but your enemy is at your feet, his possessions yours for the taking, his economy at your disposal.

Underlying all of this is the assumption that like the magic of the chessboard, a whole new army can be brought into commission for the next battle as though the decimation of the last one was irrelevant. Thus far in warfare, these illusions of the chessboard have to a large extent held true. The victor, with all the strengths and fruits of victory, could soon field another army and reasonably hope to vanquish another foe.

Nuclear weapons have changed political reality beyond recognition. They have made such games irrelevant to real life. There is no longer an endless supply of revitalized chessmen nor a succession of games. The chessmen are extinguished and a new law ordains that only one game can be played. What is left on the chessboard will be a theoretically victorious but decimated army and a vanquished king. The victorious army will have no spoils to enjoy and no new battles to fight except its own battle for survival in the harsh world of nuclear winter. The ruler who plays the game of nuclear chess would have played his last game, whether he "wins" or "loses."

The world of make believe which lay beneath the so-called world of reality is gone forever and the world of reality, shorn of make-believe, stands exposed in all its starkness. The world of realpolitik could play out its games only against a framework of potential replenishment. When that framework is gone, so is the game.

In the past the most massive destroyers of human life and the environment, such as Genghis Khan or Attila, could kill and destroy to the limit of their ability but the reservoirs of human life and earth resources would be refilled. Realpolitik had a meaning. The next game of chess could be played. That scenario is gone forever.

B. *Physical Reality*

As the "realities" of politics are stripped of their illusions, the realities of physics and chemistry take over. Increasingly, our political and geopolitical thinking reflects an awareness of the physical laws which circumscribe human activity — an awareness which could be kept at a distance so long as the scale of human activity did not approach those circumscribing boundaries.

Today we are face to face with those physical realities because we stand at the interface between humanity's expanding capabilities and nature's limiting constraints. Physical realities thus limit our thinking in a manner not known to the generations that preceded us. In fairness to those generations, however, we must observe that though they did not stand at the interface as we do, they still had the wisdom to foresee that if and when humanity arrived at that interface it would be almost too late to stand back. They advocated then, in a manner which would have stood us in good stead now, a harmony with the forces of nature rather than a confrontation with them. Had we heeded these voices of wisdom, we would not now be in the predicament in which we find ourselves.

The days of the boundless ocean and the boundless atmosphere, able to absorb without feeling all the toxins we could deposit in them, are gone. As we stand at this significant interface, we search around desperately for new principles by which to govern our international conduct. The paradox is that those principles have long been with us though we have refused to recognize or apply them.

When the concept of the nuclear winter emerged in 1982 with the

pioneering researches of P.J. Crutzen and J.W. Birks, this reality was unveiled in all its starkness and in a form so powerful that even governments and armies dedicated to the nuclear weapons enterprise were compelled to take note that a nuclear war could kill a billion humans at first blast, two billion in its after-effects, alter climatic conditions by blotting out the sunlight, destroy agriculture and reduce humanity to its most primitive level since the stone age.

C. *Economic Reality*

Economic realities can be as crippling as political realities, economic subjection as harsh as political subjection and economic aggression as vicious as armed attack.

The economic reality facing the world today is that more than 2.5 billion dollars a day are spent on fueling the world's armaments establishment. A hundred million dollars an hour, or over a million dollars a minute flow down the drain of negativity so far as human welfare is concerned. A day's expenditure on armaments would eradicate malaria or lift ten million lives out of the trough of starvation, but this is not our chosen option. Visitors from outer space would no doubt marvel at our sense of priorities, but that is economic reality today.

It has now been universally accepted by scholars in the field of human rights and development that there is an intrinsic linkage between development and the arms race. This linkage rests upon the economic reality that in a world of scarce resources the absorption of trillions of dollars by the arms race is one of the principal factors inhibiting the right to development.

We need to remind ourselves of the landmark event which occurred on 4 December 1986 when the General Assembly adopted the Declaration on the Right to Development,⁵ which viewed development as an "inalienable right." If this be so, the economic reality of the nuclear arms race is one of the most potent forces denying this basic human right to vast sections of the earth's population.

D. *Nuclear Reality*

Nuclear weapons research started as an idealistic venture in the minds of many scientists. Their memoirs reveal that the news that Germany was conducting research in this field provided several of them with powerful impetus to produce the weapon before it could fall into the hands of one of the most monstrous tyrannies that had yet appeared. One of them wrote: "[T]here was not for a long time in history any worse aberration of human conduct and human monstrosity than the Nazi regime in Germany. And the idea of an atomic bomb that could win the war

5. Declaration on the Right to Development, G.A. Res. 41/128, 41 U.N. GAOR Supp. Annex (No. 53) at 186, U.N. Doc. A/41/53 (1986).

against Germany was highly attractive to me. While nothing required me to work more than eight hours a day, I spent at least sixteen in the average day on the bomb project. I was highly motivated simply because I thought it was important to win the war against Germany."⁶ There were many more like this writer, for example Leo Szilard, who wrote: "During the war, while we worked on the bomb, we scientists thought for a while that we were in a neck and neck race against the Germans and that getting the bomb first might make a difference between winning and losing the war."⁷

But it soon became clear that Germany was not in the race to produce the bomb. The capitulation of Germany made the defeat of Nazi tyranny no longer an issue. The bomb continued, however, to be the subject of research despite the disappearance of the earlier idealism which fueled the nuclear effort. Its use against Japan was a significant fall away from the initial idealism. Continued research after the capitulation of Japan meant that the objective of defeating a particularly monstrous tyranny had now been superseded by the much more mundane motive of providing a weapon for the U.S. to use against its enemies. It also gave the U.S. a nuclear monopoly over the rest of the world.

Finally, when the bomb ceased to be a monopoly, the ideology behind its production changed dramatically again, and the nuclear arms race began. There was no longer the pursuit of ideals in the production of the bomb. In the real world of the post-war era that initial idealism had disappeared. In the nuclear weapons field as elsewhere the reality was that the powers were pursuing interests and not ideals. The scientists, on whose expertise the entire enterprise depended, had forgotten their idealism and were lending their expertise to the pursuit of national interests rather than universal ideals. The Nuremberg Principles,⁸ which all nations accepted at the end of the war, dictated that crimes against humanity were prohibited however much they promoted national interests. In such matters, universalism prevailed over nationalism. In the nuclear weapons enterprise, the real world of politicians, officials, soldiers and scientists has forgotten the Nuremberg Principles which are an integral part of international law.

E. *Social Reality*

We need to face the fact that there is a solid wall of opposition to the abolition of nuclear weapons coming from various interested sources — those who derive profit, power or prestige from the nuclear weapons establishment.

6. L. FREEMAN, *NUCLEAR WITNESSES: INSIDERS SPEAK OUT* 83 (1981).

7. L. Szilard, *A Personal History of the Bomb*, UNIVERSITY OF CHICAGO ROUNDTABLE, Sep. 15, 1949, at 14.

8. Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (International Law Commission), 5 U.N. GAOR Supp. (No. 12), at 11, U.N. Doc. A/1316, (1950) [hereinafter the Nuremberg Principles].

Who are those who derive profit, power or prestige from these weapons that can fling all living systems and cultures into oblivion? They can be analyzed under the three headings I have mentioned.

1. Profit

The profit motive has throughout history proved to be so powerful that even the certain knowledge that millions of deaths will result has not deterred those who pursue it. This statement is best illustrated through the armaments industry which, in all ages of modern history, richly documents the fact that where there is profit to be made the fact that such profit is achieved at the cost of human lives seems irrelevant.

Great commercial houses that made the lethal weapons through which the killing of humans has been reduced to a fine art have flourished since the industrial revolution. They are indeed among the most respected businesses in their respective countries, and their clients are their own and foreign governments, not to mention terrorist movements and protagonists in civil wars. The whole world flocks to the arms fairs they stage like great carnivals of death while the petty drug trafficker is hunted down in the side-streets of the city.

The nuclear weapons industry is but a sophisticated extension of the traditional armaments industry, multiplying several fold the scale of profit resulting from its operations. It is true that this industry does not have foreign customers in an open marketplace of weapons, but the scale of profit to be derived from a nuclear weapons contract is such as to take it almost beyond the dreams of avarice. Nuclear weapons manufacturers talk in billions rather than millions of dollars, and they seek to convince both rulers and the military that the level of expenditure must constantly be stepped up in the interest of national security.

Nearly a quarter century ago, President Kennedy addressed himself to the question of the alleged megaton gap between the U.S. and the Soviet Union in a radio and television interview. He was asked for his reaction to a newspaper advertisement of the Douglas Company urging a 2.5 billion dollar program for a nuclear delivery system. The President detailed the existing missile systems and said: "There is just a limit to how much we need, as well as how much we can afford, to have a successful deterrent. I would say when we start to talk about the megatonage we could bring into a nuclear war, we are talking about annihilation. How many times do you have to hit a target with nuclear weapons? That is why when we are talking about spending the 2.5 billion dollars, we don't think we are going to get 2.5 billion dollars worth of security."⁹

The possible destruction of the ecosystem and the prospects of a nuclear winter are no more a deterrent than the millions of deaths resulting from the use of conventional weapons. Indeed, in the nuclear weapons

9. J. WILEY, ENVIRONMENTAL CONSEQUENCES OF NUCLEAR WAR 490 (1985).

enterprise, there are many salves to the conscience apart from patriotism and self-defense, which are the traditional defenses of the arms manufacturer. In the case of nuclear weaponry, we have the ever attractive argument of deterrence — the makers of the weapon, far from perfecting the means of exterminating populations, are in fact said to be saving billions of lives and lifting the scourge of war from suffering humanity. The enterprise is therefore said to be so laudable that constraints upon it would indeed be counterproductive so far as national welfare is concerned.

There is also another species of profit associated with the nuclear weapons enterprise. Nuclear weapons are the livelihood of many who have been trained specifically for their production. Ask any scientist in the nuclear weapons enterprise whether he or she would not rather devote his or her talents to something more humane and you will often receive the answer that society has trained him expressly for this purpose, guided him towards a Ph.D. in nuclear physics, and thence into the weapons establishment. Society shaped his training in such a way that he is unsuited for any other occupation. If any blame is to be attached to his means of earning a livelihood, it is society that must be blamed and not himself. The author has often received this response from scientists he has questioned on the moral aspects of their work. The trained nuclear weapons scientist thus has a vested interest in the continuance of the enterprise and he or she will not easily be persuaded to look elsewhere or to lower his or her living standards through devotion to moral imperatives.

The same applies to the thousands who depend for their livelihood on the nuclear weapons establishment. No doubt there exists in many of these cases a lack of specialization that the nuclear scientist enjoys, but for them it is a livelihood. One would often prefer to continue in a secure occupation, salving one's conscience by convincing oneself of the moral rectitude of the enterprise, rather than taking the uncomfortable decision to opt out.

The military establishment is another sharer in the profits of the nuclear enterprise. Here too, is a considerable addition of privileges to the ordinary rewards of a military career. Among these are specialized employment and a high level of influence with the government and with the multi-billion dollar enterprises that produce the weapons. A specialized cadre of officers and enlisted personnel trained particularly for the enterprise also represent an additional nucleus of full time servants to the weapons enterprise, dedicated to its service and its success.

2. Power

Nuclear weapons are of course a source of power. Governments seek them as a multiplier of the powers they wield through conventional arms. Indeed, nuclear capability by itself can theoretically even displace the need for conventional weapons, so great is the power these weapons bring to their holders.

The power in question is primarily military power, but with military

power comes an expansion of political power. The known possessor of nuclear weaponry commands many multiples of bargaining power as compared with the position of one that holds only conventional weapons. The nuclear weapons do not have to be used. They lie in the background but give stentorian tones to the voices of their owners at the bargaining table.

Enough said in relation to the power of governments; this is a point too obvious to need elaboration. However, nuclear weapons also give power to those who have anything to do with them — defense contractors, the military establishment, and research workers included. They proceed about their daily business with an aura of special importance that no other weaponry can match. They have access to the corridors of political power and are privy to the secrets of governments. The finances involved in their activities are also at such a level that association with them in any way adds another dimension of power to the world in which they live.

There is also domestic political power in the nuclear weapons enterprise for the enterprise means tens of thousands of jobs and every job represents a vote. The political systems (and the economic systems) of many states in the U.S. are heavily dependent on the weapons establishment, and the same can be said of power realities in other countries.

The nuclear weapons lobby is immensely powerful, and in Washington, as in other centers of power, the weapons enterprise, with vast funds at its disposal, has the ear of senators and representatives in a manner which the anti-nuclear movement cannot match. As for the military leaders themselves, their power keeps expanding as the nuclear weapons enterprise expands. With nuclear weapons, a static state means a state of lack-lustre. New contingencies must be envisaged and new plans made, for these mean expansion of power. Helen Caldicott in her book *Missile Envy*¹⁰ suggests that such attitudes are a result of both commitment to nuclear weapons and frustration at the knowledge that with the inclusion of nuclear weapons, proper wars in the sense leaders are accustomed to can no longer be fought. Hence, they indulge in the fascination of and drive to build and experiment with more and more complicated technology and weapons systems which, of course, are enormously expensive. These are some of the psychological factors which operate in the real world where power and prestige are such real motivating factors.

3. Prestige

The nuclear weapons business is a business of high prestige. Everything associated with it is prestigious — position, privilege, finances, secrecy, all go with it. All sharers in the enterprise are partakers in this bounty of benefits.

In the socialist world, where private profit is not to be made out of

10. H. CALDICOTT, *MISSILE ENVY: THE ARMS RACE AND NUCLEAR WAR* (1985).

the weapons enterprise, the element of prestige no doubt provides a substitute for all of those in the establishment, military as well as non-military, who are linked with the nuclear weapons enterprise, and who enjoy a special aura of prestige.

Vested interests thus stand at every point in support of the nuclear weapons enterprise. Their combination of industrial-military-financial-bureaucratic strength presents too solid a phalanx for easy penetration. Do we have the weaponry with which to pierce this wall of protection?

My answer is in the affirmative. We have that weapon, and that weapon is the law. Strong enough by itself, it has been reinforced in recent years by scientific research which spells the end of civilization, of life-styles, and of life itself if the nuclear enterprise proceeds unabated. That reality combines with the law to spell the doom of nuclear weapons. This is the single central theme of this paper, and it rests on a principle so powerful that it must prevail in the face of even the most concerted opposition that vested interests can mount.

II. SOME SPECIFIC CONTRASTS

A. *Contrasts Between the Real World and Nuclear Weapons Treaties*

We have not thus far been able to procure a treaty which bans nuclear weapons outright but we have had a series of partial successes. Each of these is, no doubt, a great achievement and is cause for congratulations, but we must not be so carried away by these treaties as to lose sight of the real world of nuclear danger that exists despite them.

In this paper, we shall not be able to cover the field of nuclear treaties completely but will use two of them as illustrations.

1. The I.N.F. Treaty of 8 December 1987¹¹

This is no doubt a landmark event as it represents the first significant move towards de-escalation and the cessation of the arms race. It is also significant as the first effective reduction of a whole category of nuclear weapons rather than an effort at merely controlling their numbers.

Yet these great achievements must not cause us to lose sight of reality. Let us not be carried away by the treaty, for without more steps in that direction it means very little. The elimination of 859 U.S. and 1,752 Soviet missiles over three years represents no more than four percent (4%) of the nuclear arsenals of the powers in question. Unless more significant reductions follow, this will remain in reality no more than merely a token gesture. Indeed, unless we keep these proportions in perspective, we could lull ourselves into a false sense of security that the nuclear

11. Treaty between the United States and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, Dec. 8, 1987, 88 DEPT. STATE BULL. 24 (Feb. 1988), reprinted in 27 I.L.M. 84 (1988) [hereinafter I.N.F. Treaty].

weapons threat is on the way out. Such attitudes are already visible among lawyers and the general public and provide a formidable obstacle to the work of organizations such as IALANA.

We have yet to see how this treaty works. For too long we have witnessed the sad reality that even the most well-intentioned treaties can be defeated and in fact circumvented or evaded through a lack of willingness to abide by their spirit. Perhaps the best illustration of this is offered by the celebrated Nuclear Non-Proliferation Treaty.

2. The Nuclear Non-Proliferation Treaty of 1 July 1968¹²

The Nuclear Non-Proliferation Treaty (NPT) was aimed at ending both the vertical proliferation of nuclear weapons among the nuclear powers and the horizontal proliferation of nuclear weapons among non-nuclear powers. It was a momentous step forward and should have spelled the beginning of the end of the arms race.

Yet the reality was that in the first decade of its existence the total number of nuclear warheads in the superpowers' arsenals tripled, rising from 5,800 to 16,000. By 1988, they had perhaps increased an additional fifty percent (50%) to 24,000. The reality was far from the undertaking contained in Article 6 of the treaty which intended to negotiate an early end to the arms race.

Not only was the number of weapons increased, but also the quality and capacity for geographical deployment. So also was the ability increased to use the oceans as launching grounds, for of the combined U.S./USSR total of around 4,000 strategic ballistic missiles, at least one-third are deployed at sea.

The world of hope surrounding the NPT expected a reduction in nuclear weaponry as its outcome. The real world in which the treaty has functioned has seen no commitment to an ending of the arms race, but instead both a vertical and horizontal proliferation of nuclear weapons. The INF treaty made a dent in this world of reality but only a minor dent, easily reversible if its momentum is not sustained.

We have fears that more countries are on the verge of nuclear weaponry, and the fear has even been expressed that terrorist groups, who evidently have enormous funds at their disposal, are also potential possessors of crude nuclear weapons. This is the world of reality which contrasts so strongly with the principles on which the NPT is based.

B. *Contrasts Between the Real World And The Theory That Oceans Are a Common Resource of Humanity*

Legal and human rights theory teaches us that the high seas are a common resource of humanity. The vast maritime reaches of our planet

12. The Nuclear Non-Proliferation Treaty, Jul. 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161, *reprinted in* 7 I.L.M. 809 (1968) [hereinafter NPT].

which lie beyond coastal waters and exclusive economic zones are the common property of the whole human family, for all to enjoy and use. That use must presumably be for peaceful purposes and not for the destruction of the human species — least of all for the destruction of the vast majority of humankind who are not party to the quarrels of the nuclear powers.

Yet what is the reality? There are some 5,900 tactical nuclear warheads available for use by the naval forces of the nuclear powers to strike ships, submarines, planes and land targets.¹³ Submarine launched ballistic missiles (SLBMs) of the Soviet Union and the U.S. have the potential to destroy the major cities of both countries several times over. In destroying these cities, we would launch a nuclear winter upon the entire population of the globe — the very owners of the common resource, namely the high seas, from which their destruction was launched.

A Trident submarine carrying 24 Trident missiles, each of which has eight 100 kiloton warheads, would have a grand total of 192 warheads. Each of these could be separately targeted, thus making a Trident commander “the third most powerful man in the world” according to Robert C. Aldridge, a former Lockheed engineer.¹⁴

Another problem in this regard is the deliberate refusal of nuclear weapons-states to reveal whether their battleships carry or do not carry nuclear weapons. It is, for example, a deliberate U.S. policy to refuse to confirm or deny the presence of nuclear weapons on board their vessels, thus rendering it difficult for non-nuclear states to decide on an appropriate course of action in relation to them.

The oceans then are put to the most lethal purpose which humankind has devised. This is an abuse of basic principles so strong that it needs to be violently condemned on the basis of legal principle, and IALANA could perhaps address this issue. The use of the oceans for nuclear weapons launching is no different in principle from the use of outer-space for this purpose. Yet we condone it with scarcely a protest, save for comparatively feeble attempts to establish nuclear-free zones and zones of peace.

C. Contrasts Between the Real World and the Theory That Only Heads of State Can Launch a Nuclear War

We have seen in our discussion of Trident submarines how a single Trident commander has at his fingertips the power to launch nuclear weapons in such quantity as to amount to a major nuclear war. This will no doubt provoke a major nuclear response from the power attacked, with all the potential of triggering a nuclear winter.

13. See Study on the Naval Arms Race, U.N. Doc. A/40/535 at 28 (1985).

14. Aldridge, *First Strike Breakout in 1988*, GROUND ZERO, Dec. 1983-Jan. 1984, at 1.

According to an authority on nuclear armaments,¹⁵ there is a growing number of officers in the military chains of command among the nuclear weapons powers who are empowered to decide on the use of nuclear weapons in case of attack. These are officers at the operational tactical level — a level far removed from the head of state who theoretically alone enjoys the right to decide on the use of nuclear weapons.

Indeed, the time scale available for this decision keeps decreasing with improvements in the sophistication of nuclear weaponry; decisions would have to be taken in minutes — far less time than would be needed to awaken either President if he should happen to be in bed at the crucial moment. The decision not to use weapons and to stay passive and suffer the risk of losing one's whole arsenal of nuclear weaponry, or to strike back, is a crucial one and can in no circumstances be delayed.

To this must be added the Launch on Warning Capability (LOWC) which in many cases means that this decision is taken by a computer without human intervention at the moment of decision. The possibility of grave error resulting from malfunctioning machines is ever-present, and the record of near accidents in the past is so serious as to merit careful consideration.

As one United Nations Institute for Disarmament Research (UNIDIR) Study entitled *Risks of Unintentional Nuclear War*¹⁶ tells us, the crucial factor affecting the propensity of a system to produce unintentional nuclear war is the *urgency* with which the decision must be made. If the forces enabling retaliation are vulnerable to sudden destruction, the deterrent threat can be removed by a preemptive attack. This can only be prevented by an immediate and urgent decision during the vital minutes when the attacking missiles are on their way. Where, in reality, is the time for a Presidential decision?

D. *Contrasts Between The Real World And The Theory That Nuclear Weapons Or Know-How Must Not Be Exchanged Between States*

There is a theory, enshrined in Articles I and II of the NPT,¹⁷ that there should be no transfer between states of nuclear weapons or assistance in weapons technology. However, the phraseology of the two articles read in the context of the general tenor of the Treaty seems to concentrate on the prohibition of transfer between nuclear states and non-nuclear states rather than among nuclear states *inter se*. Consequently, transfer of nuclear weapons or know-how as between two nuclear states (e.g., the U.S. and Britain), does not seem in reality to attract the same level of prohibition (notwithstanding the use of Article I of the expression

15. Subrahmanyam, *The Link Between Horizontal and Vertical Proliferation*, in *NUCLEAR WAR, PROLIFERATION AND THEIR CONSEQUENCES* 136 (A. Kahn ed. 1986).

16. D. FREI, *RISKS OF UNINTENTIONAL NUCLEAR WAR* 5 (1982).

17. NPT, *supra* note 12.

"to any recipient *whatsoever*").¹⁸ Thus a primary purpose of the treaty, namely the prevention of such transfer, is defeated.

An important reason for the geographical proliferation of nuclear weapons is the apparent freedom of the nuclear weapons-states to position nuclear weapons in the territory of non-nuclear states. It is possible to argue that this too is contrary to the spirit if not the letter of Articles I and II, but the real world of NATO and the Warsaw Pact flies in the face of such a principle.

In addition, the Treaty does not stand in the way of non-nuclear states such as Australia extending their active cooperation to nuclear states in technological cooperation (for example, by providing tracking stations which assist in the nuclear weapons enterprise). Such assistance is a real, indeed an indispensable, aid to the maintenance of the nuclear weapons enterprise and without it the enterprise would need to be conducted on a truncated scale. Yet this is what the real world offers the nuclear weapons enterprise despite principles and protestations to the contrary.

E. Contrasts Between The Real World And The Theoretical Freedom Of Non-Nuclear Powers To Desist From Participation In The Nuclear Weapons Enterprise

Non-nuclear powers may perhaps be divided into three categories. There are those, on the one hand, who are part of the two military alliances that are underpinned by nuclear power — NATO and the Warsaw Pact. Secondly, there are countries which are thought to be on the verge of achieving nuclear capability. The third category comprises countries which have no interest at all in the nuclear weapons enterprise and wish to distance themselves as far as possible from nuclear weapons, their manufacture, testing and tracking.

The majority of the world's nation states are in this third category. They are, in the real world, the passive victims of the nuclear weapons enterprise. However, whether they desire it or not, they provide the testing grounds for nuclear explosions and often the harbors for nuclear vessels. The Pacific Islands and New Zealand provide examples respectively of the two categories. The devastation caused to the natural environment of the former and the economic sanctions applied to the latter when it decided to ban the entry of nuclear vessels into its ports illustrate how in reality there is often no true option to keep one's hands off the nuclear weapons enterprise.

Moreover, even when the countries of this latter group desire to take active steps against the nuclear weapons enterprise, there are often unseen barriers to such a course of action. Perhaps the best example lies in the fact that although for some years now lawyers who are campaigning

18. *Id.* (Emphasis added).

for the outlawing of nuclear weapons have tried hard to find a nation to sponsor a resolution in the General Assembly of the United Nations seeking an Advisory Opinion from the International Court of Justice on the illegality of nuclear weapons, they have not been able to persuade even one state to come forward with such a proposition. The reason is not difficult to find. In varying measure, they are afraid to take the initiative in a matter that can attract many powerful sanctions from nuclear weapons powers. Many countries would vote for such a resolution if a proposer could be found. Nearly every state is in reality a client state of some nuclear power and knows too well the sanctions which, in the real world, will accompany such independent action.

It is important to mention that IALANA's objectives include obtaining such an Advisory Opinion from the ICJ, and it is to be hoped that with the incentive given to this proposal by IALANA and the present convention there will be success in the near future in finding a sponsor.

F. Contrasts Between the Real World and the Theory of Deterrence

The theory of nuclear deterrence is the theory most often propounded as a justification for the manufacture of nuclear weapons. The manufacture of these weapons, we are led to understand, is almost a benign enterprise, for it has kept the world away from nuclear war for forty-five years. Nuclear weapons manufacture, far from being a means of destroying the planet, is indeed, from this point of view, a project that helps to keep the peace.

At any rate, such is the theory. But is it matched by conditions in the real world? In the real world, in which nuclear weapons will or will not be used, the reality is that weapons produced for deterrence are used as bargaining counters with no intention of using them in the last resort.

If there is no intention to use them in the last resort, one is only playing a game of bluff with one's opponent. Such a bluff cannot be maintained for all ensuing time. Sooner or later one's opponent will call one's bluff. One cannot persuade one's opponent that nuclear weapons will be used in deterrence unless one really means to use them.

The manufacture of nuclear weapons with a view to deterrence is nothing less than using them as a weapon of last resort. They are not manufactured with a view to their being locked away for all time in a closet. Thus, the real world intends, in the last resort, to use nuclear weapons that are manufactured supposedly for deterrence. Such use will annihilate both those who use them and those against whom they are used. It is mutually assumed destruction (MAD) — no more and no less. To think otherwise is to pull the wool over our eyes and to be blind to reality.

Lest all that I have said thus far should present reality in a dim and foreboding light, I hasten to brighten up the presentation of reality by reference to some truly hopeful features of the real world.

III. SOME HOPEFUL FEATURES OF REALITY

Having dealt at some length with the obstacles presented by the real world, let us now see what factors in the real world operate to bring closer the prospect that the international community will hold itself bound by international law in relation to nuclear weapons.

A. *Soviet Initiatives*

Truth is sometimes stranger than fiction, and the change that has come over the foreign policy of the Soviet Union in the past few years must be a good illustration of this adage. In fact, this is one of the nicest aspects of reality we have seen manifested in our generation.

We now have in office a Soviet leader whose attitudes on a number of matters bearing upon our subject are significantly different from those of his predecessors. Among these are the following:

1. A recognition of the practical unsuitability of nuclear weapons for military purposes;
2. a proclaimed resolve to end the regime of nuclear weapons by the turn of the century;
3. an increasing recognition of and respect for international law and its binding nature;
4. a recognition that with the proliferation of nuclear weapons there is an ever-present danger of accidental war;
5. the idea of open discussion at all levels and on all topics concerning Soviet society and government, including necessarily, the question of the nuclear danger and the possibility of nuclear holocaust;
6. an acknowledgement that science and technology must be the servants of society, guiding it towards a richer future, rather than a dominant influence holding society in its grip;
7. a consciousness of the need to pay attention to the diversion caused by the arms race of scarce resources from much needed social welfare projects;
8. a support for the concept that security comes from mutual understanding rather than unilateral superiority;
9. an acceptance that reasonable sufficiency of military forces is the ideal to be arrived at, rather than military superiority;
10. the unprecedented notion that unilateral disarmament can be resorted to by a major power without detriment to its security or prestige;
11. a vision of a mutually supportive and inter-related world order of the future in which all sections of global society play an interlocking role;
12. an emphasis upon the vital need for humanity as a whole to address the problem of environmental protection of planet Earth rather

than for each nation to pursue selfishly the policies that are in its best interests regardless of environmental repercussions; and

13. the recognition that imbalances in conventional forces such as Soviet tank superiority must be rectified as a prelude to more effective nuclear disarmament.

These factors in combination help considerably in transforming political reality from the life-consuming and soulless concept it once was, into a reality of hopefulness. For the first time in the post-war years, we are perhaps able to say that hopefulness has entered the real world and become part of it rather than being cloistered away in the wishful thinking of philosophers and idealists. When we speak of political reality, therefore, we are no longer talking of a concept that we view with disdain, but we are talking of a concept vibrant with possibilities for bettering the human condition.

Political reformers have appeared in the world before, but few have been able to transform the thinking of a generation regardless of their political orientation, as Mr. Gorbachev has done, transmuting frustration into hope.

Early products of that new spirit are the INF Treaty,¹⁹ the concept of Nuclear Risk Reduction Centers, the unilateral moratorium on nuclear testing, and the many speeches in which the Soviet leader has proclaimed his antagonism to nuclear weapons and his abiding faith in the strength of international law.

There is also a new and more relaxed attitude in the United States under the Presidency of President Bush, which in itself has helped to reduce international tensions. The declining priority given to such programs as "Star Wars" and the growing awareness of legislators and the public that it can at best deliver only a minute fraction of the protection it promised to offer, are other hopeful factors. Altered attitudes in the U.S. towards the Soviet Union and a softening of the attitude of distrust which once prevailed are also a very helpful feature of current realities.

Writers on nuclear weapons, including the present writer, have continually stressed the need to break the spiral of escalation which has kept the nuclear weapons enterprise growing from stage to stage to reach a situation where its very consumption of resources becomes a sort of cancer on the face of the planet. Escalation begets escalation, and so the spiral ascends until a magic formula can be found to break the escalation. It may be that the developments outlined above have provided that magic formula, and that the ascending spiral has been broken. Unilateral action can do this, for just as tension begets tension, relaxation of tension begets relaxation.

When we speak of political realities we must not permit these hopeful aspects to pass unnoticed.

19. I.N.F. Treaty, *supra* note 11.

B. *Erosions of Sovereignty*

There is another aspect to reality that inures to our benefit. That is the erosion currently taking place in traditional attitudes towards the concept of sovereignty. Many forces combine to bring about this result, not the least of which is the reach of modern technology. Technology knows no national barriers and requires concerted international action for its handling.

As a consequence of this enormously expanded reach of modern technology, areas of sovereign power which the nation state would not have dreamt of letting out of its grasp, are now willingly handed over in an increasing number of fields to the regulation of an international controlling authority. Indeed, it is not merely in technical fields such as telecommunications or the prevention of atmospheric pollution that such international cooperation is becoming increasingly visible. The foremost evidence of this comes from the European Economic Community which is progressively abandoning to the supranational control of the community topics drawn from such fields as currency, trade and customs regulation.

This is a new internationalism — the internationalism of cooperation rather than mere coexistence. We are realizing increasingly that the age is past when different nations looked upon each other as necessary evils with whom they had to coexist whether they liked it or not. Under the pressures of our age we are forced into a spirit of positive cooperation rather than negative tolerance — and cooperation means a willing acceptance of others as co-participants in a common enterprise — the enterprise of managing spaceship earth which is the common home of all. Coexistence is compatible with inimical states of mind towards each other. Cooperation is not.

An attitude of cooperation immensely strengthens the arm of international law by strengthening the willingness of all to abide by its spirit and its letter whereas the age of coexistence meant only unwilling acceptance out of sheer self-interest.

As international law grows stronger in this new climate, its ability to curb the abuse of power — nuclear or otherwise — is likewise immeasurably strengthened.

C. *The Decline of the Superpowers*

A potent factor altering international attitudes since the end of World War II is the fact that we are today in a world where the superpowers no longer dominate. The Soviet Union's economic weakness and its inability to sustain the arms race at the present level show that the power scenarios of the future will not be bipolar.

In the immediate aftermath of the war, the U.S. was the world's greatest power — militarily, economically, technologically and perhaps ideologically. Alone among the victorious nations, it had not been decimated by the war but was rising resurgent from it to take over the role of

world leader. In the shattered remains of the post-war world, if one spoke in terms of global administration one was speaking of an administration on terms dictated by the United States.

No longer is this the case. We have been told that Japan has outstripped the United States in net wealth. The Soviet Union overtook the U.S. in the race to outer space. Vietnam defeated the armed might of the U.S. for the first time in the history of the Union. A united Europe is poised to take its place alongside the superpowers as their equal if not superior in wealth, trade and technology.

One can therefore talk of global regulation without the fear of domination by any one power. The inhibitions inherent in the old frame of discussion of global regulation have to a large extent melted away.

D. *The Growing Authority of International Law*

Against that background as well, the authority of international law becomes all the stronger, for neither in content nor in administration is there a danger that it will be heavily weighted in favor of the superpower that dominated the immediate post-war world.

Moreover, in the past decade in particular, international law in relation to nuclear weapons has exhibited a dramatic resurgence of interest with lawyers from all countries who have joined their voices in a common call for the outlawing of nuclear weapons. Our current convention is perhaps the best illustration of this. Moreover, this development is occurring against a backdrop of a general revival and revitalization of international law as a discipline.

In the aftermath of World War II there was a remarkable reluctance on the part of international law and international lawyers to address the question of the illegality of nuclear weapons. The U.S. was the one power that had thus far used the nuclear weapon in war, and if international law threw serious doubts on its legality the entire moral authority of the U.S. would have been seriously undermined at that critical phase in world history. Such considerations combined with other fortuitous events such as the Korean War and the cold war to direct attention from this important problem of international law. Today those inhibitions no longer exist. Time enough has passed since Hiroshima and Nagasaki for the world to engage in a dispassionate appraisal of the legality or illegality of nuclear weapons. The world order is not likely to be thrown into turmoil by a consideration of this matter. Indeed, the time is propitious for doing so. Reality thus favors rather than obstructs the consideration of this matter.

E. *The Confluence of Global Perils*

Other global dangers drive us into each other's arms. Environmental dangers resulting from depletion of the ozone layer, deforestation of tropical rain forests and industrial pollution causing acid rain are some of these. New phenomena such as AIDS, which can be likened to medieval pestilences which swept through continents, require concerted interna-

tional effort. Drug trafficking and terrorism cannot be tackled by countries singly. The fact that the globe is inhabited by one interlocking society is being emphasized and underlined in this age as never before.

United action calls for united regulation and universal norms. The climate of respect for these is growing. Born on this tide of necessity towards a regime of universal norms, humanity in this age finds that reality is more on the side of international law than against it.

Students of international law have been taught in the past that but for international law the pirates would rule the seas, airplanes would collide in mid-air, letters would not be delivered beyond national boundaries, and telecommunication would be impossible. To those realities of the past have now been added a set of new realities, some of them grim and some of them benign, but all of them so compelling that they cannot be ignored.

We are not moving towards a world sovereign state. Our thinking has become clearer on this issue. But we are inexorably moving towards a world governed by international norms and the epitome of those norms is the system of international law.

F. *Universal Popular Movements*

The past decade has witnessed the emergence, world wide, of a number of popular movements which aim at the preservation of our planet without further injury to it and its life support systems.

Popular movements such as Greenpeace have demonstrated their strength and a level of dedication to this cause which will not be deterred by physical danger. Green movements throughout the world are becoming a political force so significant that even hardened politicians who know only the world of realpolitik are beginning to recognize their force. They sway elections, make and unmake governments, stir the conscious of their generation, and perform a valuable educational role whose full potential has yet to be seen.

An important aspect of these popular movements is that they are now beginning to make use of national and international law in the ordinary judicial processes of their countries to assert the proposition that nuclear weapons are illegal and a crime against humanity.

One of the most notable illustrations of this is the case presently pending in the courts of Holland — *20,000 Plaintiffs v. The State of the Netherlands*. The writ of summons was filed on behalf of the foundation "Ban the Cruise Missiles." The writ of summons and the background material have appeared in book form and the reader, anxious to discover the grounds of illegality, will find in this book a most detailed discussion of all the principal legal arguments.

Other protest cases have been filed in various jurisdictions, and there is currently pending in Australia an income tax claim made against a taxpayer who refuses to pay on the basis that a substantial part of his tax

dollar is used by the Australian Government for supporting the nuclear weapons enterprise.

The groundswell of popular protest is thus gathering strength and will soon be a force which legislators in all countries must reckon with. In the countries of the Eastern bloc the new spirit of *perestroika* and *glasnost* will also give more opportunity for the average citizen to register his or her opposition to the nuclear weapons enterprise.

IV. THE ILLEGALITY OF NUCLEAR WEAPONS

It is not the purpose of this paper to examine at length the question of the illegality of nuclear weapons. Sufficient literature has already appeared on this aspect to make such information readily available.

A. Domestic Legal Systems

There are numerous possibilities within each legal system to urge the question of illegality, whether on the basis of violation of international law *simpliciter*, the violation of human rights to which the country's legal system is committed, on the basis of constitutional provisions, or on the basis of principles embedded in the legal system. The variety of ways in which this can be done will come as a surprise to most lawyers practicing in domestic forums, and one of the vital purposes this congress can serve is to alert the international legal community to the variety of procedures and forums available for taking up these issues. Professor Francis Boyle's trail-blazing book, *Defending Civil Resistance Under International Law*,²⁰ explores these possibilities in detail. It shows the relevance of international law to the paradox of nuclear deterrence and sets out a range of trial materials on nuclear weapons and international law. The case of *20,000 Plaintiffs Against the Government of the Netherlands* is another notable source of a wide range of arguments that can be urged in domestic forums.

In short, the law is there and the only reason why it has not been used is that lawyers are unfamiliar with it as it falls outside the beaten track of their normal professional activities.

It was the sense of frustration induced by this failure that urged George Delf to write his incisive book, *Humanizing Hell: The Law v. Nuclear Weapons*,²¹ in which he castigates the profession for failing to translate into domestic legal systems the principles of the Nuremberg trials which, if properly applied in ordinary domestic forums, could well have obstructed the preparations for nuclear war by countries with a commitment to the observance of principles of international law.

It is perhaps the task of IALANA to sensitize professionals all over the world and show the way. The materials to be used are those showing

20. F. BOYLE, *DEFENDING CIVIL RESISTANCE UNDER INTERNATIONAL LAW* (1987).

21. G. DELF, *HUMANIZING HELL: THE LAW v. NUCLEAR WEAPONS* (1985).

in what way international law forms part of each domestic legal system — the Nuremberg Principles,²² the defence of superior orders, the Hague Regulations,²³ the Geneva Protocol of 1925,²⁴ the Genocide Convention,²⁵ military manuals setting out the recognized duties of the armed forces,²⁶ and issues of personal criminal responsibility, among others.

B. *International Law*

It will suffice to observe that a strong argument can be set up under each of the various sources of international law as enumerated in Article 38(1) of the Statute of the International Court of Justice,²⁷ namely:

1. international conventions;
2. international customs;
3. general principles of law recognized by civilized nations;
4. judicial decisions; and
5. the teachings of the most highly qualified publicists.

A brief note ensues on each of these matters, but for more detailed information the reader is referred to the more specialized writings on the subject.

1. International Conventions

This heading refers to treaties. There is no specific treaty expressly recognizing the general principle that the use, manufacture or possession of nuclear weapons is illegal. However, such a general principle is arguably implicit in many treaties. The principal treaty in international law, the Charter of the United Nations,²⁸ states in Article I that the purposes of the United Nations are *inter alia*:

1. To maintain international peace and security and to that end to take effective collective measures for the prevention and removal of threats to the peace . . . and to bring about by peaceful means and in conformity with the principles of justice and international law, adjust-

22. The Nuremberg Principles, *supra* note 8.

23. See Convention (No. IV) Respecting the Laws and Customs of War on Land, The Hague, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631.

24. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, T.I.A.S. No. 8061, 94 L.N.T.S. 65. [hereinafter Geneva Gas Protocol of 1925].

25. Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1948) [hereinafter Genocide Convention].

26. See, e.g., DEPT. OF THE ARMY, FM 27-10, THE LAW OF LAND WARFARE (1956); DEPT. OF THE AIR FORCE, AEP 110-31, INTERNATIONAL LAW: THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS (1976).

27. Statute of the International Court of Justice, June 26, 1945, art. 38 (1), 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179.

28. U.N. CHARTER, art. 1, reprinted in 59 Stat. 1031.

ment or settlement of international disputes or situations which might lead to a breach of the peace.

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.

It is arguable that the nuclear weapons enterprise stands in direct contradiction to these purposes. For example, it is implicit that the measures for the prevention and removal of threats to the peace must be lawful measures under international law. If there are other principles, the U.N. Charter is the corpus of international law which makes the nuclear weapons enterprise unlawful (e.g., on the basis that it is more destructive than even the crime of genocide and therefore a crime under international law). Likewise, it is arguable that the nuclear weapons enterprise is itself a direct negation of the principle of equality among nations.

The Declaration on Friendly Relations²⁹ among states, which is looked upon as containing principles which are a generally accepted interpretation of the provisions of the Charter, provides that every state has the duty to fulfill in good faith its obligations under the generally recognized principles and rules of international law.

For lack of a general treaty outlawing nuclear weapons, the world has been forced back upon a series of piecemeal treaties such as the Nuclear Non-Proliferation Treaty of 1968,³⁰ the Antarctic Treaty of 1961,³¹ and the U.S. and U.S.S.R. Treaty on the Limitation of Underground Nuclear Weapons Tests of 1974.³² It is the submission of this writer that we do not need treaties to reach the principle that nuclear weapons are illegal whether in their use, possession or manufacture. The necessary principles for this purpose are already contained in the pre-existing body of international law.

We need also to bear in mind such treaties as the Genocide Convention,³³ which makes the extermination of human life on a lesser scale than nuclear destruction a crime against humanity, and the Geneva Gas Protocol of 1925,³⁴ which prohibits chemical agents of warfare — whether solid, liquid or gaseous — whose toxic effect on people, animals or plants would be contrary to the generally recognized rules of international law. It is quite possible to argue by analogy that nuclear weapons stand con-

29. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations, G.A. Res. 2625 (XXV), 13 U.N. GAOR Supp. (No. 28) at 337, U.N. Doc. A/8028 (1970).

30. NPT, *supra* note 12.

31. The Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

32. Underground Nuclear Weapons Test Treaty, July 3, 1974, U.S. Dep't of State, Press Release No. 281 (July 3, 1974), *reprinted in* 13 I.L.M. 906 (1974) (unratified). *See also* Peaceful Nuclear Explosions Treaty, May 28, 1976, U.S. Arms Control & Disarmament Agency, Pub. No. 87 (May 1976), *reprinted in* 15 I.L.M. 891 (1976) (unratified).

33. Genocide Convention, *supra* note 25.

34. Geneva Gas Protocol of 1925, *supra* note 24.

demned upon any reasonable construction of such international treaties.

2. International Custom

The greatest strength of the argument against nuclear weapons comes from the principles of international customary law.³⁵ These go back to many cultures — Judaic, Christian, Islamic, Hindu — in all of which principles have long been recognized that there is a limit to the suffering that can be inflicted for purposes of war. Hyperdestructive weapons and weapons that inflict unnecessary suffering have long been condemned. The following principles of international law are available:

- (a) the principle against causation of indiscriminate harm to combatants and non-combatants;
- (b) the principle against aggravation of pain and suffering;
- (c) the principle of proportionality;
- (d) the principle against destruction of or damage to neutral states;
- (e) the principle against extermination of populations;
- (f) the principle that damage should not be caused to future generations;
- (g) the principle against permanent environmental damage; and
- (h) the basic principles of human rights.

It can be argued also that the arguments commonly adduced in justification of nuclear war are inapplicable. These are:

- (a) abrogation of international law by contrary practice;
- (b) the necessities of war;
- (c) practical military strategy;
- (d) the concept of a just war;
- (e) self-defense;
- (f) the preservation of one's way of life; and
- (g) preventing destabilization of areas of influence.

The argument extends from the use of nuclear weapons to their manufacture and possession through a consideration of:

- (a) the impracticality and the illegality of deterrence;
- (b) the impossibility of a contained nuclear war;
- (c) the unpredictability of the outbreak of war;
- (d) the unpredictability of the course of nuclear war; and

35. See, e.g., A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (1971); P. TROBOFF, *LAW AND RESPONSIBILITY IN WARFARE* 24-25 (1975).

(e) the uncontrollability of nuclear war, once commenced.

Through such considerations it is possible to demonstrate that there is a sufficient reservoir of principles available under customary international law to establish the illegality and indeed criminality of nuclear war.

3. General Principles of Law Recognized by Civilized Nations

If the contentions set out earlier are correct, this head can also be invoked. For example, genocide and, *a fortiori*, nuclear extermination and ecocide, would offend such general principles of international law. It would even be possible to argue that nuclear weapons in their use, manufacture or possession contravene the principle of *jus cogens* (for example, certain compelling norms of international law universally recognized as being incapable of being overridden even by express agreement to the contrary).

4. Decisions of Courts

We have not yet had an authoritative decision from a major international court upholding the illegality of nuclear weapons. Certain national courts such as the Tokyo Court in the *Shimoda* case have so held, but we urgently need a judgement from a high ranking international court. For this reason, it is of vital importance that IALANA proceed with one of its projects — obtaining a referral of this question to the ICJ for an Advisory Opinion.

5. Juristic Writings

Unlike a decade ago, we today have a considerable volume of writing from highly respected international jurists on the illegality of nuclear war. It is true there are contrary views, but it may fairly be said that the weight of juristic opinion today is in favor of the view of illegality. It may also fairly be said that the writings of the opposite school of jurists do not contain adequate answers to some of the principle contentions advanced in favor of the view of illegality, such as those outlined above.

The connection set out earlier in this paper — that there are sufficient principles of international law already in existence pointing to illegality — can be amply sustained. It is time now to bring those principles into operation rather than permit them to continue to lie dormant. With their assistance it can reasonably be expected that the obstacles presented by the real world to the outlawing of nuclear weapons can be overcome. We must not be browbeaten any longer by “realities,” for many of them can indeed be changed under pressure of the congruence of anti-nuclear forces and factors at this time in history. The law has achieved dramatic results in past eras of human history, upsetting apparently changeless structures and attitudes that have prevailed from the beginning of time. It can do so again in the greatest challenge humanity has ever faced.

It seems clear that the next round in the battle against nuclear weapons must be fought by lawyers. They have weapons at their disposal which other groups cannot match. It is for us at this convention to urge the legal professions of the world to rise to their responsibilities and to use these weapons which at present lie rusting in their legal armories.