

## ETHICAL AND MORAL FRAMEWORK FOR ADDRESSING THE ISSUE

In his concurrence with the historic opinion of the International Court of Justice (ICJ) issued July 8, 1996, addressing the legal status of the threat or use of nuclear weapons,<sup>1</sup> Judge Ranjeva stated, "On the great issues of mankind the requirements of positive law and of ethics make common cause, and nuclear weapons, because of their destructive effects, are one such issue."<sup>2</sup> Human society has ethical and moral norms based on wisdom, conscience and practicality. Many norms are universal and have withstood the test of human experience over long periods of time. One such principle is that of reciprocity. It is often called the Golden Rule: "Treat others as you wish to be treated." It is an ethical and moral foundation for all the world's major religions.<sup>3</sup>

Several modern states sincerely believe that this principle can be abrogated and security obtained by the threat of massive destruction. The Canberra Commission highlighted the impracticality of this posture: "Nuclear weapons are held by a handful of states which insist that these weapons provide unique security benefits, and yet reserve uniquely to themselves the right to own them. This situation is highly discriminatory and thus unstable; it cannot be sustained. The possession of nuclear weapons by any state is a constant stimulus to other states to acquire them."

The solution can be stated simply: "States should treat others as they wish to be treated in return."<sup>4</sup>

It is inconsistent with moral wisdom and practical common sense for a few states to violate this ancient and universally valid principle of reciprocity. Such moral myopia has a corrosive effect on the law which gains its respect largely through moral coherence. Can global security be obtained while rejecting wisdom universally recognized for thousands of years?

Judge Weeramantry said, "(E)quality of all those who are subject to a legal system is central to its integrity and legitimacy. So it is with the body of principles constituting the corpus of international law. Least of all can there be one law for the powerful and another law for the rest. No domestic system would accept such a principle, nor can any international system which is premised on a concept of equality."<sup>5</sup>

## LAW AND VALUES

Law is the articulation of values. Values must be based on moral foundations to have credibility. The recognition of the intrinsic sacredness of life and the duty of states and individuals to protect life is a fundamental characteristic of all human civilized values. Such civilized values are expressed in humanitarian law and custom which has an ancient lineage reaching back thousands of years. "They were worked out in many civilizations -- Chinese, Indian, Greek, Roman, Japanese, Islamic, modern European among others." Humanitarian law "is an ever continuous development... (and) grows as the sufferings of war keep escalating. With a nuclear weapon, those sufferings reach a limit situation, beyond which all else is academic."<sup>6</sup>

In testimony before the Court, then Foreign Minister of Australia Gareth Evans said, "The fact remains that the existence of nuclear weapons as a class of weapons threatens the whole of civilization. This is not the case with respect to any class or classes of conventional weapons. It cannot be consistent with

\*First presented at the United Nations to the States Parties to the Nuclear Non-Proliferation Treaty May 11, 1999. An extended in-depth version of this presentation can be found at Brigham Young Law Review, "Nuclear Weapons, Ethics, Morals, and Law," J. Reuben Clark Law School, Vol. 2000, No. 4.

humanity to permit the existence of a weapon which threatens the very survival of humanity. The threat of global annihilation engendered by the existence of such weapons, and the fear that this has engendered amongst the entire post-war generation, is itself an evil, as much as nuclear war itself. If not always at the forefront of our everyday thinking, the shadow of the mushroom cloud remains on all our minds. It has pervaded our thoughts about the future, about our children, about human nature. And it has pervaded the thoughts of our children themselves, who are deeply anxious about their future in a world where nuclear weapons remain.”<sup>7</sup>

We must never forget the awesome destructive power of these devices. “Nuclear weapons have the potential to destroy the entire ecosystem of the planet. Those already in the world’s arsenals have the potential of destroying life on the planet several times over.”<sup>8</sup>

Not only are they destructive in magnitude but in horror as well. <sup>9</sup>

Notwithstanding this knowledge we permit ourselves to continue to live in a “kind of suspended sentence. For half a century now these terrifying weapons of mass destruction have formed part of the human condition. Nuclear weapons have entered into all calculations, all scenarios, all plans. Since Hiroshima, on the morning of 6 August, 1945, fear has gradually become humanity’s first nature. Human life on earth has taken on the aspect of what the Qur’an calls ‘a long nocturnal journey’, a nightmare whose end one cannot yet foresee.”<sup>10</sup>

Attempting to obtain ultimate security through the ultimate weapon, we have failed for, “the proliferation of nuclear weapons has still not been brought under control, despite the existence of the Non-Proliferation Treaty. Fear and folly may still link hands at any moment to perform a final dance of death. Humanity is all the more vulnerable today for being capable of mass producing nuclear missiles.”<sup>11</sup>

As the General Assembly in its “Declaration on the Prevention of Nuclear Catastrophe” in 1981 said, “all the horrors of past wars and calamities that have befallen people would pale in comparison with what is inherent in the use of nuclear weapons, capable of destroying civilization on earth.”

A five megaton weapon represents greater explosive power than all the bombs used in World War II and a twenty megaton bomb more than all the explosives used in all the wars in history. Several states are currently poised ready to deliver weapons that render those used in Hiroshima and Nagasaki small. One megaton bomb represents the explosive force of approximately seventy Hiroshimas while a fifteen megaton bomb a thousand Hiroshimas. Judge Weeramantry emphasized that “the unprecedented magnitude of its destructive power is only one of the unique features of the bomb. It is unique in its uncontainability in both space and time. It is unique as a source of peril to the human future. It is unique as a source of continuing danger to human health, even long after its use. Its infringement of humanitarian law goes beyond its being a weapon of mass destruction, to reasons which penetrate far deeper into the core of humanitarian law.”<sup>12</sup>

We are challenged as never before: technology continues to slip away from moral guidance and law chases after common sense.

## INTERNATIONAL COURT OF JUSTICE

When the International Court of Justice addressed the legal status of threat or use of nuclear weapons members of the nuclear club, which has since grown, asserted a principled reliance on nuclear weapons. The Court held that “the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable to armed conflict, and in particular the principles and rules of humanitarian

law” and that states are obligated to bring to a conclusion negotiations on nuclear disarmament in all its aspects. <sup>13</sup>

Did the Court open the way for permissible uses of a nuclear weapon by saying that is “generally” illegal and that it could not say that there would never be an attack on a country that threatened its very existence to which nuclear weapons would be necessarily an illegal response?

Did the Court acknowledge that there were conceivably hypothetically legally compliant uses? It quoted the United Kingdom’s statement that “(I)n some cases, such as the use of a low yield nuclear weapon against warships on the high seas or troops in sparsely populated areas it is possible to envision a nuclear attack which caused comparatively few civilian casualties.”<sup>14</sup> However, the Court further pointed out that no state demonstrated when even such a limited use would be justifiable or “feasible.”<sup>15</sup>

The Court had already ruled unanimously that nuclear weapons must in any and all instances obey humanitarian laws of war. Can our most basic moral judgments founded on “dictates of conscience”, “elementary considerations of humanity” which remain “fundamental” and “intransgressible” be squared with these devices?<sup>16</sup> It seems scarcely reasonable with respect to these humanitarian legal requirements that they can.<sup>17</sup>

The Court stated unequivocally that the rules of armed conflict, including humanitarian law, prohibits the use of any weapon that is likely to cause unnecessary suffering to combatants;<sup>18</sup> that is incapable of distinguishing between civilian and military targets;<sup>19</sup> that violates principles protecting neutral states (such as through fall out or nuclear winter);<sup>20</sup> that is not a proportional response to an attack;<sup>21</sup> or that does permanent damage to the environment.<sup>22</sup>

Under no circumstance may states make civilians the object of attack nor can they use weapons that are incapable of distinguishing between civilian and military targets. Regardless of whether the survival of a state acting in self defense is at stake, these limitations continue to hold.

For this reason the President Judge stated in forceful terms that the Court’s inability to go beyond its statement “can in no manner be interpreted to mean that it is leaving the door ajar to the recognition of the legality of the threat or use of nuclear weapons.”<sup>23</sup> He emphasized his point by stating that nuclear weapons are “the ultimate evil, destabilize humanitarian law which is the law of the lesser evil. Thus the very existence of nuclear weapons is a great challenge to humanitarian law itself.”<sup>24</sup>

The Court held that no formal testimony was presented that nuclear weapons can meet the humanitarian law requirements for their use.<sup>25</sup>

The President Judge along with several other judges undertook to point out the illogic of the situation: “It would thus be quite foolhardy unhesitatingly to set the survival of a state above all other considerations, in particular above the survival of mankind itself.”<sup>26</sup>

The President Judge said, “Atomic warfare and humanitarian law therefore appear to me mutually exclusive: the existence of one automatically implies the non-existence of the other.”<sup>27</sup> The Court said, “(M)ethods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons...the use of such weapons in fact seems scarcely reconcilable with respect to such requirements.”<sup>28</sup>

Discordance between the incompatibility of these devices with the requirements of humanitarian law, the assertion that there could be possible instances in which their use could be legal and the reliance on the

doctrine of deterrence compelled the Court to seek a resolution: "the long promised complete nuclear disarmament appears to be the most appropriate means of achieving that result."<sup>29</sup> The requirements of moral coherence and ethical conduct and the need for "international law, and with it the stability of international order which it is intended to govern,"<sup>30</sup> drive the imperative of nuclear disarmament.

## ONGOING PROBLEM

Legal and moral questions continue to loom before us. We are not faced with nuclear policies founded on a strategy of dropping depth charges in mid-ocean or bombs in the desert. What the world faces is nuclear deterrence with its reliance on the horrific destruction of vast numbers of innocent people, destruction of the environment rendering it hostile to generations yet to be blessed with life.

Deterrence proponents claim that nuclear weapons are not so much instruments for the waging of war but political instruments "intended to prevent war by depriving it of any possible rationale."<sup>31</sup> The United States has boldly argued that because deterrence is believed to be essential to its international security that the threat or use of nuclear weapons must *therefore* be legal. The United States representative stated: "If these weapons could not lawfully be used in individual or collective self defense *under any circumstances* (emphasis added), there would be no credible threat of such use in response to aggression and deterrent policies would be futile and meaningless. In this sense, it is impossible to separate the policy of deterrence from the legality of the use of the means of deterrence. Accordingly, any affirmation of a general prohibition on the use of nuclear weapons would be directly contrary to one of the fundamental premises of the national security policy of each of these many states."<sup>32</sup>

It is clear that deterrence is designed to threaten massive destruction which would most certainly violate numerous principles of humanitarian law. Additionally, it strikes at generations yet unborn.

Even in the instance of retaliation the moral absurdity challenges us. As Mexico's Ambassador Sergio Gonzalez Galvez told the Court, "Torture is not a permissible response to torture. Nor is mass rape acceptable retaliation to mass rape. Just as unacceptable is retaliatory deterrence—'You burnt my city, I will burn yours.'"<sup>33</sup>

Professor Eric David, on behalf of the Solomon Islands, stated, "If the dispatch of a nuclear weapon causes a million deaths, retaliation with another nuclear weapon which will also cause a million deaths will perhaps protect the sovereignty of the state suffering the first strike, and will perhaps satisfy the victim's desire for revenge, but it will not satisfy humanitarian law, which will have been breached not once but twice; and two wrongs do not make a right."<sup>34</sup>

Judge Weeramantry rigorously analyzed deterrence theory:

1. Intention: "Deterrence needs to carry the conviction to other parties that there is a real intention to use those weapons in the event of an attack by that other party. A game of bluff does not convey that intention, for it is difficult to persuade another of one's intention unless one really has that intention. Deterrence thus consists in a real intention to use such weapons. If deterrence is to operate, it leaves the world of make believe and enters the field of seriously intended military threats."<sup>35</sup>
2. Deterrence and Mere Possession: "Deterrence is more than the mere accumulation of weapons in a storehouse. It means the possession of weapons in a state of readiness for actual use. This means the linkage of weapons ready for immediate take off, with a command and control system geared for immediate action. It means that weapons are attached to delivery vehicles. It means that personnel are ready night and day to render them operational at a moment's notice. There is clearly a vast

difference between weapons stocked in a warehouse and weapons so ready for immediate action. Mere possession and deterrence are thus concepts which are clearly distinguishable from each other."<sup>36</sup>

For deterrence to work one must have the resolve to cause the resulting damage and devastation.

Is deterrence limited to depth charges in the ocean or strikes in the desert? Are we willing to permit global security to rely on a bluff? If it is not a lie but a resolve to be willing to destroy all, are we not reducing humanitarian law to being a mere servant of raw power? Is not the very definition of lawlessness when might claims to make right?

While deterrence continues to place all life on the planet in a precarious position of high risk, one must wonder whether it provides any possible security against accidental or unauthorized launches, computer error, irrational rogue actions, terrorist attack, criminal syndicate utilization of weapons and other irrational and unpredictable, but likely, scenarios.

Did the Court undermine the continued legitimacy of deterrence? The Court stated clearly that "if the use of force itself in a given case is illegal—for whatever reason—the threat to use such force will likewise be illegal."<sup>37</sup>

The moral position of the nuclear weapons states is essentially that the threat to commit an illegal act—massive destruction of innocent people—is legal because it is so horrible to contemplate that it ensures the peace. Thus the argument is that the threat of committing that which is patently illegal is made legal by its own intrinsic illogic. Does this engender moral coherence in the youth of the world to whom we must argue that violence and the threat of violence in daily life does not bring human fulfillment?

An unambiguous political commitment by the nuclear weapon states to the elimination of nuclear weapons evidenced by unambiguous immediate pledges never to use them first as well as placing the weapons in a de-alerted posture pending their ultimate elimination will promptly evidence the good faith efforts by the nuclear weapon states to reduce our collective risks. These steps increase our collective security, but are hardly enough to meet the clear decision of the court and the dictates of reason. Only commencement in good faith of multilateral negotiations leading to elimination of these devices will bring law, morals, ethics and reason into coherence. Only then will we be able to tell our children that ultimate violence will not bring ultimate security, a culture of peace based on law, reason and values will.

## CONCLUSION

We are heartened by the level of cooperation articulated in the integrated human security agendas that emerged from the world summits of the 1990's which addressed our common environmental and human security concerns. However, it must be pointed out that to fulfill the commitments made at these summits a new level of cooperation is required. It is appropriate, therefore, that the United Nations has declared the first ten years of the 21<sup>st</sup> century as dedicated to the creation of a Culture of Peace. That Culture of Peace will require a pattern in which trust, respect and transparency will breed disarmament and reverse the pattern of fear and threat which have continued to justify irrational levels of armaments. According to the Brookings Institute the U.S. alone has spent 5.8 trillion on nuclear arms since 1940.<sup>38</sup> General Dwight D. Eisenhower said, "Every gun that is made, every warship launched, every rocket fired signifies, in the final sense, a theft from those who hunger and are not fed, those who are cold and are not clothed. The world in arms is not spending money on arms alone. It is spending the sweat of its laborers, the genius of its scientists and the hopes of its children."

The moral experience of shame has been placed in us along with the moral sensibility of revulsion. What right do we have to organize ourselves such that we might give human beings the Sophie's choice of ending all life on the planet in order to save a human creation, the state. As General Omar Bradley stated, "We live in an age of nuclear giants and ethical infants, in a world that has achieved brilliance without wisdom, power without conscience. We have solved the mystery of the atom and forgotten the lessons of the Sermon on the Mount. We know more about war than we know about peace, more about dying than we know about living."

It is time that we took bold moves to change the moral incoherence of the 20<sup>th</sup> century for it is now time in which statesmen must delve deep into themselves and become men in a state of grace. Let us grasp this moment of hazard and opportunity with our full humanity. Ultimate hazard and horror is our future if we let it slip away; opportunity to lead the world in fulfilling nothing less than an ultimate moral imperative -- nuclear disarmament -- is ours if we meet the challenge. This is a long journey that must take us from fear and incoherence into reason and moral coherence. Let it truly begin with us today.

Thank you.

## FOOTNOTES

<sup>1</sup> Legality of the Threat or Use of Nuclear Weapons, General List No. 95 (Advisory Opinion of the International Court of Justice of July 8, 1996). Unless otherwise noted, references are to this opinion, which was requested by the General Assembly. The historic importance of this decision cannot be overemphasized for it is the first judicial analysis of the issue by this international tribunal even though the first General Assembly Resolution, unanimously adopted January 24, 1946 at the London session, called for elimination of atomic weapons.

<sup>2</sup> Opinion of Judge Ranjeva, para. 105(2)E1.

<sup>3</sup> Buddhism: "Hurt not others in ways that you yourself would find hurtful." Udana-Varga, 5:18; Christianity: "All things whatsoever you would that men should do to you, do you even so to them." Matthew 7:12; Confucianism: "Do not unto others what you would not have them do unto you." Analects 15:23; Hinduism: "This is the sum of duty: do not unto others which would cause you pain if done to you." Mahabharata 5:1517; Islam: "No one of you is a believer until he desires for his brother that which he desires for himself." Hadith; Jainism: "In happiness and suffering, in joy and grief, we should regard all creatures as we regard our own self." Lord Mahavir 24th Tirthankara; Judaism: "What is hateful to you, do not do to your fellow man. That is the law; all the rest is commentary." Talmud, Shabbat 31a; Zoroastrianism: "That nature only is good when it shall not do unto another whatsoever is not good for its own self." Dadistan-I-Dinik, 94:5.

<sup>4</sup> See, excellent analysis, "Ethics of Abolition" in Douglas Roche's Unacceptable Risk, Nuclear Age Peace Foundation, 1995, p.90.

<sup>5</sup> Opinion of Judge Weeramantry, V4.

<sup>6</sup> Ibid. I 5.

<sup>7</sup> Gareth Evans of Australia, verbatim record, 30 October, 1995, pp. 44-45, 49.

<sup>8</sup> Opinion of Judge Weeramantry, II 3(a).

<sup>9</sup> "1. Nuclear weapons cause death and destruction; induced cancers, leukemia, keloids and related afflictions;

2. cause gastrointestinal, cardiovascular and related afflictions; continued for decades after their use to induce the health related problems mentioned above;

3. damage the environmental rights of future generations;

4. cause congenital deformities, mental retardation and genetic damage;

5. carry the potential to cause a nuclear winter;

6. contaminate and destroy the food chain;

7. imperil the eco system;

8. produce lethal levels of heat and blast;

9. produce radiation and radioactive fallout;

10. produce a disruptive electromagnetic pulse;

11. produce social disintegration;

12. imperil all civilizations;

13. threaten human survival;

14. wreak cultural devastation;

15. span a time range of thousands of years;

16. threaten all life on the planet;

17. irreversibly damage the rights of future generations;

18. exterminate civilian population;

19. damage neighboring states;

20. produce psychological stress and fear syndromes—as no other weapons do" Opinion of J,

Ibid. para. II 4.

<sup>10</sup> Opinion of President Judge Bedjaoui. para. 2.

<sup>11</sup> Ibid. para. 5.

<sup>12</sup> Opinion of Judge Weeramantry II para. 3.

<sup>13</sup> Para.105, the *dispositif* of the Court's opinion. For full opinion and commentary, See, Ann Fagan Ginger, ed. Nuclear Weapons Are Illegal: The Historic Opinion of the World Court and How It Will Be Enforced, Apex Press, New York, 1998; For analysis with excellent bibliography on the opinion, See, John Burroughs, The (Il)legality of Threat or Use of Nuclear Weapons. A Guide to the Historic Opinion of the International Court of Justice, Munster, London, 1997; For opinion available at cost from UN (document A/51/218, 15 October 1996), UN Publications, 2 UN Plaza, DC2-853, NY, NY 10017, 212-963-8302; Also, available at International Association of Lawyers Against Nuclear Arms (IALANA) website <http://www.ddh.nl/orz/ialana>

<sup>14</sup> Para. 91.

<sup>15</sup> Para. 94.

<sup>16</sup> Paras. 78-79.

<sup>17</sup> Para. 95.

<sup>18</sup> Paras. 78, see paras. 92,95.

<sup>19</sup> Paras 78, 95

<sup>20</sup> Para. 78.

<sup>21</sup> Ibid.

<sup>22</sup> Paras. 32, 33, 35.

<sup>23</sup> Opinion of President Judge Bedjaoui, para. 20.

<sup>24</sup> Ibid. 23

<sup>25</sup> Paras.94-95, see para. 91.

<sup>26</sup> Opinion of President Bedjaoui, para. 22.

<sup>27</sup> Ibid. para 20.

<sup>28</sup> Para. 95

<sup>29</sup> Para. 98

<sup>30</sup> Ibid.

<sup>31</sup> Marc Perrinde Brichambaut, France, Verbatim record (trans.) 1 November, 1995, page 33.

<sup>32</sup> Michael Matheson, US, Verbatim record, 15 November, 1995, p. 78.

<sup>33</sup> Verbatim record, 3 November 1995, p. 64.

<sup>34</sup> Verbatim record, (trans.), 14 November, 1995, p. 45.

<sup>35</sup> Opinion of Judge Weeramantry, VII 2(v).

<sup>36</sup> Ibid.

<sup>37</sup> Para. 47.

<sup>38</sup> Washington Post, July 1, 1998.