

## AN INTERNATIONAL LAW PERSPECTIVE: NUCLEAR FREE OBLIGATIONS AND TRIDENT II

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For the 55<sup>th</sup> Anniversary of US "Bravo" Nuclear Detonation, Bikini Atoll Sponsored by: The Ground Zero Center for Nonviolent Action, the Pacific Life Community, and Washington PSR  
7:00 p.m. Thursday, February 26, 2009, University Lutheran Church, Seattle, WA

Thank you all for coming. I am honored and humbled to be with you. Deep thanks Hilda Lini for your courage and strength in leading the way beyond the nuclear system in the face of grave health and environmental damages. Thank you too Jackie Hudson and Sue Ablao for still having faith in the possibilities of international law to help us toward "nuclear disarmament in all its aspects" in spite of the debacle that was the Sacred Earth and Space II Plowshares case.

1. This conference is especially timely for positive analysis and action in this period of major transition. The US body-politic has rejected extreme cynicism, and unlimited acts of elite/state powers. The Obama administration and the economic and environmental crises offer us a real opening for progress toward complete nuclear disarmament. Stopping weapons and fissile materials production as well as environmental clean-up and health care are urgently required.
2. Still, we are faced with the reality that military-industrial institutions and elites continue to operate from the premise that threat or use of nuclear weapons, the apex of the war system, is necessary for security and success. On the other hand such justifications are increasingly disconnected to factual, moral, legal, economic and environmental realities. Specification and implementation of necessary changes is up to us.

### **Nuclear disarmament in all its aspects is both essential and possible through legal processes: negotiation, treaty-making, adjudication and institution building.** <sup>i</sup>

3. Judge Christopher Weeramantry states in his opinion in the Nuclear Weapons Case (ICJ 1996) "All postulates of law presuppose that they contribute to and function within the premise of continued existence of the community served by that law." The fundamental rules and principles of humanitarian law, human rights and environmental law protect us all and generations to come. Nuclear weapons in general and the Trident in particular cannot comport with these basic rules and principles of law.
4. In 1982, Richard Falk and Saul Mendlovitz as part of Studies on a Just World Order described this broad transition period away from the state system as follows: "[I]t is important to appreciate that loyalty and legitimacy are shifting away from the state in two directions simultaneously: toward the center of the globe and toward the realities of community and sentiment. The role of the individual in war/peace and human rights settings is expanding as is the role of subnational movements for self determination."<sup>ii</sup>
5. Falk goes on to ask how we can consciously act as lawyers and I would add a human beings and citizens. The struggle Falk contends is toward "a vision of central guidance that is built around the values of human dignity and oriented toward the possibility of a planetary community joined together by contractual bonds rather than regimented by hegemonical bondage?"<sup>iii</sup> And Falk adds, "The perspective adopted here accepts a developmental view of the transition process that is neither beset nor alleviated by a *deus*

*ex machina*. At the same time it rejects the position that human capacities for response must be confined to marginal adjustment.”<sup>iv</sup>

6. We are at a crucial and opportune stage. Necessary and sensible “[p]rocesses involve minimization of violence, maximization of social and economic well-being, maximization of social and political justice and maximization of ecological balance.”<sup>v</sup> Nuclear weapons and the nuclear system have proven major mistakes the antithesis of these processes.
7. I would like to focus this talk on how we as lawyers and citizens can achieve nuclear disarmament in all its aspects by fostering and applying “legal techniques such as negotiation, adjudication, treaty-making and institution building?”<sup>vi</sup>
8. What are “the positive paths available, premised upon an affirmation of the wholeness of the planet and the solidarity of the human species that could bring about a rearrangement of power, wealth and authority more beneficial than anything the world has ever known?”<sup>vii</sup>
9. Where do we stand here in Seattle in devising such paths which must include nuclear disarmament? As a practical matter here the current reality is indeed frightening and overwhelming, partly because we have not learned from the horrors of what we have already done as Hilda Lini has described. In Bangor a few miles from here the US deploys most of its “14 Trident submarines with about 1,728 operational warheads. Many warheads have been removed from Trident II submarines to meet 2001 Strategic Arms Reduction Treaty (START) requirements and to keep pace with future SORT goals. But the D5 missiles fully installed since 2005 “have considerably greater range and accuracy.” The D5 missiles are armed with 1,344 active W76 warheads each 100 KT and 384 active W88 warheads each 455 KT. In addition “the Bush administration decided in 2005 that 63 percent of the approximately 3,200-warhead W76 inventory would be modified under a life-extension program (LEP) lasting through 2021...with increased capability against hardened targets... through a new Mk-4 reentry vehicle... [whose] initial operational capability is expected around March 2008...” Further, “[b]eginning in 2014, if approved by Congress, the navy plans to begin replacing the W76 warheads in the D5s with new ones from the Reliable Replacement Warhead (RRW) Program, RRW-1 warheads (sometimes called WR-1s)...”<sup>viii</sup>
10. Most of us understand that planning, preparing, and daily threatening to unleash the vast heat, blast and radiation of even one of these weapons is grotesquely unlawful according to existing law. Numerous treaties, fundamental rules and principles of humanitarian law, human rights and environmental law prohibit any threat or use of such weapons. These laws already reflect understanding of the “wholeness of the planet and the solidarity of the human species” (See Weeramantry, Edinburgh, 3 Feb.09). Are the Bangor personnel really oblivious to the law and the realities of the Trident? We will explore the particulars of the law in more detail in the Adjudication section a bit later
11. So how can we bridge this gap between continued improvement and deployment of the Trident, the refusal of nuclear states to pursue good-faith disarmament negotiations and the reality that threat or use of weapons or tactics of mass destruction cannot end threat or use of weapons or tactics of mass-destruction?

### **Negotiation and Treaty-Making:**

12. Complete nuclear disarmament is both necessary and possible. A step by step process, as agreed in the 2000 NPT Review Conference can be and, I venture to say with well organized public insistence will be, implemented and verified. Good-faith negotiating and treaty-making are normal methods.

13. What is the role of us as human beings, citizens and lawyers? Popular opinion strongly supports complete nuclear disarmament. (In the US 77% according to Global Zero polls.) What are the specifics here in Seattle in which we play parts?
14. In interpreting Article VI of the Nuclear Non-Proliferation Treaty, the ICJ unanimously held: “There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control” (ICJ 1996 paragraph 105 F). This is a 2 part obligation: 1) “to pursue in good faith” and 2) “bring to a conclusion negotiations leading to nuclear disarmament in all its aspects.”
15. The obligation adheres to the states as the law is generally interpreted. But the nuclear states will not act until their citizens and lawyers insist on and organize around implementation. At the 2000 NPT Review Conference all parties agreed to “unequivocal undertakings” for complete nuclear disarmament in accordance with Article VI of the NPT. These steps include signing and ratifying the CTBT, commencing and concluding negotiations on a Fissile Materials Cutoff Treaty; applying the principles of verification, irreversibility and transparency to the reduction and elimination of nuclear weapons, diminishing the role of nuclear weapons in security policies, reducing the operational status of existing nuclear weapons systems, refraining from developing nuclear weapons systems with new military capabilities or for new missions and planning and preparing for security without nuclear weapons.
16. By enhancing, up-grading, extending the life of, and requesting new warheads for the Trident system the US is acting here in violation (material breach) of the NPT. We can as citizens insist upon verification, irreversibility and transparency in our organizing around steps including opposition to RRW and Trident enhancements as well as for reduction of operational status.
17. We can insist upon a transparent verifiable process of transition including steps such as taking the weapons off high-alert. A transparent, systematic, reliable and verifiable process of dismantlement, elimination of warheads and delivery systems is entirely possible. Such a disarmament process is the flip-side or mirror image reverse of upgrading and replacement of warheads and delivery systems. For example, let’s figure out who will remove and dismantle the D-5 missiles and make sure Lockheed no longer has lucrative contracts for them.
18. In addition a comprehensive nuclear disarmament treaty-making process can be engaged in along-side of and consistently with a step-by-step process. A comprehensive draft treaty has been circulated by the United Nations Secretary General to all UN Member state. The Model Convention on the Prohibition of the Development, Testing, Production, Stockpiling, Transfer, Use and Threat of Use of Nuclear Weapons and their Elimination with commentary is available on the LCNP website. Again whether good-faith negotiation begins depends at this point on well-organized public insistence.
19. Good-faith negotiation in all our dealings with each other is a fundamental principle not only of international negotiations but also of humanity and of humanness. Acting for “a planetary community joined together by contractual bonds rather than regimented by hegemonical bondage” is an extension of normal human dealings. We all normally operate in discussions and agreements with each other with such standards as “awareness of the interests of the other, a general obligation of information and communication, and without

- fraud or deceit.”<sup>ix</sup> It is not normal, according to accepted norms or rules, for any of us, for you to sit under the bondage of the enormous nuclear threat here in the Seattle area.
20. Local actions consciously designed contribute to a transition process beyond “security” defined as reliance on nuclear weapons, war, and exploitation? Is it clear to people here that in the Seattle area that Trident existence endangers not only your existence but also that of the human species?
  21. Our governments acting on our behalf and with our active or passive consent and public funds have built these weapons and continue to upgrade and threaten to use them. If we know that the Trident does not provide security and gravely endangers our health, safety and welfare, our collective responsibility is to systematically eliminate them through good-faith negotiation. We all play roles, individually and collectively, at all levels of decision-making. This is a good time to sharpen our roles on individual, local, watershed, state, ecosystem, national and international levels.

### **Adjudication**

22. Those of you, who have engaged in non-violent resistance actions at the Bangor base, did so to refuse complicity in unlawful threat or use of the Trident. You also have sought to inform the base personnel that they are acting in violation of humanitarian law, the laws of war, treaties, human rights and environmental law. You know the record of success here in convincing courts that you have a right, duty or privilege to engage in non-violent resistance.
23. Citizens’ actions and the grim realities of nuclear weapons effects have contributed to some major successes. Often successes such as at the Nevada Test site have come as a result of massive demonstrations or non-violent resistance. The overall reduction in the numbers of nuclear weapons including those delivered by Trident has been achieved through various treaties. This would not have been done without strong public insistence and strong evidence that such moves were essential for our common health, safety and welfare.
24. Mostly authoritatively, the International Court of Justice adjudicated the question of the Legality of Threat or Use of Nuclear Weapons in response to a UN General Assembly request for an advisory opinion. You have handouts which review the relevant rules and principles of international law applied by the ICJ. These laws render the Trident categorically unlawful.
25. The applicable international humanitarian laws, human rights and environmental laws already give a centralized framework based on the acceptance of “human solidarity.” These including positive limits to the use of force, enumerated economic, social, civil and political rights and environmental laws.
26. In any judicial or legal proceeding the law is applied to the facts. The Trident II nuclear weapons systems are designed and intended to unleash vast heat, blast and radiation; the radiation will cause immediately lethal and long-term carcinogenic, mutagenic and teratogenic effects on human beings and other life forms that cannot be controlled in space or time. No one can deny the heat, blast and radiation-induced death, injury and illness caused by the Hiroshima and Nagasaki bombs and nuclear tests. The 14 US UGM-133A Trident II submarines, based mostly at Bangor, WA are currently armed with 288 D5 missiles carrying 1,344 active W76 warheads each 100 KT (at least 8 times the Hiroshima bomb) and 384 active W88 warheads each 455 KT (40 times the Hiroshima bomb).<sup>x</sup> Bikini unleashed 15 MTs of heat, blast and radiation.

27. The Rules and Principles of Humanitarian Law, the Laws of war, limit threat or use of force. This body of positive law as applied to threat or use of nuclear weapons is summarized most authoritatively by the International Court of Justice in its 1996 advisory opinion (ICJ Op.).<sup>[i]</sup> The London Charter and the Nuremberg Tribunals made it clear that those rules and principles preempt contrary domestic law. Particular prohibitions of law are directly incorporated into the US criminal code as war crimes (18 USC 2441) or genocide (18 USC 1091-1093) and binding US treaties that are “the supreme law of the land” (US Constitution, Article VI, clause 2) and universally binding “intransgressible” rules of humanitarian law.
28. The fundamental rules and principles of humanitarian law include: a) "States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilians and military targets" (ICJ Op., § 78). A corollary is that it is prohibited to use weapons that cause uncontrollable effects [1977 Protocol I to the Geneva Conventions, Art. 51(4)]. Use of Trident II system is unlawful *per se* because if targeted at military objects, the effects still are indiscriminate and uncontrollable. b) “It is prohibited to cause unnecessary suffering to combatants; it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering” [ICJ Op., § 78; 1907 Hague Convention IV, Art. 23(e)].
29. “If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law” (ICJ Op., § 78).
30. For our purposes here this weekend, we have copied various statements of the law and the Trident which can be used for presentation and argument. The most important development for us is a recent speech given by Judge Christopher Weeramantry, the Vice President of the ICJ during the Nuclear Weapons case and one of the world’s most eminent authorities on nuclear weapons and international law. In Notes for the presentation of Judge Weeramantry given at the Conference on Trident and International Law: Scotland’s Obligations organized in Edinburgh by the Acronym Institute for Disarmament Diplomacy, Edinburgh Peace and Justice Centre and Trident Ploughshares on February 3, 2009: “Do the people of Scotland have a right to demonstrate their concern with their safety, their health, their environment, their food chains, their future generations and their cultural inheritance? Modern human rights learning and doctrine would indicate an affirmative answer to these questions. Moreover, the missile is being perfected for deterrence. Deterrence means the threat of use. Use attracts retaliation. The target for retaliation is the geographical area where the missiles are located. The victims of retaliation will be the people of Scotland. The decision to use the missile will be a decision taken by the national government. Is there a conflict here which international law needs to resolve? International law cannot stand aside when human rights are violated and negated by doctrines of state sovereignty. Indeed anti nuclear civil resistance is the right of every citizen of this planet for the nuclear threat, attacking as it does every core concept of human rights, calls for urgent and universal action for its prevention. If it is a basic human right to be free of threat or violence, if the right to life is a basic human right, and if the protection of children and future generations is a basic human duty, international law must unhesitatingly recognise that the right to non violent resistance activities for the prevention of such an international crime is basic to human dignity.”
31. Citizens assertions of unlawfulness of the Trident can also rest on the Martens Clause which states: “In cases not covered by this protocol or other international agreements

civilians and combatants remain under the protection and authority of the principles of international law derived from custom, from the principles of humanity and from the dictates of the public conscience” (ICJ Op., § 78, Hague Convention II 1899; Additional Protocol I, 1977). What Declarations of Conscience are already designed?

32. If nuclear weapon states understand both the law and the danger why do they refuse to enter into good-faith negotiations for their elimination? Conversely, why do nuclear weapons states feel the need to “justify” threat or use of nuclear weapons, as not necessarily unlawful for “defensive” purposes? The US argued before the ICJ: “If these weapons could not lawfully be used in individual or collective self-defense under any circumstances, there would be no credible threat of such use in response to aggression and deterrent policies would be futile and meaningless”<sup>xi</sup> Yet even Mistery Shultz, Perry, Kissinger and Nunn (WSJ Jan. 4, 2007) said, “Reliance on nuclear weapons for this purpose [deterrence] is becoming increasingly hazardous and decreasingly effective.” A recent UK White Paper (WP)<sup>xii</sup> claims that the ICJ “rejected the argument that such use would necessarily be unlawful.” However, the ICJ held that the requirements of necessity, proportionality, and humanitarian law must be met in all circumstances. Thus “a use of force that is proportionate under the law of self-defense, must in order to be lawful, also meet the requirements of the applicable law in armed conflict which comprise in particular the principles and rules of humanitarian law” (ICJ Op., § 42).
33. There is I believe still often an underlying presumption of evilness of the “other” “bad” people that results in self-contradictory arguments. We can easily find flaws in those arguments and organize around principles of common humanity.

**Will flawed “logic” fatal to Joan of Arc be acceptable “logic” fatal to humans?**

34. I have been reading Mark Twain’s account of Joan of Arc’s last trials with great interest. The learned clerics and scholars who condemned Joan of Arc to death as a heretic also had problems with their logic “with no way to reconcile the discrepancy...[T]he doctors of theology ...had decided that the three Voices [who spoke to Joan] were Satan and two other devils; but they had also decided that these Voices were not of the French side—thereby tacitly asserting that they were on the English side; and if on the English side, then they must be angels not devil.”<sup>xiii</sup> The learned clerics and clerics found: Joan lied. Her voices did not speak French. The voices were Satan and other devils. But since the voices did not speak French, they spoke English and so must be angels.
35. Similarly, According to US at the ICJ, Nuclear weapons must comport with the laws of war, which they can’t. But nuclear deterrence requires a credible threat. Therefore nuclear weapons must be legally usable.
36. Or according to Judge Blackburn the trial judge in SESPII: No man is above the law. In this democracy “national defense” is everything or nothing without legal limits and the law is up to Congress and the President. Congress funds nuclear weapons so the President can threaten or use them legally for national defense.
37. In this 21<sup>st</sup> century we can surely revise the foolish premises which so obviously lead to oblivion.

**Institution-Building**

38. “Processes involve minimization of violence, maximization of social and economic well-being, maximization of social and political justice and maximization of ecological balance.”<sup>xiv</sup>

39. New coalitions are emerging in the context of Nuclear Free Zones, Mayors for Peace, Global Zero using our common clout for practical steps for nuclear disarmament in all its aspects. We can list and work with the many peace, justice, human rights, and environmental groups. We can and are forming common cause for nuclear disarmament in all its aspects in the context of building our common future “around the values of human dignity and oriented toward the possibility of a planetary community joined together by contractual bonds rather than regimented by hegemonical bondage.”<sup>xv</sup>
40. Leverage Points include opportunities for education and action around: A) The uncontrollable heat, blast, radiation of the Trident II renders any use, threat, development or deployment untenable under fundamental rules and principles of humanitarian law, human rights and environmental law; B) The state and local governments have responsibility for protecting the health, safety and welfare of the people so actions and arguments here in Washington state can be coordinated with those occurring in Scotland; C) We can insist on taking and verifying steps agreed to in the 2000 NPT Review Conference including no-upgrades and de-alerting; D) Building broad grass-roots support for a new UN disarmament decade with sophisticated organizing around good-faith negotiation for nuclear disarmament in all its aspects; E) Organizing super majorities of citizens and organizations who consciously articulate “security” as care for each other and our common environment and declaring nuclear weapons, Trident and the nuclear system the opposite of sensible economic priorities and sound human rights and environmental policies; F) Insisting on proper due process in every case of non-violent civil resistance including as the right to be informed of the charges brought, requiring the prosecutor to meet his burden of proof of each element of the charge beyond a reasonable doubt, and right to bring evidence in one’s defense.
41. Through statements and arguments which incorporate some of these specifics we can through good-faith negotiation, treaty-making, fair adjudication move unequivocally toward nuclear disarmament in all its aspects and thus go a long way in building increasingly human and environmentally-centered institution building.
42. In these ways we humans can preserve, protect and restore the waters of the Pacific, the Atlantic, and all the lakes, rivers, lands and air of our common earth.

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<sup>i</sup> Studies on a Just World Order, Richard Falk and Saul H. Mendlowitz, General Editors

<sup>ii</sup> 38. “A New Paradigm for International Legal Studies: Prospects and Proposals,” Richard Falk, *International Law: A Contemporary Perspective*, Studies on a Just World Order, No.2, Richard Falk, Friedrich Kratochwil and Saul H. Mendlovitz, Eds., 1982, p.690

<sup>iii</sup> Ibid, p.690.

<sup>iv</sup> Ibid, p.668

<sup>v</sup> Ibid, p.685

<sup>vi</sup> Ibid, p. 655

<sup>vii</sup> Ibid, p.654B

<sup>viii</sup> NRDC “Nuclear Notebook, US Nuclear Forces 2008,” Robert S. Norris & Hans M. Kistensen, March/April 2008 Bulletin of Atomic Scientists 51.

<sup>ix</sup> See LCNP.org, Judge M. Bedjaoui, “Good Faith, International Law, and the Elimination of Nuclear Weapons: The Once and Future Contributions of the International Court of Justice,” 1 May 2008, Geneva

<sup>x</sup> NRDC, p 50-53

<sup>xi</sup> ICJ Hearing for the Nuclear Weapons Advisory Opinion, November 15, 1995, at 78 <<http://www.icj-cij.org/>>

<sup>xii</sup> “The Future of the United Kingdom’s Nuclear Deterrent,” Secretary of State for Defence and Secretary of State for Foreign and Commonwealth Affairs (December 2006).

<sup>xiii</sup> Mark Twain, *Joan of Arc*, Ignatius Press, p.401

<sup>xiv</sup> Falk, , p.685

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<sup>xv</sup> Falk, p 690.