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THE INTERNATIONAL COURT OF JUSTICE AND THE SCOTTISH HIGH COURT Two Views of the Illegality of Nuclear Weapons

Peter Weiss, July 31, 2001

I consider it a singular honor to be invited to give this lecture at one of Japan's most distinguished universities (Waseda University). As a survivor of the World War II Holocaust, in which part of my family perished, I have long felt a kinship with the Japanese people who are committed to rid the world of nuclear weapons and particularly with the hibakusha, who are dedicating their lives to the noble task of ensuring that what happened to them will never happen to another human being. My topic today will be based on the actions of three European women who, although not victims of nuclear devastation themselves, are entitled, by virtue of their unceasing devotion to nuclear abolition, to be regarded as soul sisters to the hibakusha.

On July 8, 1996, the International Court of Justice rendered its momentous decision in the Nuclear Weapons Case.¹ In 270 pages of text, including separate opinions by each of the fourteen judges, it answered the following question put to it by the General Assembly of the United Nations:

Is the threat or use of nuclear weapons in any circumstance permitted under international law?

¹ The Opinion, some of the judges' separate statements and a record of the written and oral proceedings can be seen at the Court's website, www.icj-cji.org.

By thirteen votes to one, that of Judge Oda of Japan, it held the question to be admissible.

Then, preceded by 105 paragraphs of closely reasoned discussion, it made the following holding, or *dispositif*, as the conclusions of the World Court are called:

A.. Unanimously, There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons.

B. By eleven votes to three, There is in neither customary nor international law any comprehensive and universal prohibition of the threat and use of nuclear weapons as such.

C. Unanimously, A threat or use of force by means of nuclear weapons that is contrary to Article 2 of, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51 is unlawful.

D. Unanimously, A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons.

E. By seven votes to seven, It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law.

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.

F. Unanimously, 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.

On June 8, 1999, three courageous women, Angela Zelter, Bodil Roder and Ellen Moxley, managed to board a British Royal Navy vessel, the “Maytime”, moored in a Scottish lake, and to throw overboard certain computer equipment used to track the movements and communicate with submarines armed with nuclear Trident missiles. The Trident nuclear warheads have a force of 100 to 120 tons each, eight to ten times those of the bombs dropped on Hiroshima and Nagasaki. They are among the deadliest weapons in the current nuclear arsenals, each able to kill millions of people and to condemn millions more to a slow lingering death. The damage their use would cause to the environment and to future generations is unimaginable.

The women were arrested, charged with malicious damage to Her Majesty’s property, and came to trial before a jury on September 27, 1999 in Greenock Sheriff Court. First instance judges in Scotland are called Sheriffs and the judge assigned to the case was a woman, Sheriff Gimblett.

There have been many trials of this kind in the last half century in the United Kingdom, the United States and certain other countries, arising from the action of nuclear resisters in trespassing on government property or causing minor damage to nuclear weapons related government property. The normal defense in such cases, as it was in the Greenock case, is to offer factual evidence of the nature and effect of nuclear weapons and

the nuclear weapons policy of the government involved, and legal evidence and arguments as to the illegality of such policy under customary international law. Taken together, this factual and legal evidence is intended to show that the defendants can avail themselves of the defense of necessity; that is, the principle recognized by virtually all legal systems that a minor breach of the law is justified if it leads to the prevention of a greater one and if there is no likelihood of preventing by legal means the greater one which will or may occur in the immediate or near future. In the great majority of the cases involving resistance to nuclear weapons, the courts will refuse to hear such evidence and will treat the proceedings as simply involving trespass upon or damage to government property. Therefore, these cases normally last from a few hours to at most two or three days and end in the conviction of the defendants and the imposition of small fines or prison sentences.

The Greenock case was an exception. Sheriff Gimblett considered it her duty to hear the evidence offered by the defendants, and to hear it both from them and from four expert witnesses: Professor Paul Rogers and Rebecca Johnston, highly qualified nuclear weapons researchers from the United Kingdom; Francis Boyle, a law professor and long-time anti-nuclear activist from the United States; and Ulf Panzer, a German judge who had himself, some fifteen years earlier, participated in actions protesting the siting of nuclear cruise missiles in Germany. As a result, the trial lasted over three weeks. At its conclusion the judge, who, under Anglo-American legal procedure, decides questions of law, leaving questions of fact to the jury, told the jury that, as a matter of law, the defendants had proved their case and therefore instructed the jury to acquit them. In doing so, she relied to a large extent on the ICJ Opinion.

In Scotland, as in many other jurisdictions, a conviction can be appealed, but an acquittal cannot. However, there exists in Scotland, whose judicial system differs considerably from that of England, a rather unique procedure called The Lord Advocate's Reference. This enables the Crown, i.e. the prosecution, to in effect appeal the *ratio decidendi*, the principles on which a decision was based, by putting a number of questions

to the Appeal Court of the High Court of Justiciary of Scotland. In the Greenock case the Crown, which evidently had not expected Sheriff Gimblett's decision, put the following questions to the Appeal Court:

1. In a trial under Scottish procedure, is it competent to lead evidence as to the content of customary international law as it applies to the United Kingdom?
2. Does any rule of customary international law justify a private individual in Scotland in damaging or destroying property in pursuit of his or her objection to the United Kingdom's possession of nuclear weapons, its action in placing such weapons at locations within Scotland or its policies in relation to such weapons?
3. Does the belief of an accused person that his or her actions are justified in law constitute a defence to a charge of malicious mischief or theft?
4. Is it a general defence to a criminal charge that the offence was committed in order to prevent or bring to an end the commission of an offence by another person?

The High Court's extremely disappointing 33 page decision, answering all four questions in the negative, was rendered on March 30, 2001.² As it constitutes the first detailed analysis of the ICJ Opinion by another judicial body, I propose to discuss at some length its tortured interpretation of the Opinion. First, however, a political point needs to be noted: Had the High Court in essence agreed with Sheriff Gimblett's courageous decision, this would have opened the way for further actions of the type involved in the Greenock case to be undertaken with impunity from judicial prosecution; in other words, it would have meant, ultimately, the end of the United Kingdom as a nuclear power. Thus, it

² The full text of the decision, as well as a number of comments, including one by this author, can be seen at the Trident Ploughshares website, www.gn.apc.org. Trident Ploughshares is the organization which carries on the civil resistance campaign against Trident.

is perhaps no more than an example of what Vice-President Schwebel, in his dissenting opinion in the ICJ case, called the “titanic tension between State practice and legal principle.”

Indeed, the Scottish court gave away its sympathy with Judge Schwebel’s “titanic tension” by repeated references ³ to a 1964 British case, *Chandler v. Director of Public Prosecutions*, in which one of the judges, Lord Reid, held as follows:

It is in my opinion clear that the disposition and armament of the armed forces are and for centuries have been within the exclusive discretion of the Crown and that no one can seek a legal remedy on the ground that such discretion has been wrongly exercised ... Anyone is entitled, in or out of Parliament, to urge that policy regarding the armed forces should be changed; but until it is changed ... no one is entitled to challenge it in court.

That case, as I understand it, involved a legal challenge to certain budgetary dispositions concerning the armed forces of the United Kingdom. In that sense, the rationale for the holding in *Chandler* was similar to the political question doctrine in American law, which is often used by American courts to avoid ruling on issues which they consider to be within the prerogative of the legislature, even if they involve questions of law. But to suggest, as the Scottish court did, that a military policy which violates customary international law can be “within the exclusive discretion of the Crown” is to betray a grievous misunderstanding of one of the basic principles of international law.

In fact, the Court did treat the issue as justiciable, but only because the issue of justiciability was not raised by the Crown in the trial below or in the Lord Avocate’s Reference. But the very fact that the Court referred to the doctrine of the *Chandler* case suggests that what was in the judges’ minds was that the very notion of citizens

³ Par. 56

challenging the government's choice of weapons and tactics was still unacceptable in the nuclear age, as it had been for centuries before the invention of the atom bomb. The modern incarnation of this mindset is the doctrine of national security, which lurks in the shadows behind every political and legal attempt to justify the continuing reliance of the nuclear weapon states on these monstrous weapons, no matter in what technical and superficially rational terms such justification may be phrased.

In order to arrive at its dissection of the ICJ Opinion, the Appeal Court had to take a number of preliminary steps. It had to reformulate the defense as consisting of two separate arguments: First, that the deployment of Trident submarines by the government was illegal or criminal and that this justified the defendants' actions which otherwise would have been criminal. Second, that the defendants acted out of necessity, which is a defense under Scots law.⁴ As to the first point, which relates to the fourth question put to it by the Crown, the Court categorically stated that "Apart from the defence of necessity, it is not a defence to a criminal charge that the actions complained of were carried out to prevent another person committing a crime."⁵ This may be true as a general proposition, but it leaves open the question of the magnitude of the crime to be prevented and its proportion to the crime committed in the attempt at prevention. One can easily agree that seeing a person picking someone's pocket in the subway does not justify killing that person or even assaulting him (although it may justify restraining him until the arrival of the police, which otherwise would be an offense). But what of the point raised by the defendants that, as was stated at Nuremberg, citizens have a right, if not an obligation, to take action to prevent crimes against humanity? The Court dismissed this as being restricted to the particular facts of the Nuremberg trials and not having risen to the level of a general principle of customary law⁶.

⁴ Par. 33

⁵ Par. 111

⁶ Par. 89

There is, clearly, a symbiotic relationship between the defense of necessity and the defense of crime prevention. But, while it may be difficult to sustain the latter without a showing of necessity, the element of crime prevention is not inherently necessary to sustain the defense of necessity. This is illustrated by the example given by the Court in paragraph 34:

A vehicle rolling out of control towards a crowd might be intercepted by someone other than the owner or driver as the only way of preventing death or injury, even if the actions carried out caused damage to the vehicle. The contingency giving rise to the danger ... appears to be immaterial.

But the Court then goes on to draw a distinction between dangers caused with and without the intervention of human actors:

... the Government's actions in relation to Trident must be regarded as entirely lawful unless the breach of customary international law is established. If the Government's actions were thus entirely lawful, notwithstanding any danger they might create, it is difficult to see how the defence of necessity could be invoked in relation to the otherwise criminal act of a third party.⁷

This raises two interesting questions: One, what if, before the ICJ Opinion, before the Geneva Conventions, before the Hague Conventions, before the Declaration of St. Petersburg, before, in other words, customary law had crystallized around the principles violated by nuclear weapons, some government or group or individual stood poised to use a devilish new method of killing millions of persons, inflicting genetic damage on untold

⁷ Par. 35

future generations and destroying the environment of a good part of the earth's surface? Would such an action be "entirely lawful"?

And two, if the necessity alleged to justify an otherwise illegal action is due to human action, what difference does it make whether such action is lawful or criminal? Take the example of the vehicle rolling toward a crowd. Suppose this is due to the fact that the driver, upon parking the vehicle on an incline, had failed to engage the emergency brake. A negligent action, surely, but hardly a criminal one. Thus, while there are good grounds to accuse the United Kingdom and other nuclear weapon states of illegal and perhaps criminal action in maintaining and threatening to use nuclear weapons, the horrendous potential or likely consequences of such conduct should be sufficient in themselves to justify action to prevent their occurrence.

Be that as it may, the Appeal Court rose, perhaps somewhat too eagerly, to what it perceived to be the challenge of the defendants to declare Trident a criminal enterprise, a challenge that was not contained as such in the four questions of the Lord Advocate's Reference. In this respect, the Court said it was its "function to reach its own conclusion as to the rules of customary international law, taking full account but not being bound by, the conclusions reached by the International Court of Justice." In fact, however, the Court failed to conduct its own review of customary law, except as it was discussed in the ICJ Opinion. It also failed to take into account developments subsequent to the date of the Opinion, such as the "unequivocal undertaking to accomplish the total elimination of their nuclear arsenals", given by the nuclear weapon states on May 20, 2000 at the United Nations, all of which reinforce what the ICJ called the emerging *opinio juris* of illegality.

At the outset of its analysis, the Court echoes the position of all the nuclear weapon states that the Opinion is "an advisory opinion, not a judicial determination of customary international law."⁸ But in the same paragraph, the Court states that "the advisory opinion may be regarded as confirmatory of the then rules of customary international law." It is

⁸ Par. 66

difficult to perceive the distinction between a confirmation and a determination of customary international law. It is a distinction without a difference. Therefore the attempt to diminish the importance of the ICJ Opinion by emphasizing its advisory nature is bound to fail.

The Court then proceeds to give a lengthy and reasonably fair account of the ICJ Opinion, section by section. Many of the Court's interpretations of the Opinion, however, are open to challenge:

1. In Par. 69, the Court states that the ICJ "distinguished" the right to life in Art. 6 of the International Covenant on Civil and Political Rights and the genocide convention and that various environmental laws do not specifically prohibit the use of nuclear weapons. But what the ICJ actually said was that Article 6 could be relevant by reference to the law of armed conflict, that the Genocide Convention could be relevant if intent was shown and that there are "important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict.
2. In par. 71, the Court says that pars. 35 and 36 of the ICJ Opinion make it clear that what the ICJ had in mind were weapons of mass destruction and that, if it had considered that there was a distinct class of "small scale or tactical nuclear weapons which could be regarded as different ... it would no doubt have made that clear." It is always risky for one court to speculate about what another court might or might not have done. At any rate, the ICJ's reference to the inadequacy of "the elements of fact at its disposal", in the crucial second subsection of Section E of the *dispositif*, suggests that the Opinion may have come out differently had the ICJ been provided with "elements of fact" concerning small scale or tactical nuclear weapons. Note, in this connection, the ICJ's complaint,

in par. 94 of its Opinion, that “none of the States advocating the legality of nuclear weapons under certain circumstances, including the ‘clean’ use of smaller, low yield tactical nuclear weapons, has indicated what, supposing such limited use were feasible, were the precise circumstances justifying such use.”

3. In par. 72, the Court states that at par. 42 of its opinion the ICJ acknowledges that the use of nuclear weapons in self-defense cannot be excluded in all circumstances, but fails to recognize that in the same paragraph the ICJ cautions that “a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.” The Court does not explain how the Trident nuclear warheads, which it has described earlier⁹ as having an explosive force of “100 to 120 kilotons each, approximately eight or ten times larger than the weapons used at Hiroshima and Nagasaki”, could possibly, under any conceivable circumstance, be used in accordance with the requirements of humanitarian law.
4. In par. 72, the Court avers that the ICJ did not see deployment as a deterrent as necessarily constituting a threat within the meaning of Art. 2(4) of the United Nations Charter. What the ICJ actually said was that this would depend on “whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations or whether, in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality.” Here again, the Court accepts as determinative for the present case the universe considered by the ICJ – all nuclear weapons, possessed by any state under any circumstance – rather than the much more limited universe of the

⁹ Par. 63

Trident weapons, possessing certain characteristics and deployed by the United Kingdom under certain policies of the UK and NATO.

Following its parsing of the ICJ opinion leading up to the *dispositif*, the Court quotes and analyzes the *dispositif* itself. It expresses its puzzlement at the words “should” and “particularly” in Section D (“A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law.”) The choice of “should” is indeed somewhat puzzling, but the discussion preceding the *dispositif* makes it crystal clear that “should” is to be given the same meaning as “must”. There is, however, nothing strange about “particularly”. It could simply mean that *ius in bello* is more relevant to the illegality of nuclear weapons than *ius ad bellum*, both being branches of the law of armed conflict.

Having concluded that no illegality attaches to the deployment of Trident, the Court then proceeds to deliver itself of the somewhat astounding proposition that humanitarian law does not apply in time of peace.¹⁰ Presumably this is advanced by way of *dictum*, since it is not responsive to any of the four questions addressed to the Court. But for at least two reasons, the proposition seems to be a case of literalness stretched to absurd limits.

First, it ignores the well known criminal law principles of conspiracy to commit a crime, as well as preparation to commit a crime, accompanied by some overt act, as being themselves criminal. “Threatening” and “menacing” are also crimes, at least in Anglo-American law. The Court cites the ICJ’s reference to “the rules of international law applicable in armed conflict” to support its view that “in” literally means that these principles do not apply until armed conflict has broken out. But the ICJ Opinion is replete with references to the fact that the threat to use an illegal weapon, or to use a weapon in an illegal manner, is itself illegal. Surely this rule is not limited to threats made, directly or

¹⁰ Par.95

indirectly, once armed conflict has started, but must be seen as applying to any period preceding the outbreak of hostilities.

Second, while the Court disclaims an intent to draw fine distinctions between war and armed conflict, it seems oblivious to the difficulty of drawing a fine line between armed conflict and peace. Modern technology is in the process of substituting the computer for the musket, the laser for the bomb, the disabling of a command and control center for a siege laid to a town. At any given time, two less than friendly states may be engaged in any number of covert operations against each other, long before the shooting starts. We know what “conflict” is, but what is “armed”, in the 21st century?”

Finally, the Court returns to the question of necessity, to say “we cannot see any substance at all in the suggestion that what the respondents did was justified by necessity.”¹¹ In support of this view, the Court points out that the action of the respondents – as the defendants are referred to at the level of the Appeal Court - was planned over a period of months, that what they did was not a natural or instinctive reaction to some immediate perception of danger, that there was no likelihood that Trident was about to be used and that what they did could not have had any conceivable impact upon the supposedly immediate risk.

This is the weakest part of the decision. It contrasts the action of the defendants to “a youngster brandishing a knife at another a foot away from him, and perhaps indicating by word and action that he intends to stab him then and there.”¹² In doing so, it demonstrates how far removed from reality judges can be and what an uphill battle nuclear resisters face in getting courts to understand what the ICJ called the unique nature of nuclear weapons, which President Bedjaoui, who is about to retire from the World Court, called “the ultimate evil.”

¹¹ Par. 100

¹² Par. 97

Consider what lies behind those four points made by the Appeal Court to demonstrate that the defendants had not met the test of necessity under Scots law:

- ❖ *They had prepared their action for months.* What were they supposed to do? Decide, on the spur of the moment, that Trident posed an immense danger to the earth and to humanity and that they should therefore hide themselves to the well guarded Royal Navy base at Loch Goil, make their way unto the vessel “Maytime” and throw some random pieces of equipment overboard? Clearly, careful preparation was needed to carry out this operation and the fact that careful preparation was done in no way detracts from the perception that the operation was necessary.
- ❖ *What they did was not a natural or instinctive reaction to a perception of immediate danger.* True, instinct played no part in the decision of the three women. All had perceived the danger of nuclear weapons for years and had taken various actions to make policy makers and the public at large share that perception. But to say that their reaction to this danger was not natural is to denigrate the moral force at the core of their action. What, indeed, could be more natural for one realizing that instant catastrophe rides the seas with the Trident than to feel that something must be done?
- ❖ *There was no likelihood that Trident was about to be used.* In terms of the proportionality of the evil to be prevented by the otherwise criminal action, in a case of necessity, the temporal proximity of the event is not the only factor to be considered. One must consider the possibility, not simply the likelihood, of the event, and weigh it against the magnitude of the evil. A Trident on hairtrigger alert poses a potentially immediate risk of enormous harm, even though the likelihood of the harm occurring may not be more than one on a scale of one to ten at a given moment. At any rate,

courts which dismiss the defense of necessity in nuclear resistance cases never come to grips with this fundamental question: If not now, when? When the button has been pushed and the missile is on its deadly way? When war has been declared, even though no one declares war any more? When the other side has launched its nuclear weapon or massive conventional attack and only seconds remain before Trident retaliates?

❖ *What they did could not have had any conceivable impact upon the supposedly immediate risk.* On the contrary. The damage done to the equipment on board the “Maytime” could well have prevented communication with some Trident submarines during what may have been a brief but critical period. But more importantly, “what they did” has served as the most energizing factor in the movement to rid the world of nuclear weapons since the ICJ Opinion came down in 1996. The effect produced by the necessitated action must be viewed in terms of the field of action available to the actors. It would be nice to incapacitate the Trident arsenal by seizing a knife about to be used to stab someone. It would also be utterly foolish to think that it could be done in so simple and direct a way. “What they did”, after years of fruitless peaceful protest, was the most effective way to express the necessity of doing something.

What lessons can we draw from this unfortunate decision? Let me suggest a few.

1. There is no doubt that the importance of the ICJ Opinion has been diminished by this frontal assault on it by a respected and influential court. The Scottish decision has exposed its weaknesses and ambiguities and provided ammunition to those in the legal departments of the nuclear weapons states and their allies who see it as merely a restatement of

humanitarian law principles without conclusive effect on the question of the illegality of threat and use of nuclear weapons under international law.

2. On the other hand, we must strive to emphasize the points in the ICJ Opinion which the Scottish decision sought to minimize or gloss over:
 - a. That the threat and use of nuclear weapons must *in any circumstance* comply with the requirements of humanitarian law, which makes their legal use as weapons of mass destruction an impossibility..
 - b. That the threat and use of nuclear weapons is and remains *generally* illegal under international law and that the so-called exception for an extreme circumstance in which the survival of a state is at stake is no exception at all, but merely a *non liquet*, a decision not to decide.
 - c. That, in any case, the declared policy of the nuclear weapon states does not limit their use to such an extreme circumstance and is therefore inherently illegal.
3. The decision illustrates the limits of legal action in resistance to state crimes, but in no way diminishes the need for such resistance. On the contrary, the fact that courts are reluctant to do their duty in holding no one above the law should encourage civil society to redouble its efforts to hold policy makers, even those who consider “national security” a shield from prosecution, accept the restraints placed upon them by legal and moral principles.

We are, indeed, in a time of titanic tension between practice and principle and the course of history is moving, slowly but surely, in the direction of principle. Great strides are being made in the area of human rights: Witness the progress toward an international

criminal court and the cases brought in the last two years against three former Presidents, Hissene Sabre of Chad, Milosevic of Yugoslavia and Pinochet of Chile. The fact that only one of these, the case against Milosevic, is going forward, is less important than the fact that indictments against them were returned for crimes against humanity.

There is much work for lawyers to be done. I hope many of you, in your varied careers, will play a part in doing it.

Peter Weiss

President, IALANA

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