The Prohibition of Nuclear Weapons in Light of the Prohibition of Genocide and *Jus Cogens* Norms

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This article addresses whether the threat or use of nuclear weapons entails intent to commit genocide, thus violating the Genocide Convention and, therefore, whether the use of such weapons is a violation of jus cogens (peremptory) norms contrary to the greater human interest and the fundamental values that ground international law. The extended argument advanced here answers in the affirmative. It is grounded in a moral-philosophical conceptual framework on justice and practical rationality elaborated by moral philosopher Alasdair MacIntyre and a perspective on international law that emphasizes associative obligations of States (contrary to State claims of 'unrestricted sovereignty') and the principle of salience (in contrast to the principle of consent) as elaborated by Ronald Dworkin. The authors conclude with a reminder of the ineradicable ambiguity and lack of fail-safe mechanisms in chains of command in nuclear security decision-making, as was manifested e.g., during the Cuban Missile Crisis.

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***Regardless of the legal niceties, a nuclear conflict would be a catastrophe. There could be no winners.

-- Charles Garraway, *Nuclear Weapons under International Law* (2014)

I. INTRODUCTION

In its advance report of August 12, 2022, the International Law Commission (ILC) published a set of draft conclusions as part of its recommendation to the United Nations General Assembly (UNGA) on the "identification and legal consequences of peremptory norms of general international law (*jus cogens*)."[1] In 'Part One, Introduction' of the advance report, various 'conclusions' are provided as part of the rationale essential to understanding the central concepts involved.[2] Conclusion 2' concerns the *nature* of peremptory norms, noting that these norms "reflect and protect fundamental values of the international community." [3] Further, these norms are "universally applicable and are hierarchically superior to other rules of international law." Then, 'Conclusion 3' stipulates a *definition*:

> A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[4]

Especially important in relation to this definition is how the phrase 'international community of States as a whole' is to be interpreted, first in the recognition and then in the acceptance of such norms. Thus, 'Conclusion 7.2' asserts that, "[a]cceptance and recognition by a very large and representative majority of States is required for the identification of a norm as a peremptory norm of general international law (*jus cogens*); acceptance and recognition by all States is not required."[5]

These preliminary conclusions in the ILC report elicit a number of questions that, if answered with compelling rationale, may present the international community with opportunities for a more dedicated expression of such norms in relation to contemporary concerns about global security policy and practices. Specifically, the legal and moral status of nuclear weapons is a principal legal-moral concern vis-à-vis fundamental values expressive of the greater *human* interest, in contrast to merely sovereign *national* interests that are represented in the national security policy of major nuclear powers such as the USA and Russia.

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[1] Int'l L. Comm'n, Rep. on the Work of Its Seventy-Third Session, U.N. Doc. A/77/10 (2022).

[2] *Id.* at 16–28.

[3] *Id.* at 18.

[4] *Id.* at 27.

[5] *Id.* at 37.

This human interest disposition is made clear in the International Court of Justice's (ICJ) Advisory Opinion on the legality of the threat and use of nuclear weapons (issued in 1996), [6] in the ongoing engagement with the Non-Proliferation Treaty (NPT) in sequential review conferences (the most recent being the 10th NPT Review Conference held in August 2022),[7] and in the Treaty on the Prohibition of Nuclear Weapons (TPNW) that, mostly through the initiatives of nations of the 'Global South' that are non-nuclear weapons States,[8] entered into force in January 2021.[9] These instruments of international law form part of what Dorothy V. Jones calls the 'declaratory tradition' of international law, meaning that since World War I "states have, through their official representatives, set down principles to guide their own behavior and to provide standards by which that behavior can be judged," and such that, "[t]his sustained effort has created a body of reflections that is closer to moral philosophy than it is to positive law."[10]

This reference to moral philosophy rather than to positive law is salient to the kind of scrutiny of the ILC conclusions that is in order. On the one hand, it is not entirely clear what counts as fundamental values, even though the operating assumption is that they express near universality in their recognition and acceptance by the international community and, thereby, motivate the identification of the peremptory norms that protect those values as a matter of general international law. But how a fundamental value is also a universal value is not immediately clear. *Philosophically* at least, there is ample reason to ask, as moral philosopher Alasdair MacIntyre has asked in a more general context of moral-philosophical reasoning: *Whose Justice? Which Rationality?*[11] Following MacIntyre's line of thought, the point is that the international community expresses varied concepts of justice, all of which are inextricably connected to various theoretical frameworks of practical rationality. [12] This theoretical diversity has its implications for practices that are observed in the declarations of nation-state authorities and in the behavior of governing institutions. In particular, the criterion of consent or consensus is subject to critique, in which case legal philosopher Ronald Dworkin's 'new philosophy' of international law helps to illuminate a meaningful approach to interpretation of nation-state responsibility.

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[6] Legality of the Threat or Use of Nuclear Weapons, Judgment, 1996 I.C.J. Rep. 226, at 248 (July 8).

[7] *Tenth Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons* (Aug. 26, 2022), https://www.un.org/en/conferences/npt2020.

[8] Richard A. Falk, *Two Perspectives on the 10th NPT Review Conference*, NUCLEAR AGE PEACE FOUND., https://www.wagingpeace.org/two-perspectives-on-the-10th-npt-review-conference/ (last visited Aug. 17, 2022).

[9] *Id.*

[10] Dorothy Jones, *The Declaratory Tradition of International Law*, *in* TRADITIONS OF INTERNATIONAL ETHICS 42 (Terry Nardin & David R. Mapel eds., Cambridge Univ. Press 1992).

[11] ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? (Univ. Notre Dame Press 1989).

[12] *Id.*

First, MacIntyre's general concern can be engaged in view of the moral-legal nexus involved in the identification of such norms. With clarifications gleaned from the moral-legal philosophical positions articulated by MacIntyre and Dworkin, there is then basis for engaging the central question of the moral-legal relation of the prohibition of genocide and the immorality and illegality of nuclear weapons in view of the greater human interest, as expressed in the legal instruments noted above.[13]

II. MACINTYRE'S *PROBLEMATIQUE* OF JUSTICE AND PRACTICAL RATIONALITY

In Chapter 1 of his *Whose Justice? Which Rationality?*, MacIntyre clarifies that within the international community we have a scene of radical contention of both the concepts of justice and the theoretical frameworks of practical rationality.[14] He would have us consider "the intimidating range of questions about what justice requires and permits, to which alternative and incompatible answers are offered by contending individuals and groups within contemporary societies." [15] Note here that a concept of justice can have both a set of requirements, thus *obligations* or *prohibitions*, but also a set of *permissible* actions. Further the contention of concepts is such that these concepts of justice are *incompatible* with each other and thus are presented as *alternatives* to each other within the scene of contention. The implication of that scene of contention is that any appeal to the legal or moral authority of so-called fundamental values must somehow overcome this contention in both theory and practice if the normative authority of peremptory norms is indeed to have universal effect. That is, such values are not merely *fundamental* but in some moral and legal sense also *universal* values. Further, assuming this basic philosophical question has a reasonably defensible answer, the foregoing set of ILC conclusions elicits the salient question about what counts as a *very large and representative majority* of States so as to be sufficiently authoritative for the identification of *jus cogens* norms. This question arises because it is unclear whether such a majority of States also is representative of the identified set of fundamental, universal values that are to be reflected and protected in identified peremptory norms, such that they are non-derogable.

Concepts of justice depend on specific contexts of practical rationality. Thus, e.g., one can have a concept of justice that is part of one or another moral theory—eudaimonism (virtue ethics), utilitarianism, deontological theory, libertarianism, communitarianism, Marxist-socialism, human rights, just war theory, divine law (i.e., consistent with well-known "orthodox" or "heterodox" belief systems such as articulated in Judaism, Christianity, Islam, Hinduism, Jainism), or a non-theistic system of belief such as Confucianism and Buddhism. It is within both a theoretical and practical context of individual and societal engagement that the concept of justice is debated. In short, every individual

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[13] Legality of the Threat or Use of Nuclear Weapons, Judgment, 1996 I.C.J. Rep. 226, at 248 (July 8); *Tenth Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons* (Aug. 26, 2022), https://www.un.org/en/conferences/npt2020.

[14] MACINTYRE, *supra* note 11.

[15] *Id.* at 1.

within a given society who recognizes that society's interactions with individuals in other societies, and who is concerned to have some settlement of conviction on this question, must ask, as MacIntyre does: "How ought we to decide among the claims of rival and incompatible accounts of justice competing for our moral, social, and political allegiance?"[16] This is a moral-philosophical question that has its own normative presuppositions that would have to be made explicit through some procedure of deliberation and judgment. Any moral-legal decision presupposes a manner of thinking (thus a mode of practical rationality), a standard of judgment (thus a concept of justice), and a consequent action (obligatory, permissible, prohibited).

Problematic for MacIntyre (and so for us also if one finds the observation reasonably compelling in its factuality) is that "[o]ne of the most striking facts about modern political orders is that they lack institutionalized forums within which these fundamental disagreements can be systematically explored and charted, let alone there being any attempt made to resolve them."[17]

A. Fundamental Values and Jus Cogens

Those who specialize in the scholarship of moral philosophy, the philosophy of law, and international law surely engage themselves with elements of theory or practice as they work with one or another concept of justice. But, the lack of authoritative institutional forums remains problematic, especially if one is to articulate a compelling case for what counts as fundamental, universal values that thereby serve as the basis of peremptory norms of general international law (*jus cogens*). Hence, if one is concerned with the question of the moral and legal status of nuclear weapons (including here 'strategic' and 'tactical' weapons), there is no obvious consensus among nation-states, notwithstanding decades of effort to regulate such weapons of mass destruction (WMD) as manifest in bilateral or multilateral treaties (including the various nuclear weapons test ban treaties, the Strategic Arms Limitations Talks (SALT),[18] the Strategic Arms Reductions Talks (START), the NPT, and the more recent TPNW). One way or another, the answer to this question must appeal to fundamental values and then to principles of morality and law on the basis of which judgments as to obligatory, permissive, or prohibitive policies and practices may be rendered.

Consider as a case in point, that the philosopher Bertrand Russell collaborated with physicist Albert Einstein to produce what became known as the "Russell-Einstein Manifesto," published on July 9, 1955.[19] The document

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[16] *Id.* at 2.

[17] *Id.*

[18] Interim Agreement between the US and the USSR on Certain Measures with Respect to the Limitation of Strategic Offensive Arms (SALT I Interim Agreement), May 26, 1972, 944 U.N.T.S. 3 (entered into force Oct. 3, 1972).

[19] *See* BERTRAND RUSSELL, COMMON SENSE AND NUCLEAR WARFARE 11 (1959). For Russell, nuclear brinkmanship was a dangerous game lacking in moral authority, since statesmen who adhere to such a policy endanger the whole of humanity thereby. Furthermore, for him it was unfortunate and disappointing that anyone seeking the prevention of nuclear war would be "regarded throughout the West as Left-Wing" or otherwise "as inspired by some–ism which is repugnant to a majority of ordinary people." *Id.*

stated the concern of the signatories viz., "the tragic situation which confronts humanity" with "the development of weapons of mass destruction," all signatories to this manifesto speaking "not as members of this or that nation, continent, or creed, but as human beings, members of the species Man, whose continued existence is in doubt."[20] More precisely, the signatories—Russell, Einstein, and nine other prominent scientists—warned of their fear that "there will be universal death—sudden only for a minority, but for the majority a slow torture of disease and disintegration."[21] To preempt this catastrophe, the signatories recommended the abolition of war, including thereby "limitations of national sovereignty."[22] Clearly, despite the explicit commitment to speaking "as human beings,"[23] the question that confronts us in this manifesto is precisely what MacIntyre has asserted is at issue: what does it mean to speak from such a perspective, supposedly without incorporating prejudices of one or another concept of justice and practical rationality present in national or religious discourse? Was Russell correct to make the distinction of speaking from a human species standpoint, rather than as a member of a given nation-state or religious creed?

This manifesto represents a philosophical commitment to the greater human interest that was perceived by many to be in conflict with the national sovereign interest of, at the time, the United States (U.S.) and the Soviet Union, as articulated in national defense and nuclear deterrence policies—so much so that Russell objected to those who were critical of opposition to such weapons systems, insofar as they characterized proponents of nuclear disarmament as ideologically left-wing.[24] But the point is nonetheless clear: the moral and legal status of nuclear weapons was contested during the Cold War period and remains contested currently with the end of the Cold War and the ongoing geopolitics that seek to install and sustain a global hegemon or a novel geopolitics of multipolarity.[25] And, more often than not, this contestation is grounded in a commitment to political principles and supposed defense of 'Western' values on the one hand (U.S.) or 'socialist/communist' values on the other hand (formerly the U.S.S.R., and currently, the Russian Federation). Concerned as he was with the dire prospect of nuclear catastrophe and the abolition of war because of the massive destructiveness of such weapons, Russell held that "the philosopher's duty was now [at the time of writing in 1964] to forget philosophy and to study 'the probable effects of a nuclear war.'"[26]

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[20] BERTRAND RUSSELL, THE RUSSELL-EINSTEIN MANIFESTO (1955).

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] COMMON SENSE AND NUCLEAR WARFARE*, supra* note 19, at 11.

[25] *See, e.g.*, Michael A. Peters, *The Emerging Multipolar World Order: A Preliminary Analysis*, 55 EDUCATIONAL PHILOSOPHY AND THEORY 1653, 1653–63 (2022).

[26] Stephen Leach, *Philosophy and Nuclear Weapons*, DAILY PHIL., https://daily-philosophy.com/stephen-leach-philosophy-nuclear-weapons/ (last visited Aug. 24, 2022); Bertrand Russell, *The Duty of a Philosopher in this Age*, *in* THE ABDICATION OF PHILOSOPHY: PHILOSOPHY AND THE PUBLIC GOOD, ESSAYS IN HONOR OF PAUL ARTHUR SCHILPP 15 (Eugene Freeman ed., 1st ed. 1976).

This is a salient example of the sort of moral contestation that concerns MacIntyre inasmuch as in the case of nuclear weapons: (a) the *human* interest is pitted against the *national* interest; (b) the value of *peace* is pitted against the disvalue of *war*; (c) the immorality and illegality of *mass murder* is pitted against belief in the moral legitimacy of policies of *nuclear deterrence* and the *balance of power* approach to international relations; (d) a concept of *international justice* linked to a moral duty to the human interest is pitted against a concept of *national justice* linked to the political principle of sovereignty, and so on.[27] This complex contestation is all the more palpable today, given that, as Nobuo Hayashi remarks:

> The absence of a specific ban on nuclear weapons under today's international law mirrors our moral ambivalence about them. Consequentialist arguments for or against nuclear weapons cannot refute each other, since they both rely on alternative histories and rival futures that are ultimately unverifiable. . . .The challenge now is to cultivate a political consensus that, nuclear weapons are so singularly inhumane we ought categorically to reject their use, whatever purposes they may be said to serve.[28]

It is also plausible to argue that any use of nuclear weapons may run counter to one of the cardinal principles of international humanitarian law: that indiscriminate attack on civilians is illegal.[29] Surely, the use of nuclear weapons would inevitably kill indiscriminately and, thus, violate the firmly established rules of international humanitarian law. Perhaps the only exception would be the use of a low-yield nuclear weapon against an army in a desert area, or against warships on the high seas (without the presence of civilians in the vicinity), for instance, which would not be an indiscriminate attack and thus, not run counter to this principle of humanitarian law.

B. The Issue of 'Recognition' and 'Acceptance'

That said, even the idea that this is a matter of generating political 'consensus' is at issue. As Jan Wouters and Sten Verhoeven have reminded, given the stipulated condition that at least a vast majority of States should recognize and accept a peremptory norm, this "purely consensualist approach of international law is partially abandoned, since a (qualified) majority of States can bind a minority."[30] Why so? Wouters and Verhoeven explain: "[w]hile at first

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[27] MACINTYRE, *supra* note 11.

[28] Nobuo Hayashi, *On the Ethics of Nuclear Weapons: Framing a Political Consensus on the Unacceptability of Nuclear Weapons*, ILPI-UNIDIR NPT REVIEW CONFERENCE SERIES (2015).

[29] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 48, June 8, 1977, 1125 U.N.T.S. 25 ("In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.").

[30] Jan Wouters & Sten Verhoeven, *The Prohibition of Genocide as a Norm of* Jus Cogens *and Its Implications for the Enforcement of the Law of Genocide*, 5 INT'L CRIM. L. REV. 401, 403 (2005).

sight this may seem peculiar, it is the logical consequence of the aim of *ius cogens* (alternatively, *jus cogens*), namely the protection of the fundamental interests of the international community and not the particular interests of certain States."[31] The moral-legal implication for the status of nuclear weapons is clear: there are, as of 2023, nine States (U.S., Russia, China, France, United Kingdom, Israel, India, Pakistan, North Korea) that possess nuclear weapons approaching a stockpile of 13,000,[32] a clear minority of the international community which today is comprised of 195 "countries" (193 Member-States of the United Nations plus the Vatican and Palestine).[33] It is reasonable to assert that the non-nuclear States constitute *a* qualified majority.[34] Hence, these States can bind the nuclear weapons States on a peremptory norm that is recognized and accepted by the non-nuclear States *qua* qualified majority of the international system of nation-states. This is precisely for the moral and legal obligation and prohibition that norm intends, even if the nuclear weapons States do not recognize or accept that norm as *jus cogens*. This, of course, is a question at issue within the deliberations that led to the various extant multilateral treaties that seek to regulate the proliferation (NPT) and eventual elimination (TPNW) of nuclear weapons.[35]

There remains, of course, the prior philosophical question here as to what practical rationality underlies any such commitment to a peremptory norm. MacIntyre reminds us that one thesis about rationality is that it "requires . . . that we first divest ourselves of allegiance to any one of the contending theories and also abstract ourselves from all those particularities of social relationship in terms of which we have been accustomed to understand our responsibilities and our interests."[36] If one is able to enact such a practical rationality, then:

> Only by doing so, it has been suggested, shall we arrive at a genuinely neutral, impartial, and, in this way, universal point of view, freed from the partisanship and the partiality and one-

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[31] *Id.*

[32] Hans Kristensen et al., *Status of World Nuclear Forces*, FED. AM. SCIENTISTS (Mar. 31, 2023), https://fas.org/initiative/status-world-nuclear-forces/.

[33] *Countries in the World: 195*, WORLDOMETER, https://www.worldometers.info/geography/how-many-countries-are-there-in-the-world/ (last visited Aug. 24, 2022).

[34] However, it is true that the position of some states is complicated, such as the members of nuclear alliances like NATO or those which benefit from the nuclear umbrella of nuclear weapon states. Even though they do not possess nuclear weapons, their position may not be considered abolitionist. But even if some of them may not be clearly abolitionist, an overwhelming majority of states still can be taken to be abolitionist. By analogy, one may argue that just because states may resort to some form of torture and treat it as legal, it would not necessarily mean torture does not violate *jus cogens*. For examples on how some liberal states resort to and justify torture, *see* Andrea Liese, *Exceptional Necessity: How Liberal Democracies Contest the Prohibition of Torture and Ill-Treatment When Countering Terrorism*, 5 J. INT'L L. & INT'L REL. 17 (2009).

[35] Treaty on the Non-Proliferation of Nuclear Weapons (NPT), *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161; Treaty on the Prohibition of Nuclear Weapons (TPNW), July 7, 2017, 3379 U.N.T.S. (entered into force Jan. 22, 2021); *see also* U.N. Office for Disarmament Affairs, *Treaty on the Prohibition of Nuclear Weapons: Treaty Overview*, https://disarmament.unoda.org/wmd/nuclear/tpnw/#:~:text=Treaty%20overview&text=The%20Treaty%20on%20the%20Prohibition,threaten%20to%20use%20nuclear%20weapons (last visited Feb. 20, 2024).

[36] MACINTYRE, *supra* note 11, at 3.

> sidedness that otherwise affect us. And only by so doing shall we be able to evaluate the contending account of justice rationally.[37]

If one adopts *this* conception of practical rationality as a means of generating a universal account of justice, then the presumption of neutrality, impartiality, and universality seems to be unproblematic. There are, however, as MacIntyre informs us, those who object to this conception of rationality with compelling argument.[38] Problematic is

> [i]ts requirement of disinterestedness in fact covertly presupposes one particular partisan type of account of justice, that of liberal individualism, which it is later to be used to justify, so that its apparent neutrality is no more than an appearance, while its conception of ideal rationality as consisting in principles which a socially disembodied being would arrive at illegitimately ignores the inescapably historically and socially context-bound character which any substantive set of principles of rationality, whether theoretical or practical, is bound to have.[39]

In short, the concept of rationality that we have inherited from the European Enlightenment will not suffice to achieve a universal account of justice precisely because of what that methodological commitment has ignored. MacIntyre, therefore, proposes a correction to this approach:

> What the Enlightenment made us for the most part blind to and what we now need to recover is, so I shall argue, a conception of rational enquiry as embodied in a tradition, a conception according to which the standards of rational justification themselves emerge from and are part of a history in which they are vindicated by the way in which they transcend the limitations of and provide remedies for the defects of their predecessors within the history of that same tradition.[40]

This latter approach entails that, "[t]o justify is to narrate how the argument has gone so far,"[41] i.e., to recognize the historical character of the practical reasoning employed, defended, or contended within a tradition. Concepts of justice, concepts of practical rationality, have their history and are meaningful only in a historical context. These contended concepts may be represented to be incompatible with each other, at least initially and *prima facie*. However, opportunity exists in the continued engagement of the conflicted concepts to move towards a meaningful resolution once it is clear 'how the argument has developed thus far' within a given tradition of inquiry.

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[37] *Id.*

[38] *Id.* at 3.

[39] *Id.* at 3–4.

[40] MACINTYRE, *supra* note 11, at 7.

[41] *Id.*

It behooves us to recall, therefore, that international law has its own character of contested tradition, including conceptualizations that have been expressed in the philosophy of law, thereby allowing for a varied conceptualization of justice in relation to, natural law, positivism, classical realism, utilitarianism, Kantian global rationalism, twentieth century realism, contractarianism, Marxism, human rights, religious or scripturally-grounded divine command.[42] Consider, for example, the contestation in international law (construed as a repository of juridical knowledge produced by the international community and considered to be applicable to that community of States) that is present in the debate between legal positivists who eschew morality from law *per se* and those such as philosophy of law theorist Ronald Dworkin who defends a normative account of international law.[43] In his *A New Philosophy for International Law* Dworkin reminds that the concept of international law has its history and thus is itself a tradition of inquiry.[44] In that tradition of discourse, the concept of international law was more or less depreciated, if not rejected entirely, during the historical heyday of legal positivism, e.g., with John Austin in the nineteenth century and H.L.A. Hart in the twentieth century, and in recent time by John Bolton, former US National Security Advisor during the Trump Administration.[45]

For Hart, Dworkin noted, "what the law of a community actually is depends on nothing more than a contingent aspect of its social and political history.[46] Political or personal morality has nothing to do with it."[47] Some aligned with Hart allowed for the fact and legitimacy of the category of international law but stipulated that, "a sovereign state is subject to international law but, on the standard account, only so far as it has *consented* to be bound by that law, and they take that principle of consent to furnish an international rule of recognition."[48] This reference to a rule of recognition or principle of consent is basically what one finds in the claim that recognition and acceptance of a norm by a vast majority of States is a condition that must be satisfied if a rule of law is to have the status of a peremptory norm (*jus cogens*) in general international law.[49] This is a matter of factuality in the sense that it is a matter of historical record manifested in some empirically verifiable way.

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[42] TRADITIONS OF INTERNATIONAL ETHICS (Terry Nardin & David R. Mapel eds., Cambridge Univ. Press 1992); *see also* INTERNATIONAL LAW AND WORLD ORDER: A PROBLEM-ORIENTED COURSEBOOK 79 (Burns H. Weston et al. eds., 4th ed. 2006).

[43] Ronald Dworkin, *A New Philosophy for International Law*, 41 PHIL. & PUB. AFFS. 1 (2013).

[44] *Id.* at 2.

[45] John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205 (2000); John R. Bolton, *The Risks and the Weaknesses of the International Criminal Court from America's Perspective*, 64 LAW & CONTEMP. PROBS. 167 (2001); John R. Bolton, *The Risks and the Weaknesses of the International Criminal Court from America's Perspective*, 41 VA. J. INT'L L. 186 (2001).

[46] Dworkin, *supra* note 43, at 4.

[47] *Id.*

[48] *Id.* at 5.

[49] *See id.*

Thus, Dworkin clarifies, when international lawyers speak of *jus cogens* or peremptory norms and reference the Vienna Convention on the Law of Treaties (1969), "these, too, [are brought] under the umbrella of consent. . . . Law for nations, on this view, is grounded in what nations—or at least the vast bulk of those that others count as 'civilized'—have consented to treat as law."[50] This approach to *jus cogens* is problematic, however, since, as far as Dworkin is concerned, "the scheme has several defects as a proposed rule of recognition that are finally fatal."[51] But one must ask: How so?

First, Dworkin argues this approach to *jus cogens* offers no priority among the different sources it recognizes. Must treaties yield to general practices? Or vice versa? More importantly, though it is founded on the idea of consent, it sometimes binds those who have not consented. It offers no explanation why states that have not accepted a rule or principle as law may nevertheless be subject to it because the bulk of other states, or of "civilized" states have accepted it. It offers no standard for deciding how many states must accept a practice as legally required before the practice becomes "customary" and therefore binding on everyone. It offers guidance neither as to which states are sufficiently civilized to participate in that essentially legislative power nor as to which norms are peremptory.[52] Dworkin's observations here are compelling in the implicit call for explanation and identification of standards if the condition of consent is to be sustained as a rule of recognition *sine qua non*. But, as he argued, the rule has fatal flaws.[53] Thus, he concluded, "we cannot take the self-limiting consent of sovereign nations to be the basic ground of international law."[54] The task then, is to find "more basic principles within international law," bearing in mind that central to the inadequacy of consent is the nation-state system itself as a contingent structure of international relations and the logic of statecraft that privileges the principle of sovereignty, even though this principle has its historical provenance and is by no means absolute when considering calls for a just world order.[55]

If a peremptory norm is not to be found in a principle of consent as a necessary rule of recognition, what is the alternative? Dworkin proposes we find that principle in "the more general phenomenon of associative obligation."[56] Law, including here general international law, presents us with 'an *interpretive* concept,' Dworkin argues. Precisely because enactments of interpretation are involved in the discourse of international law, "[a]ny theory about the correct analysis of an interpretive political concept must be a normative theory: a theory

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[50] Dworkin, *supra* note 43, at 6.

[51] *Id.*

[52] *Id.* at 6–7.

[53] *See id.*

[54] Dworkin, *supra* note 43, at 11.

[55] *See, e.g.*, ON THE CREATION OF A JUST WORLD ORDER (Saul Mendlovitz ed., Free Press 1975); THE CONSTITUTIONAL FOUNDATIONS OF WORLD PEACE (Richard A. Falk, Robert C. Johansen & Samuel S. Kim eds., SUNY Press 1993).

[56] Dworkin, *supra* note 43, at 11.

of political morality about the circumstances in which something ought or ought not to happen."[57] Thus, law and morality, more specifically political morality, are connected inextricably—a claim incompatible with legal positivist doctrines.

Dworkin thus speaks to a fundamental issue of jurisprudence, namely that "there is a difference, often profound, between what the law is and what it ought to be."[58] This observation allows for a description of legal factuality in any historical context, but also for some presupposition of a concept of justice at work, such that one is able to assert with confidence that what obtains nonetheless falls short of that standard. Here, Dworkin turns to a claim he articulated previously, quoting his earlier work, *Justice for Hedgehogs*, "we identify the law of a community by asking which rules its citizens or officials have a right they can demand be enforced by its coercive institutions without any further collective political decision."[59] This is a matter of rights—*legal* rights (relative to extant constitutions, statutes, judicial decisions) that speak to the present in demands for enforcement, and *moral* rights (relative to one or another political morality) that speak to the present. But it also concerns the future, insofar as the lacunae between 'what *is*' and 'what *ought* to be' can be clarified and pursued. The question as Dworkin recognizes then, is: "How far can we construct an international jurisprudence on the same understanding?"[60]

We can do so, Dworkin suggests, by turning to what transpired in the European political theater during the seventeenth century when there was expressed "an at least partially moralized conception of international law."[61] Despite the centrality of the principle of sovereignty in the logic of statecraft following the Peace of Westphalia, the nation-state system or 'Westphalian system' itself presupposes political legitimacy, in which case Dworkin argues:

> It follows that the general obligation of each state to improve its political legitimacy includes an obligation to try to improve the overall international system. . . . [This obligation requires] a state to accept feasible and shared constraints on its own power. That requirement sets out, in my view, the true moral basis of international law.[62]

Dworkin proposes a thought-experiment in which one assumes (hypothesizes) the establishment of a world court that superintends the behavior of States with requisite enforcement authority. He then asks the question:

> What tests or arguments should that hypothetical court adopt to determine the rights and obligations of states (and other international actors and organizations) that it would be *appropriate* for it to enforce coercively? This is a moral question

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[57] *Id.*

[58] *Id.* at 12.

[59] *Id.*

[60] Dworkin, *supra* note 43, at 13.

[61] *Id.*

[62] *Id.* at 17.

> […]. We can identify a general theory of what it would be appropriate for such an institution to enforce as the foundation of international law.[63]

C. Perception of States and Jus Cogens

In practice currently, of course, one knows that States with nuclear weapons, such as the United States, Russia, and China, may or may not recognize and accept the authority of a world court. One sees this presently in response to the investigative authority of the International Criminal Court, which lacks enforcement authority except consequent to State consent (e.g., being a signatory to, and then ratifying, the Rome Statute).[64] Obviously, however, the fact is that States act tendentiously or expediently from time to time with reference to international legal disputes to which they may be called to account by the international community, and that goes for the nuclear weapons States, as well. As Dworkin appreciates, the fact is that the opinions of those in positions of government change, in which case a hypothetical exercise such as the one he proposes contributes to the improvement of a theory of international law that would then have its prospective efficacy in the event the authority of agencies of jurisprudence are recognized and accepted.[65]

Equally important here is the understanding that a State has obligations *not to fail its own citizens* when accounting for its obligations under general international law.[66] A moralized conception of international law entails that a State wittingly or unwittingly fails its own citizens when it rebuffs a moral basis of international law and when it depreciates or otherwise seeks to eliminate its associative obligations in the contemporary international legal order. A State cannot, in short, merely appeal to a supposedly 'unrestricted sovereignty' that it has inherited by participating in the Westphalian system.[67] In the post-World War era, the fact is that the declaratory tradition of international law articulated in multilateral treaties such as the UN Charter and other instruments of law already restrict such sovereignty, at least as a matter of principle and as testament to the fact that States are committed to maintaining the political legitimacy of the logic of statecraft.[68] Citizens who commit themselves to advocacy of the human interest challenge a State to sustain its political legitimacy consistent with what that interest requires, especially in democratic States, despite changes in political administrations and national policy.

Political legitimacy depends on the enforcement of general international law once such law is recognized and accepted; and this is all the more so for

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[63] *Id.* at 14.

[64] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 38544 (entered into force July 1, 2022).

[65] Dworkin, *supra* note 43, at 9.

[66] *Id.* at 17.

[67] *Id.* at 17.

[68] *Id.* at 17.

peremptory norms (*jus cogens*) that, because of their ranking position in the hierarchy of law, commit States to obligations from which there is no derogation. Institutional policies and practices of States that imperil the global community of peoples and threaten global catastrophe surely fall within the scope of a theory of international law that seeks to improve the political legitimacy of States in their international relations. Thus, for example, the prohibition of genocide is stipulated in the Convention on the Prevention and Punishment of the Crime of Genocide, even as the prohibition of nuclear weapons is stipulated in the Treaty on the Prohibition of Nuclear Weapons. Both prohibitions seek to prevent conduct of States (the crime of genocide, thermonuclear war) that "shock the conscience" of humanity at large and that, therefore, are considered to be both immoral and illegal in view of a morally grounded general international law. Dworkin accordingly introduces what he calls the "principle of salience," to wit:

> If a significant number of states, encompassing a significant population, has developed an agreed code of practice, either by treaty or by other form of coordination, then other states have at least a prima facie duty to subscribe to that practice as well, with the important proviso that this duty holds only if a more general practice to that effect, expanded in that way, would improve the legitimacy of the subscribing state and the international order as a whole.[69]

Important to Dworkin's interpretation is that the obligation does not depend on consent (thus not on being a signatory to and ratifying a multilateral treaty) but rather on 'the moral force of salience' that makes international law 'for all.'[70] For Dworkin, moral salience reminds of the former *jus gentium* as a law applicable to all 'civilized nations,' irrespective of the formalization of law in this or that treaty that depends on explicit consent.[71] Thus, Dworkin concludes, "[w]e should interpret the documents and practices picked out by the principle of salience so as to advance the imputed purpose of mitigating the flaws and dangers of the Westphalian system."[72] It is in view of the principle of salience, then, and not on the principle of consent, that peremptory norms should be identified, recognized, and accepted as norms from which there can be no derogation.

Dworkin's approach to international law places the principle of salience *at the base* of formulations of law conducive to State practices, and in that way can be said to be consistent with ILC draft conclusion 5, which allows that "[t]reaty provisions and *general principles of law* may also serve as bases for peremptory norms of general international law (*jus cogens*)."[73] This principle of salience is

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[69] Dworkin, *supra* note 43, at 19.

[70] *Id.* at 20.

[71] *Id.* at 20.

[72] *Id.* at 22.

[73] Peremptory Norms of General International Law (*Jus Cogens*), Int'l L. Comm'n Rep. on Its Seventy-Third Session, U.N. Doc. A/CN.4/748, at 12 (Mar. 9, 2022) (emphasis added). It is to be noted

determinative of both the formulation of law and that law's enforcement demand for consequent State practices. This approach is, of course, counter to the position of some States relative to the identification of peremptory norms, for which States international law "is grounded in the practice of States and is practical," as the government of Australia has remarked in commentary,[74] as the government of Germany observed, given "an insufficiency of substantial State practice"[75] to determine such norms, and as the government of Israel remarked as it complained that "the Special Rapporteur has relied greatly on theory and doctrine rather than on a thorough survey of State practice. . . ."[76] If one accepts the moral-legal approach that Dworkin advances, then the practice of States, in short, should not be normatively controlling, especially inasmuch as such practices may in fact merely reflect States' interests in the preservation of unrestricted sovereignty without due regard for international associative obligations.

Noteworthy also is the fact that the practice of States includes reference to 'regional norms,' such that, as the government of El Salvador commented, these norms "cannot *per se* or in an isolated manner become universally applicable,"[77] in which case there would be ready contestation of any supposed peremptory norm that originates in a regional norm of law. The government of Poland provided similar commentary, holding that "the concept of regional *jus cogens* is in contravention, by definition, with the notion of norms *jus cogens* itself and therefore should not be accepted,"[78] even as did the government of Spain.[79] The issue of universality is central here, such that any identified peremptory norm has to manifest its universality with reference to the fundamental values that motivate that norm. The issue is further constrained by positions taken, such as the one by the government of Spain, which asserts that, "[t]he effort of systemic construction [of peremptory norms] will only be robust and have normative authority if it enjoys the necessary consensus of the international community of States."[80] Here, again, one recognizes an appeal to the principle of consent, common to a legal positivist approach to international law.

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that the idea that general principles of law may be referenced as a source of peremptory norms is consistent with other work. Dworkin's principle of salience can be considered a general principle of law capable of being *common to*, though not *derived from*, principal legal systems of the world, since Dworkin advances this principle as one deriving from a political morality common to the historical period he cites. It is not surprising, thus, that in its comments on the issue of general principles as a source of peremptory norms, the government of the USA remarked "there is no State practice or international jurisprudence to support this conclusion," seemingly making a further distinction: "The draft conclusions seem to be advancing this proposition simply because general principles of law are one of the sources of international law, without reflection on whether it is in fact a source of *jus cogens*." *Id.* at 33; *see also* Marcelo Vázquez-Bermúdez (Special Rapporteur), *Second Report on General Principles of Law*, U.N. Doc. A/CN.4/741 (Apr. 9, 2020).

[74] Peremptory Norms of General International Law (*Jus Cogens*), *supra* note 74, at 4.

[75] *Id.* at 8.

[76] *Id.* at 9.

[77] *Id.* at 7.

[78] Peremptory Norms of General International Law (*Jus Cogens*), *supra* note 74, at 13.

[79] *Id.* at 15.

[80] Peremptory Norms of General International Law (*Jus Cogens*), *supra* note 74, at 16.

It is significant that the government of the United Kingdom took the position that the ILC "should not attempt to identify *jus cogens* norms or their content."[81] The rationale for this position is, again, the claim of 'lack of [State] practice' whereby such norms are identified, recognized, accepted, and have enforceable effect. Thus, similarly, the USA expressed concern that the language adopted by the ILC lacked sufficient clarity, inasmuch as "some of these proposed conclusions, principles, and guidelines contain what appear to be suggestions for new, affirmative obligations of States" while lacking in relevant State practice to warrant such an approach. [82] In this case the USA argues, "[w]hile recommendations for progressive development [of international law] do not have to reflect *lex lata*, they should generally draw on at least some State practice."[83]

Similarly, the government of Russia took issue with the ILC's cited jurisprudence to identify peremptory norms, commenting on the ICJ's advisory opinion on *Reservation to the Convention on Genocide* (1951).[84] Although the ILC claims the Court "linked the prohibition against genocide to fundamental values," nevertheless, it argued, "the Court had not sought to give a legal definition of peremptory norms of general international law (*jus cogens*), which emerged later as a separate legal category in the context of the Vienna Convention on the Law of Treaties."[85] Even granting this objection, however, the fact is that the Vienna Convention is now part of *lex lata*. That in and of itself is sufficient to satisfy the initial stipulation of a legal definition of peremptory norm.

III. 'FUNDAMENTAL' VALUES *QUA* 'UNIVERSAL' VALUES?

In its comments on the ILC draft conclusion 2, the government of the Netherlands recommended that the ILC:

> [F]urther elaborate on the fundamental values which serve as the basis for *jus cogens*, and which parts of these fundamental values are protected by peremptory norms. For instance, human dignity lies at the heart of the peremptory prohibition of torture. The prohibition of torture, however, does not protect human dignity in all its facets.[86]

This recommendation from the government of the Netherlands is reasonable, of course. Yet, it is centrally problematic inasmuch as a peremptory norm is identifiable specifically for the preservation and protection of fundamental values. If the latter are in dispute, then *ipso facto* so is the peremptory character of any proposed norm. Thus, one way or another, the ILC draft conclusions cannot make significant progress in the absence of a reasonably defensible

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[81] *Id.* at 16.

[82] *Id.* at 18.

[83] *Id.* at 19.

[84] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28).

[85] Peremptory Norms of General International Law (*Jus Cogens*), *supra* note 74, at 23.

[86] *Id.* at 20.

clarification of what these fundamental values are. The government of Germany, in contrast, prefers there be "no such reference to 'fundamental values of the international community'" at all, since the inclusion of this language conflicts with Article 53 of the Vienna Convention on the Law of Treaties.[87] The U.S. also argued that, "it is unclear whether and how States would determine what the 'fundamental values of the international community' might be." This is so even if it is to be granted (as in the case of the prohibition of genocide) that such a *jus cogens* norm seeks to "protect essential humanitarian values" or otherwise refers to "a violation of the relevant *jus cogens* norm as one that 'shocks the conscience of mankind.'"[88] In short, as long as the ILC prefers to reference fundamental values that peremptory norms are to preserve and protect, conceptual clarification is needed.

In that regard, a panel discussion at the 111th annual meeting of the American Society of International Law (ASIL) in 2017 engaged the question of the value and purpose of international law. In its theme statement on the question, 'What International Law Values,' ASIL reminded that despite the expansion of international law in the current century, "seemingly intractable global problems persist, raising vital questions about the field," hence the need "to consider the normative basis of international law and how those goals are realized in practice."[89] The statement is important for the fact that it (in contrast to the legal positivist doctrine) presupposes that there is a normative basis of contemporary international law, and that this normativity yet requires clarification.

At this ASIL meeting, Mortimer N.S. Sellers pointed to what is, of course, fundamental—justice.[90] Sellers remarked that, "[e]mbracing justice as the justifying value and underlying purpose of international law should not be controversial, as justice has been understood for centuries to be the proper purpose and justifying value of all law, everywhere." Referring to the works of Hugo Grotius, Christian Wolff, and Emerich de Vattel, Sellers added, "jurists discovered and developed the fundamental principles of international law by applying the universal requirements of justice to the conduct and affairs of nations."[91] Viewed philosophically, this claim is presumptuous; however, as MacIntyre's moral-philosophical treatise makes clear, the concept of justice is contended relative to practical rationality and is indeed controversial despite any claim to the concept of having 'universal requirements.' Were one to contend that peace or order is a fundamental value, Sellers argues in reminder of the ASIL motto that if one says *'Inter Gentes Ius et Pax'* ('Justice and Peace Among Nations'), then peace depends upon the first.[92]

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[87] *Id.* at 22.

[88] *Id.* at 25.

[89] American Society of International Law, *Theme Statement: What International Law Values*, 111 PROC. ASIL ANN. MEETING 347 (2017).

[90] Mortimer N.S. Sellers, *The Purpose of International Law Is to Advance Justice—And International Law Has No Value Unless It Does So*, 111 PROC. ASIL ANN. MEETING 301 (2017).

[91] *Id.* at 302.

[92] *Id.* at 301.

Insofar as the concept of justice is contended, one may consider whether a definition such as Sellers proposes is adequate. Again, referring to the historical accounts from Grotius, Vattel, Henry Wheaton 'and other great publicists of international law,' Sellers tells us that, "global 'justice' signifies that social and political order in which all persons are taken into account and none are disregarded. The just world would be a world constructed for the common good. . ."[93] Problematic here, of course, is that there is no universal commitment to this presumed authority of such publicists of international law for a determination of 'global' justice that incorporates what is at once fundamental and universal.

This fact is so even if one accepts as quite reasonable Sellers's claim that, "[l]aw itself is a system of requirements that determine what must be done or not done in particular circumstances—what must be done if we are to establish a world order that is actually just, in reality."[94] Sellers may be correct that, "[j]ustice is claimed as the value and purpose of every legal system the world has ever known, and indeed this claim is inherent in the very concept of 'law.'" Yet, Sellers speaks here from the vantage point of what he has appropriated from modern European publicists, who, embracing the Enlightenment project of universal reason, rejected the earlier religious basis of law and concepts of justice articulated therein. This applies to all religious (monotheist) systems (e.g., Judaism, Christianity, Islam) that contain ostensibly divine commandments, ordinances, statutes, etc., the substance of which is in one way or another related to the formulation of international law.[95] The point is also pertinent to the debate in the latter twentieth century about Asian values vis-à-vis human rights discourse.[96]

Thus, in his remarks in the 2017 ASIL session, Maxwell Chibundu rightly observed that, "[t]he interpretation of [legal] text necessarily occurs within a value system, whether expressly articulated or otherwise," in which case, "[h]istory is essential to understanding the value system, and indeed to its

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[93] *Id.* at 303.

[94] *Id.*

[95] *See, e.g.*, Gilad Ben-Nun, *How Jewish is International Law?*, 23 J. HIST. INT'L L. 249, 249 (2020); Pnina Lahav, *The Jewish Perspective in International Law*, 87 AM. SOC'Y INT'L L. PROC. 331, 331–35 (1993); Shabtai Rosenne, *The Influence of Judaism on the Development of International Law*, 5 NETH. INT'L L. REV. 119 (1958); PAMELA SLOTTE & JOHN D. HASKELL, CHRISTIANITY AND INTERNATIONAL LAW: AN INTRODUCTION 351–52 (Cambridge Univ. Press 2021); RAFAEL DOMINGO & JOHN WITTE, JR., CHRISTIANITY AND GLOBAL LAW (Routledge 2020); MARIE-LUISA FRICK & ANDREAS TH. MÜLLER, ISLAM AND INTERNATIONAL LAW: ENGAGING SELF-CENTRISM FROM A PLURALITY OF PERSPECTIVES (Martinus Nijhoff 2013); MASHOD A. BADERIN, INTERNATIONAL LAW AND ISLAMIC LAW (Routledge 2008).

[96] *See, e.g.*, AMARTYA SEN, HUMAN RIGHTS AND ASIAN VALUES 9 (1997) (noting that Sen, of course, is a champion of political freedom and democracy and engages the argument that "Asian values do not give freedom the same importance as it is accorded in the West," that "Asia must be faithful to its own system of political priorities," and that China and Singapore insist on "the reality of diversity" over the appeal to universalism in human rights discourse. Sen observed, important to the counter-argument, that "[t]here are no quintessential values that apply to this immensely large and heterogeneous population, that differentiate Asians as a group from people in the rest of the world." Further, "[t]he temptation to see Asia as one unit reveals, in fact, a distinctly Eurocentric perspective," e.g., that of Orientalism.).

formation."[97] Thus, Chibundu reminds, when the UN Charter appropriated concepts such as peace, justice, equality, and freedom, these objectives of international cooperation:

> [C]annot be viewed by international lawyers as abstract propositions, but must be given meaning as practical constructs generated in response to particular historical facts. But those responses are not frozen in time. They must be read and fashioned to respond to new historical facts. And so the interpretation and prioritization of values, purposes, and objectives of international law will be shaped as much by historical facts as by linguistic text.[98]

These remarks are salient to the fact that international law continues to evolve in relation to both its historical provenance and current affairs that call for appropriation, revision, and application of such law to the conduct of States. International law is a construct in that sense, having its provenance in an assortment of practical rationalities that are subject to debate, agreement, and disagreement as to particulars within a larger framework of what is posited to stand contingently as general international law. As for the question of uniformity or universality in the normativity of international law, Chibundu argues, "[i]f one norm supersedes all others, it is that difference will always govern, because it is the only genuine response to the variations and diversities of human experiences."[99]

Clearly, one cannot reasonably ignore this intercultural diversity among nations as one formulates international law that seeks to approximate justice such as a *jus gentium* hoped to do within the natural law tradition. It is important to recognize, however, that the anthropological facts of cultural variety and particularity include elements of *counter*-tradition within given cultures, which is to say that no political culture is so monolithic as to exclude heterogeneity and that, accordingly, every political culture includes elements of contestation, manifest in contested concepts, beliefs, and practices. Counter-traditions are ever pertinent to the debate about *whose* concepts of justice and *which* practical rationalities are to be governing at any given historical time frame across known cultures and traditions. In short, endorsement of ostensibly fundamental values is often a mixed phenomenon precisely in view of contested tradition both internal and external to a given society and as currently experienced in contemporary international relations.

This fact has been well recognized by students of international political culture. In the latter twentieth century, political scientist and world order scholar Ali A. Mazrui advocated for a world federation of cultures (in contrast to proposals for world government) on the basis of a gradualist process of global political reform, moving more or less sequentially from conditions of

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[97] Maxwell Chibundu, *Remarks by Maxwell Chibundu*, 111 PROC. ASIL ANN. MEETING 305, 306–07 (2017).

[98] *Id.* at 307.

[99] *Id.* at 308.

international 'cultural contact' to 'cultural co-existence' to 'cultural convergence' and, finally, to the *desideratum* of 'cultural coalescence.'[100] This process of global reform includes a rejection of political institutions and practices that sustain cultural asymmetry and dependency, especially in view of tendencies towards dominance of Western value orientations. This asymmetry and dependency have been grounded in beliefs that conduce a merely presumptive moral-legal legitimacy, one that privileges 'the West' over other sociocultural traditions and thereby sustains a framework of cultural hierarchy and hegemony. Any normatively compelling international law that includes peremptory norms presumably must eschew such a framework.

IV. NUCLEAR WEAPONS, *JUS COGENS*, AND GENOCIDE

It appears that there is at least a plausible argument that any form of use of nuclear weapons constitutes genocide. Per Article II of the Genocide Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group: "[k]illing members of the group; [c]ausing serious bodily harm or mental harm to members of the group; [d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole in part." Following the judgement of the International Crimes Tribunal for Rwanda in *Akayesu* that "a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties,"[101] it should be established that nationals of a State would fall under the categories of a protected group. Given the definitive threat a nuclear attack poses, it can be argued that if a State commits such an attack, then it is a clear manifestation of an unequivocal intention to destroy the group that is the target of the attack.

Arguably, when it comes to the threat of a nuclear attack, the case is not that complex either. As the ICJ in *The Threat of Use of Nuclear Weapons* has held:

> [I]t would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths. The notions of "threat" and "use" of force under Article 2, paragraph 4, of the Charter stand together in the sense 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. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter. For the rest, no State—whether or not it defended the policy of deterrence—suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal.[102]

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[100] ALI A. MAZRUI, A WORLD FEDERATION OF CULTURES: AN AFRICAN PERSPECTIVE (Free Press 1976).

[101] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 512 (Sept. 2, 1998).

[102] Legality of the Threat or Use of Nuclear Weapons, *supra* note 6, at ¶ 47.

It is difficult to argue that a State's mere *possession* of nuclear weapons in any way constitutes genocide. That is, mere possession of such weapons cannot reasonably be perceived to have any implicit or explicit genocidal intent against any particular group. That said, however, since (a) the North Atlantic Treaty Organization's security strategy specifically identifies the Russian Federation as its number one enemy, and since (b) the Russian Federation's national security strategy identifies the U.S. as its number one enemy, with expression of that designation through (c) strategic weapons manifestly targeted at each other's population centers ('counter-value' doctrine of deterrence), [103] then possession *plus* such targeting strengthens the argument concerning manifested genocidal intent. Such identification and targeting of an enemy connotes the intent of mass destruction (hence, strategic nuclear weapons denominated weapons of mass destruction); therefore, one may argue this to be a violation of Article III of the Genocide Convention. This line of argument is not without its limits, as there has to be a demonstrable intent 'to destroy, in whole or in part, a national, ethnical, racial or religious group.' Thus, even in the context of the Hiroshima and Nagasaki nuclear bombing it would be difficult to demonstrate that the U.S.'s decision makers conducted the attacks in order to destroy the Japanese as a national, ethnic, racial or religious group. That being said, attention should be paid to the following observation of the ICJ in *Bosnia v Serbia*:

> [T]he Court observes that it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area. In the words of the ILC, "it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe. The area of the perpetrator's activity and control are to be considered.[104]

Thus, one may argue reasonably that the intent to destroy a group need not be present for the whole territory of a state; it can relate to a smaller geographical area within the state.

In this case, perhaps, another somewhat arguable option to challenge legally is this: if one finds that there is a *jus cogens* norm proscribing the possession of nuclear weapons, then it can be deduced that a State's possession of these weapons violates international law. It is logical to surmise that the possession of nuclear weapons, in and of itself, is a threat to international peace and security as expressed in norms such as prohibiting the use of force and waging aggressive war (except for self-defence),[105] the latter long established as a *jus cogens* norm. UNSC resolution 1540 is also pertinent to analyze this point.

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[103] *See, e.g.*, Keir Lieber & Daryl G. Press, *US Strategy and Force Posture for an Era of Nuclear Tripolarity*, ATLANTIC COUNCIL (May 1, 2023), https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/us-strategy-and-force-posture-for-an-era-of-nuclear-tripolarity/.

[104] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 47, ¶ 199 (Feb. 26).

[105] Thomas Kleinlein, *Change of Peremptory Norms of General International Law (Jus Cogens)*, 12 ESIL REFLECTIONS 1, 3 (2023) (stating that "[a] vast majority of authors generally regard the prohibition of the use of force as such to be peremptory."). Again, it is important to note that even Article 64 of VCLT clearly recognizes that peremptory of international norms may evolve.

UNSC Resolution 1540 (28 April 2004) asserts that, the "*proliferation* of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security" (emphasis added).[106] However, the word 'proliferation' implies that the drafters of this resolution did not construe the mere possession of nuclear weapons by nuclear States as a threat to the peace. The same Resolution also stipulates that, "all States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear. . . weapons and their means of delivery." Thus, any support to a non-state group to acquire nuclear weapons would be illegal. But they do not have any bearing on State actors, and it is difficult to conclude that they constrain the presumed right of nuclear States to possess nuclear weapons.

A. NPT or TPNW and Jus Cogens

Assuming *arguendo* that the nuclear power States' continued possession of nuclear weapons is a threat to the peace,[107] a State should be able to argue that the NPT or TPNW allowing nuclear power states to continue to hold nuclear arsenals is contrary to the *jus cogens* norm, a bold but arguable position. However, the difficulty with the argument is that the existing treaties recognize the nuclear weapons States' right to possess nuclear weapons. As B.V.A. Röling has stated, "[i[n the nuclear age, the jurist's role is not to interpret the law, but to *formulate* the natural law of the nuclear age."[108] Hence, as far-fetched as it may sound, if note is taken of the value of human life under extant international human rights norms, and if the fundamental value of humanity is the basis of *jus cogens*—as opposed to the practice of States or even treaties signed by them—then it may not be an implausible argument. The contour of natural law is that all laws must conform to fundamental values of humanity and, hence, even sovereign State actors cannot have unbridled freedom to act. Natural law is, in this sense, a limitation of national sovereignty and a constraint on nuclear security doctrines formulated by nuclear weapons States when possession plus targeting manifest genocidal intent. It is conceded that this is not in line with the contemporary positivist turn of international legal

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[106] S.C. Res. 1540 (Apr. 28, 2004).

[107] For instance, US President Kennedy acknowledged the threat posed by nuclear weapons, as he stated:

Men no longer debate whether armaments are a symptom or a cause of tension. The mere existence of modern weapons—ten million times more destructive than anything the world has ever known, and only minutes away from any target on earth—is a source of horror, of discord, and distrust. Men no longer maintain that disarmament must await the settlement of all disputes—for disarmament must be a part of any permanent settlement.

Edwin B. Firmage, *The Treaty on the Non-Proliferation of Nuclear Weapons*, 63 AM. J. INT'L L. 711, 732–33 (1969). Of course, some analysts claim that the fact that superpowers have possessed nuclear weapons meant that a third world war did not break out during the Cold War. *See* Morton Deutsch, *The Prevention of World War III: A Psychological Perspective*, 4 POL. PSYCH. 3 (1983); Jeremi Suri, *Nuclear Weapons and the Escalation of Global Conflict since 1945*, 63 INT'L J. 1013, 1016 (2008).

[108] ANTONIO CASSESE, FIVE MASTERS OF INTERNATIONAL LAW: CONVERSATIONS WITH R-J DUPUY, E. JIMÉNEZ DE ARÉCHAGA, R. JENNINGS, L. HENKIN AND O. SCHACTER 23 (Hart Publishing 2011) (emphasis added).

practice and scholarship; but it is in sync with the natural law school of thought. This comportment arguably is present in the very Preamble of the UN Charter in expressions such as we "reaffirm faith in fundamental human rights, in the dignity and worth of the human person."[109]

Assuming that a State takes up the case before the ICJ, then the next question would be: through what legal avenue might it do so? Consider, for example, that the Marshall Islands filed a case against India, Pakistan, and the U.K., requiring the respondent states to engage in good faith negotiations towards nuclear disarmament.[110] However, a split 8-8 decision (with the tie broken by the casting vote of President Abraham) asserted that there was no dispute between the parties, since the respondents were not properly aware of the fact of a legal dispute between them and the applicant. Since this was only the first instance of a case being dismissed by the ICJ on a technical ground, this likely implies the Court's sensitivity to the issue of nuclear weapons. Thus, bringing a contentious case would face a jurisdictional hurdle.

There is not yet any pronouncement on the extent to which the ICJ's advisory opinion would serve as a *res judicata*. Should an authorized organ of the UN present a request for an advisory opinion on the legality of possession of nuclear weapons, in any case, it should not fall within the ambit of *res judicata*. This is due to the reason that, in the prior case, the question put to the Court was: "[i]s the threat or use of nuclear weapons in any circumstance permitted under international law?"[111] Thus, the question of the legality of the possession of nuclear weapons in the context of the Genocide Convention is a different matter. Given the primacy of non-nuclear member States in the UN General Assembly, it is likely that such a proposal would garner enough support of the UN membership. Furthermore, the *res judicata* is based on the binding effect of a ruling, which is not pertinent for advisory opinions, since they are (technically speaking) the Court's authoritative interpretation of international law, not binding judgments *per se*. This may beg another question regarding the efficacy of an advisory opinion. However, open defiance of an authoritative pronouncement of the Court—e.g., The Construction of Wall[112]—is extremely rare in the behavior of States.[113]

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[109] Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945.

[110] Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India), Judgment, 2016 I.C.J. 255 (Oct. 05); Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. Pak.), Judgment, 2016 I.C.J. 552 (Oct. 05); Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. UK), Judgment, 2016 I.C.J. 833 (Oct. 05).

[111] Legality of the Threat or Use of Nuclear Weapons, *supra* note 6, ¶ 1.

[112] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, (July 9). However, technically, as an advisory opinion of the ICJ, it was not a 'judgement'.

[113] For a scholarly discourse on states' behavior in response to advisory opinion, *see* Eran Sthoeger, *How do States React to Advisory Opinions? Rejection, Implementation, and What Lies in Between*, 117 AM. J. INT'L L. UNBOUND 292 (2023).

V. CONCLUSION

National security policy staff and those at various levels of military operations cannot ignore the psychology of ambiguity and subjective assessments of utility that affect the calculus of nuclear weapons launch decisions. This is so especially in the case of a doctrine of preemptive strike, such as former President George W. Bush advanced in his Nuclear Security Strategy in 2002, represented incorrectly as a right to preventive war.[114] Thomas Schelling, an economist and game theorist who was engaged in strategic studies in the early years of this field of study, discussed this ambiguity of decision in important detail in 1958.[115] His analysis remains pertinent to international security policy even today, when national security policies depend on psychological factors present in the doctrine of nuclear deterrence and additional strategic 'counter*force*' or 'counter*value*' doctrines of nuclear weapons targeting.

Schelling reflected upon the fact that a preemptive strike unavoidably involves "a process of interacting expectations" between the two nuclear-armed powers, the U.S. and Russia, each assumed to be a player in a game having 'instrumental rationality' and seeking a purposeful (rationally self-interested) outcome.[116] This may or may not involve a '*rational* calculation of probabilities,' given the psychology of interacting expectations. But, as Schelling reminds, ostensibly rational players in this game strategy remain "victims of the logic that governs their expectations of each other[.]"[117] This is a logic that unavoidably involves 'subjective anxieties about each other's anxiety' concerning whether the one nuclear-armed power will strike first, despite an apparent or overt 'defensive' posture on each side that seeks to deter an adversarial power in view of a compelling retaliatory strike capability, the latter promising a highly

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[114] For an overview *see* Michael E. O'Hanlon, *The Bush Doctrine: Strike First*, BROOKINGS INST. (July 14, 2002), https://www.brookings.edu/opinions/the-bush-doctrine-strike-first/. For the original text of Bush's doctrine, *see* President George W. Bush, *The National Security Strategy of the United States of America*, THE WHITE HOUSE (Sept. 17, 2002), https://georgewbush-whitehouse.archives.gov/nsc/nssall.html (The precise words that caused concern in this strategy document were these, presented in the context of the federal government's response to terrorists, but taken to be indicative of a more expansive strategy: "While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country . . . ." This position acknowledged the customary authority of international law: "[f]or centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurors often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack. . . . The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attach. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.").

[115] Thomas Schelling, *The Reciprocal Fear of Surprise Attack*, RAND CORP. 1 (Apr. 16, 1958), https://www.rand.org/content/dam/rand/pubs/papers/2007/P1342.pdf.

[116] *Id.* at 1.

[117] *Id.* at 2.

probable yet absurd logic of mutually assured destruction.[118] This logic also includes an assessment of the adequacy of early warning systems, all of which have a probability of false alarm that is problematic for the miscalculation that may ensue in the immediacy of the decision to prosecute a nuclear war.

This calculus allows for the probability that one nuclear-armed power will in fact strike first (presumably in view of an articulated national security self-interest), even though the governing security policy is *prima facie* one of 'no-attack.' That is, Schelling remarks, "a player [in this ostensibly rational calculus] might attack when he 'shouldn't,'" since a player in this ominous game may in fact be irrational (i.e., be a psychologically disturbed or emotionally motivated irrational actor, be 'woefully misinformed' as to the true facts in contrast to projection or misperception of the adversary's intentions and behavior, or have "totally unreasonable objectives."[119] This is despite the supposed rationality of the calculus of decision. But, *more likely*, "somebody will make a mistake and inadvertently send off the attacking force"[120] when he, as a matter of policy and correct calculation (i.e., maximum utility), should not do so.

Nuclear security policy, in short, can be disposed willy-nilly to a 'perverse situation' of the prisoner's dilemma[121] where a preemptive attack with thermonuclear weapons motivated by a supposedly rational national self-defense amounts, in the outcome, to an act of self-annihilation. When the rational calculus tells us to model the outcomes such that 'the expected value of simultaneous attack' is '0', with a '50-50' probability of 'winning or losing' (whatever that might mean), while '1' is the value of no war at all, and the probability of 'winning' depends further on whether an early warning system works or fails (including here the probability of decision in view of a false alarm),[122] then the 'no-attack strategy' is always preferable to a preemptive first

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[118] *Id.* at 2.

[119] FRANK C. ZAGARE, GAME THEORY, DIPLOMATIC HISTORY AND SECURITY STUDIES 44, 47 (2019).

[120] Schelling, *supra* note 113, at 6.

[121] *Id.* at 9. For a philosophical discussion of the prisoner's dilemma, *see* Steven Kuhn, *Prisoner's Dilemma*, STAN. ENCYC. PHIL. (2019), https://plato.stanford.edu/archives/win2019/entries/prisoner-dilemma/. At issue in the prisoner's dilemma is rational self-interest, in contrast to group interest, and the value or disvalue of cooperation, accounting for the generality in which "it is difficult to get rational, selfish agents to cooperate for their common good," yet it would be preferred that the players cooperate rather than not. In the case of a nuclear weapons launch decision, the common good requires that each power forego its seemingly rational self-interest (i.e., preemptive first strike) in favor of the cooperative "no-strike" decision. But clearly, the dilemma is manifestly a dilemma from the fact that the psychology of ambiguity that Schelling recounts includes a probability of *irrational* pursuit of self-interest at the expense of the common good. For a further discussion of game theory in relation to security studies, *see* Zagare, *supra* note 115.

[122] One cannot ignore the possibility of a false alarm or inaccurate information at any level of launch decision. *See* Nicola Davis, *Soviet Submarine Officer Who Averted Nuclear War Honoured with Prize*, GUARDIAN (Oct. 17, 2017), https://www.theguardian.com/science/2017/oct/27/vasili-arkhipov-soviet-submarine-captain-who-averted-nuclear-war-awarded-future-of-life-prize (documenting a story about submarine officer Vasili Arkhipov on board the Soviet submarine B59 during the Cuban Missile Crisis on October 27, 1962, who "refused to sanction the launch of the weapon," a 10 kiloton nuclear torpedo, and thereby averted a catastrophic start to a nuclear war); Svetlana V. Savranskaya, *New Sources on the Role of Soviet Submarines in the Cuban Missile Crisis*, 28 J. STRATEGIC STUD.

strike.[123] Entirely problematic here, of course, is that in view of the intended outcome, this is a dilemma in which the 'prisoners' are not merely those who play the game with the calculus of nuclear launch decision. Rather, when the decision involves two superpowers such as the U.S. and Russia, with the prospect of launching thousands of thermonuclear warheads with short-time launch capability (8 minutes from decision for land-based intercontinental ballistic missiles, 15 minutes from decision for submarine-launched ballistic missiles, and 15 minutes from launch decision for air force bombers), then the whole of humanity and the entire planet *qua* sustainable global ecosystem are held hostage to this dastardly game of shifting probabilities and nuclear terror.

For context, the history of the Cuban Missile Crisis of 1962 and other incidents of both American and Soviet military behavior[124] during the Cold War afford us ample evidence of the danger of *inadequate knowledge* of the adversary's *intentions* and *actions*—including the equivalent of what in that crisis Robert Kennedy termed 'shocked incredulity' at the discovery of deception (i.e., Krushchev's deception), not to mention the fact that, again as Robert Kennedy put it, the Kennedy administration was its own victim of deception by way of "fooling [them]selves"[125] about Krushchev's sincerity. This strategy of deception worked both ways, since the Kennedy administration surreptitiously planned—albeit unsuccessfully—for sabotage and insurrection against Fidel Castro's rule of Cuba, best depicted in the failed Bay of Pigs mission. Furthermore, there is always in play the high probability of mistaken decision-making to launch a nuclear warhead that would then likely escalate to an all-out thermonuclear war, unless political and military leaders could be prevailed upon for restraint and constraint. The difficult deliberations and communications between Kennedy and Krushchev are well known to historians and remind us just how close the world came to a full-scale nuclear war in 1962.

A lesser known but instructive part of this historical event involves the deployment of Soviet submarines to Cuba, when, "unbeknown to the Americans,

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233 (2005); *see also* NAT'L SEC. ARCHIVE, THE SUBMARINES OF OCTOBER: U.S. AND SOVIET NAVAL ENCOUNTERS DURING THE CUBAN MISSILE CRISIS (William Burr & Thomas S. Blanton eds., 2002). Concerning the dire eventuality of a false alarm, *see* the case of Lt. Col. Stanislav Petrov and David Hoffman, *I Had a Funny Feeling in My Gut*, WASH. POST (Feb. 10, 1999), https://www.washingtonpost.com/wp-srv/inatl/longterm/coldwar/shatter021099b.htm.

[123] Schelling, *supra* note 113, at 19.

[124] Consider, e.g., reports of American and Soviet submarine "cat and mouse" games that have included collisions involving submarines with nuclear missiles onboard. Matthew Weaver, *Scottish Cold War Nuclear Submarine Collision Kept Secret for 43 Years*, GUARDIAN (Jan. 25, 2017), https://www.theguardian.com/us-news/2017/jan/25/nuclear-submarine-collision-cold-war-cia-scotland; *see* Art Pine, *U.S. and Russian Subs Collide Under the Ice in Barents Sea*, L.A. TIMES (Mar. 23, 1993), https://www.latimes.com/archives/la-xpm-1993-03-23-mn-14205-story.html. Also consider the fact that both the USSR and the USA have had accidents with nuclear weapons during transport and transfer. *See, e.g.*, *Broken Arrows: Nuclear Weapons Accidents*, ATOMIC ARCHIVE, https://www.atomicarchive.com/almanac/broken-arrows/ ("Since 1950, there have been 32 nuclear weapon accidents, known as 'Broken Arrows.' A Broken Arrow is defined as an unexpected event involving nuclear weapons that result in the accidental launching, firing, detonating, theft, or loss of the weapon. To date, six nuclear weapons have been lost and never recovered.").

[125] *See* MICHAEL DOBBS, ONE MINUTE TO MIDNIGHT: KENNEDY, KRUSHCHEV, AND CASTRO ON THE BRINK OF NUCLEAR WAR 9 (Alfred A. Knopf, 2008).

[four diesel-powered Foxtrot class] Soviet submarines [normally operating as part of the Northern Fleet in Arctic waters] had been fitted with [10-15 kiloton] nuclear-tipped torpedoes"[126]—not standard for this class of submarine. Further, it was unclear precisely what kind of discretionary authority the submarine commanders had in the decision to launch these weapons in the event of loss of radio communication with Moscow.[127] The available documentary history of this component of the crisis illustrates the problem of ambiguity and interacting expectations about which Schelling warned in his discussion of the strategy of surprise attack. As Svetlana V. Savranskaya observed, "[i]f submarine commanders could have used these torpedoes at their own discretion, one could argue that such an option added a major aspect of unpredictability to the crisis,"[128] especially since there was one nuclear torpedo per Foxtrot submarine (thus four such weapons) in the Sargasso Sea off the east coast of Cuba. It is unclear whether the use of this class of submarine was part of a clandestine Soviet strategy or simply a decision based on lack of sufficient nuclear missile class submarines to deploy to Cuba. In any case, this was a Soviet maneuver that had no failsafe element at the battlefield level of decision whether and when to use such torpedoes.

Soviet submarine commander decision-making was clearly hampered by the fact that apparently "no specific instructions were given about the use of the nuclear torpedoes,"[129] except for ambiguous orders to use these weapons first (rather than standard torpedoes) in the event of hull damage from enemy attack below or above the surface. Otherwise they were to be deployed when Moscow (i.e., the Defense Minister) explicitly ordered their use (to be received by way of radio communications, which could be done only when the submarine was at periscope level or on the surface, thus exposed to American antisubmarine warfare operations—ASW). [130] Even then, as Savranskaya reports, the submarine commanders were not fully informed about the developing crisis and learned of this primarily from U.S. radio broadcasts they intercepted, discovering that Kennedy announced the naval blockade of Cuba and warned the American public of the possibility of a thermonuclear conflict with the Soviet Union.[131]

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[126] Savranskaya, *supra* note 118, at 234.

[127] *Id.* at 233–34.

[128] *Id.* at 234.

[129] *Id.* at 239.

[130] Savranskaya, *supra* note 118, at 240–41.

[131] *Id.* at 242; *see also* John F. Kennedy, 35th President, Address During the Cuban Missile Crisis (Oct. 22, 1962), *in Historic Speeches*, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM, https://www.jfklibrary.org/learn/about-jfk/historic-speeches/address-during-the-cuban-missile-crisis; *see also* David Von Pein's JFK Channel, *JFK'S "CUBAN MISSILE CRISIS" SPEECH (10/22/62) (COMPLETE AND UNCUT)*, YOUTUBE (Aug. 30, 2013), https://www.youtube.com/watch?v=EgdUgzAWcrw ("We will not prematurely or unnecessarily risk the costs of worldwide nuclear war in which even the fruits of victory would be ashes in our mouth; but neither will we shrink from that task at any time it must be faced…. It shall be the policy of this nation to regard any nuclear missile launched from Cuba against any nation in the Western Hemisphere as an attack by the Soviet Union on the United States, requiring a full retaliatory response upon the Soviet Union.").

In the absence of clear communications from Moscow in the interim, the submarine commanders faced dire decision-making prospects forced on them by the circumstance of no formal orders and unresolved suspicions that, while they were submerged, the Americans had launched military hostilities against the U.S.S.R. and Cuba:

> In interviews and in memoirs, all the Soviet captains recalled their state of extreme tension and confusion in a situation where the war above [the ocean surface] could have begun any time while they were trying to evade their pursuers [US Navy ASW forces] in the submerged position, with no communications with the outside world.[132]

One fateful decision is not to be ignored. The Soviet B-59 submarine was among those detected and tracked by the U.S. Navy with a carrier and multiple destroyers taking actions to force it to surface.[133] Captain 2nd Rank V.S. Savitsky, the B-59 commander, was unable to establish communications with Moscow, according to reports Savranskaya cites. Thus, "[t]he danger of the situation was precisely in the fact that the commander was acting under acute time pressure and with limited information, under tremendous stress, and that he had a physical capability to launch the [nuclear-tipped] torpedo without orders from Moscow. . . ."[134] Savitsky did make a decision to launch the nuclear torpedo, but required agreement from the second officer and a third officer aboard the B-59 Foxtrot submarine.

The third officer in this case was Captain 2nd Rank Vasili Alexandrovich Arkhipov, who also was chief of staff of the 69th Submarine Brigade. Arkhipov did not concur with the captain. Had Arkhipov not taken exception while the captain and second officer agreed, the nuclear torpedo would very likely have been launched against an American naval vessel. Fortunately for all, that tension and confusion aboard the B-59 resolved into a thwarted nuclear torpedo launch decision. Nevertheless, the incident highlights the fact that the world escaped the start of a thermonuclear war because of Arkhipov's level-headed restraint and luck.

Such a situation clearly allowed for decisions to be taken at the battlefield level, which Moscow was unable to immediately control or prevent. A situation in which a 'no attack' policy was supposedly in place (given the need for a direct order from the Soviet Defense Minister) was subject to a highly probable operational failure at the level of submarine operations, consequent to the circumstances of tension, confusion, and lack of information in the immediacy of the decision. Soviet submarine commanders were aware of the possibility of a thermonuclear war having been started while they were submerged and out of radio communication with Moscow. Hence, they were prepared to launch their nuclear torpedoes, a decision that would have amounted to a *mistaken* launch decision (thus confirming Schelling's analysis that included a mistaken launch

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[132] Savranskaya, *supra* note 118, at 242.

[133] *Id.*

[134] *Id.* at 247.

decision even though the no-attack strategy was operative). Moreover, in the same time frame of military operations one American U2 spy plane was shot down over eastern Cuba and another American U2 spy plane was lost due to navigation errors, inadvertently penetrating Soviet airspace in the Arctic. This situation leaves it unmistakably clear that a thermonuclear war was averted during the Cuban Missile Crisis mostly by chance.[135]

Not to be forgotten also is the incident of a Soviet early-warning system false alarm that occurred on 26 September 1983, when the system falsely signaled an American sequential launch of five inbound intercontinental ballistic missiles. Soviet Air Defence Lt. Col. Stanislav Petrov, duty officer at the Serpukhov-15 command operational center near Moscow, decided to violate system protocol—that would have initiated a retaliatory strike operation upon his recommendation to central command—only on his belief that the system was in error and that had the Americans launched a first strike the number of missiles would have been massive, not the five signaled by the system. This incident demonstrated without any doubt that the launch warning element of the Soviet and American nuclear deterrence doctrine was a manifest nuclear terror, itself an absurd paradox in which a full-scale retaliatory strike capability designed to be defensive nonetheless simultaneously assures near-total destruction of the population and territory being defended. Such full-scale counter-value retaliatory strike capability made operational consequent to nuclear security policy undoubtedly manifests genocidal intent in the sense discussed earlier.

As the Manhattan project scientists understood when they realized the explosive power of thermonuclear weapons, the psychology of ambiguity is simply not to be endured by the world community without rightful protest as a matter of international law and morality, given the high level of risk from the unknown number of ways in which this calculus of nuclear launch decision can go wrong. Hence, those nation-states supporting the Treaty on the Prohibition of Nuclear Weapons (including prohibition of strategic, tactical, and neutron warheads) provide to the international community of nations through this treaty a moral and legal authority seeking to ward off the ominous calculus that imperils humanity and the Earth from these weapons of mass devastation. Former American President Ronald Reagan and former Soviet Premier Mikhail Gorbachev stated the point of a rational nuclear security policy in a way that simply cannot be gainsaid: "A nuclear war *cannot be won* and *should never be fought*."[136] International law and morality combine to underscore the veracity of that assertion and to insist upon the incontrovertible obligation all nation-states have to implement a total nuclear disarmament.[137] Learning a lesson

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[135] *See* H. Wayne Whitten, *Without a Warning*, 33 AM. INTEL. J. 144 (2016); *see also* DOBBS, *supra* note 121.

[136] *Joint Soviet-United States Statement on the Summit Meeting in Geneva*, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM (Nov. 21, 1985), https://www.reaganlibrary.gov/archives/speech/joint-soviet-united-states-statement-summit-meeting-geneva.

[137] Legality of the Threat or Use of Nuclear Weapons, *supra* note 6 (showing even the ICJ in its earlier advisory opinion unanimously held that "[t]he legal import of that obligation goes beyond

from his fateful moment of decision, Stanislav Petrov understood what all must come to understand in the interest of a sustainable global peace: "The best way to destroy an enemy is to make him your friend."[138]

that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result— nuclear disarmament in al1 its aspects—by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith").

[138] *See I Destroy My Enemies When I Make Them My Friends*, QUOTE INVESTIGATOR (May 13, 2020), https://quoteinvestigator.com/2020/05/13/make-friends/ (showing the statement is attributed variously to a number of personages).