

**Freedom from Nuclear Weapons through Legal Accountability and
Good Faith**

**A Conference to Mark the 10th Anniversary of the ICJ Advisory Opinion on
Nuclear Weapons**

**Organised by
International Physicians for the Prevention of Nuclear War
Abolition 2000 Europe
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International Peace Bureau**

“The Role of Public International Law and the ICJ in a Changing World”

**Address by
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Distinguished Participants,
Dear Colleagues and Friends,

First of all I should like to express my gratitude to the organisers for inviting me to speak on this occasion. Disarmament is a question of vital importance for humanity. Needless to say, the need for nuclear disarmament must be at the forefront here, not least in view of the lack of progress in this field in later years. Although referred to as a failure, North Korea's long-range missile test a couple of days ago casts a shadow over our Conference.

I have been asked to make a more general overview of international law at the beginning of this Conference. The title of my address is "The Role of Public International Law and the ICJ in a Changing World".

The polar bear perspective

At the outset, I would like to share with you some impressions from an event in which I participated less than a week ago: the Tällberg Forum. This event takes place every summer in a very scenic setting in Dalecarlia in my country Sweden. The Forum brings together participants from different walks of life from all over the world: heads of state, politicians, businessmen, scientists, journalists, writers, artists, lawyers, representatives of non-governmental organisations and indigenous peoples, etc.¹ This year we were some 450 people from more than 60 countries from all continents. Secretary-General Kofi Annan participated by live video link at the opening session.

The Forum asks the question "How on earth can we live together?" – This year with the addition "Getting serious". The challenge discussed was, on the one hand, the necessity to reconcile the need for economic growth with limited energy resources and the fragilities of the environment, and, on the other hand, the need to strengthen democracy, the rule of law and human rights.

How do we resolve the triple-E equation: economy/energy/environment, we were asked? The combination of frantic economic activity with the exponential rise of population leads to two phenomena: critical shortages of key natural resources and closer interdependences.

One of the panels at the Forum discussed the topic "The new landscape of human security – How do we get organized to deal with the risks?" Many risks were identified: poverty, disease, terrorism, transnational crime, corruption, environmental degradation; the litany is by now well known. The lack of statesmanship was also identified by one panellist. Indeed, this was one of the concerns that I expressed in my farewell lecture upon leaving the United Nations in 2004.²

Discussions focusing on the situation in ten places in the world were also held in parallel workshops. One of these places was the High North. We focused on the Arctic and noted among other things that the polar bear is threatened by extinction. Why? Because the polar ice is melting! Another workshop looked at the situation in Bangladesh and its capital Dhaka. But now you may ask: why is he talking about all

this? Is there a connection between the polar bear and Dhaka – and, more importantly, nuclear weapons and our work at this Conference?

Indeed there is! When the ice in the Arctic is gone – and this will most probably be a reality within less than 100 years – there will be no more polar bears. At the same time the melting of the ice will cause the sea level to rise by one meter, affecting millions of people around the world and in particular in Bangladesh. The dilemma is that the melting of the ice in the Arctic is caused by sharply raising temperature in that area which in turn is caused by the burning of fossil fuel in other parts of the world.³ And it is here that the most serious effects of this melting will materialize rather than in the Arctic itself.

So, something has to be done if we want to reverse this threat. The environmental degradation and the continued burning of fossil fuel need to be addressed. These are complex issues that demand our full attention. Consequently, other threats that can be removed with more limited efforts should be dealt with expeditiously.

And this is where we have the connection with the issues that we are discussing in our Conference. We simply cannot afford spending time and energy on half-hearted and unproductive disarmament talks anymore. The threat from weapons of mass destruction can be removed. What is needed here is political will.

In this context there is also a further link to the Tällberg Forum. As the discussion in the panel on human security proceeded, one of the participants, a retired military officer, declared that in spite of the seriousness of the other threats identified, in his view the most serious threat to humankind was the risk of nuclear war. If the proliferation continues, the day will come when somebody presses the button.

I wanted to share these brief impressions from Tällberg with you because they so clearly highlight the relevance of the topic that I have been asked to address.

There is a need for an international order based on the rule of law

My presentation will touch upon the development over the last decades in the field of international law, including international criminal law. The point I will make is: there is a need for an international order based on the rule of law. This point is certainly not new, but it is of greater importance now than ever before.

The role of international tribunals, and in particular the ICJ, will be highlighted. The focus will also be on some aspects of disarmament. However, I will not address the ICJ advisory opinion on the nuclear arms issue or the prospects of requesting a new advisory opinion from the Court. There are others present who are better placed than I am to deal with those matters.

The UN Charter

When one addresses the question of the role of public international law, it is natural to take the Charter of the United Nations as a point of departure.⁴ The Organisation was established after the Second World War by persons who had experienced two world wars. Its main engineer was the United States of America.

Of particular interest in this context are the provisions in the Charter that establish the system of collective security. This system has two main elements: the prohibition laid down in article 2, paragraph 4 against the threat or use of force against the territorial integrity or political independence of any state, and the provisions that allow the use of force only in self-defence or with the authorisation of the Security Council.

Article 103 of the Charter deserves special attention in this context:

“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

This provision is of great importance in order to understand the present-day system of international law. The authors of the Charter understood that, in addition to existing international law, there would be further development. Indeed, article 13 of the Charter prescribes that the General Assembly “shall initiate studies and make recommendations for the purpose of - - - encouraging the progressive development of international law and its codification”.

But the framers of the Charter understood that in order to avoid repeating the mistakes of the past and to “save succeeding generations from the scourge of war”, to quote the preamble of the Charter, it was necessary to make certain that whatever new international agreements emerged, the Charter would prevail. Hence, article 103 of the Charter.

This provision must be understood to mean that also imperatives prescribed in e.g. a Security Council resolution would have the same effect.

Human rights and other fields of international law

If we look at progressive development of international law and its codification it is easy to conclude that tremendous advances have been made, in particular in later years.

The Secretary-General alone is the depositary of more than 500 multilateral treaties. These treaties cover almost every aspect of human life, and every day various treaty actions are being undertaken at the UN Headquarters, such as signatures and the deposition of instruments of ratification. Every month, there are more than two million hits against the UN treaty database. This shows that, increasingly, information is sought from this central source.

Among the most important treaties are the conventions for the protection of human rights. These treaties are based on the Universal Declaration on Human Rights adopted by the General Assembly on 10 December 1948.⁵ The two most significant among them are the Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights, both adopted in 1966. There are also regional conventions on human rights.

This field of international law has had great impact on the constitutional law in almost every state in the world community. Today, there is not a new constitution elaborated without a chapter on basic rights, modelled after the Covenants, or at least a general reference to the contents of the Covenants.

But also other fields of law could be mentioned: peaceful settlement of international disputes, diplomatic and consular relations, refugees and stateless persons, narcotic drugs, traffic in persons, health, international trade and development, transport and communications, navigation, economy, statistics, educational and cultural matters, status of women, freedom of information, penal matters, commodities, maintenance obligations, law of treaties, outer space, telecommunications, disarmament, environment, and fiscal matters.

The United Nations Convention on the Law the Sea

From the viewpoint of international peace and security, it is essential to mention an instrument which may not be so well known outside expert circles, namely the United Nations Convention on the Law the Sea. This convention – often referred to as the Constitution of the Oceans – has played a significant role ever since its entry into force in 1994.⁶

The potential for disputes in the maritime area is great. It is therefore important to have an authoritative source of law that States can resort to in order to solve their differences. From personal experience, having conducted three bilateral negotiations on maritime delimitation, I know that the Convention is of great value in assisting States in identifying reasonable solutions to questions that are highly sensitive. Such questions can easily be exploited for political purposes both at the international and national level, perhaps not least the latter.

The Antarctic Treaty

Another example that should be mentioned in this context because it is interesting also from a disarmament point of view is the 1959 Antarctic Treaty, which was established immediately after the International Geophysical Year in 1957-58.⁷ The 12 nations that had been active in Antarctica during that year, managed to agree that peaceful scientific cooperation in the Antarctic should continue. The Treaty applies to the area south of 60° South latitude. The Antarctic continent is some 14 million square kilometres, nearly one and a half times the size of the US.

The Antarctic Treaty is an example of a situation where States have been able to cooperate even during the most difficult times – in this case during the Cold War. The three objectives of the treaty are simple but must be said to be unique in international relations:

- To demilitarize Antarctica in order to establish it as a zone free of nuclear tests and the disposal of radioactive waste, and to ensure that it is used for peaceful purposes only;
- To promote international scientific cooperation in Antarctica;
- To set aside disputes over territorial sovereignty.

Article 1, paragraph 1 of the treaty reads as follows:

“Antarctica shall be used for peaceful purposes only. There shall be prohibited, *inter alia*, any measure of a military nature, such as the establishment of military bases and fortifications, the carrying out of military manoeuvres, as well as the testing of any type of weapon.”

There are presently 45 States parties to the Antarctic Treaty, 28 of them being so-called Consultative Parties, the others Acceding States. The treaty must definitely be mentioned among the success stories in the field of international law. Every year the States parties gather for the Antarctic Treaty Consultative Meeting, during which important decisions and measures are adopted relating to the administration of the treaty area. This year’s meeting took place in June in Edinburgh.

International trade law

Another field of public international law that should be highlighted in this context is international trade law. Many believe that this law is mainly for specialists focusing on a very specific area of the law, not related to peace and security. I beg to differ.

A proper trade law is among the first requirements that must be satisfied if States want to participate in the global trade, competing on equal terms with other States in the global market. The United Nations Commission on International Trade Law (UNCITRAL) has made an extraordinary contribution here.⁸

Since its establishment in 1966, UNCITRAL has developed texts in several areas, such as international commercial arbitration and conciliation, international sale of goods, insolvency, international payments, international transport of goods, electronic commerce, and procurement and infrastructure development.

This is not the place to go into detail on trade law. However, in order to demonstrate the interconnectivity between the different sectors of international law it is central to point to a situation where the connection with international peace and security may not be so obvious.

International criminal law

One field of international law where the development has been extraordinary over the last few years is international criminal law. The events in the former Yugoslavia and Rwanda prompted the UN Security Council to establish ad hoc criminal tribunals to deal with genocide, crimes against humanity and war crimes committed in those countries.⁹ A Special Court has been established to address the situation in Sierra Leone.¹⁰ The leaders of the Khmer Rouge in Cambodia may soon be brought to justice before the Extraordinary Chambers of the national courts of that country, based on an agreement with the United Nations.¹¹

The establishment of the International Criminal Court in 2003, only five years after the conclusion of the Rome Statute is a major achievement.¹² With some perspective, the 1998 Rome Conference will probably be regarded as one of the most important international conferences in the legal field in the 20th century.

The overriding purpose of the establishment of these courts and tribunals is to address the impunity that, with few exceptions, has been customary in the past.

The International Court of Justice

The ICJ, which is the principal judicial organ of the United Nations, will no doubt have an ever increasing importance in the future.¹³ Gradually, the Court has developed into an organ to which States turn to solve their disputes. Of particular interest is that States in Africa have resorted to the ICJ on several occasions.

As an example could be mentioned the border dispute between Cameroon and Nigeria.¹⁴ The ruling by the ICJ in 2002 in this case demonstrates in a very clear manner how the Court can contribute to international peace and security. The dispute concerned the whole border between the two countries, but in particular the oil-rich Bakassi Peninsula. In its judgement the ICJ ruled that Bakassi belonged to Cameroon.

According to the judgement, Nigeria was due to hand over the peninsula in 2004 but failed to do so because of “technical difficulties”. Secretary-General Kofi Annan engaged himself in the matter and has been pressuring the two sides to implement the Court’s ruling. Nigeria has now consented to transfer the peninsula to Cameroon. An agreement, signed between the two countries last month and witnessed by representatives of France, Germany, the United Kingdom, and the United States, sets out the procedures for Nigeria's withdrawal and provides for a follow-up committee to witness its implementation.¹⁵ This should be seen as a major achievement.

Public international law will be of increasing importance in a changing world

These examples from different legal fields are intended to demonstrate that public international law will be of increasing importance in a changing world. In any legal system, the ultimate answer to what the law means in a particular case may have to be given by a court of law. Hence, the role of the ICJ and, indeed, of other international dispute settlement mechanisms will be even more critical.

It is also essential to point to the fact that the influence of the courts in any given system goes far beyond the cases adjudicated. It is true that article 59 of the Statute of the ICJ prescribes that the decision of the Court has no binding force except between the parties and in respect of that particular case. However, for obvious reasons States look to the jurisprudence of the Court and draw their own conclusions. Therefore, this jurisprudence is of great assistance to States when they attempt, as they should, to solve disputes among themselves without resorting to a third party.

The development over the last few years gives cause for apprehension

To many, the assertion that public international law will be of increasing importance in a changing world is self-evident. Some might even consider the statement a banality. But regretfully, the development over the last few years gives cause for apprehension.

Of particular concern is the way in which the world's most powerful nation, the United States of America, has turned its back on multilateralism. Their tendency to go it alone has had a very negative impact on the efforts to create an international legal order that is respected by the state community.

The US National Security Strategy adopted in 2002 should be mentioned specifically.¹⁶ According to this strategy the US would feel free to use force without a clear mandate from the Security Council. This attitude flies in the face of the UN Charter and its system of collective security, in particular article 51 on self-defence. The US position creates uncertainty among other players on the international arena.

It is interesting to compare this attitude to the mind-set demonstrated by the US at the time of the establishment of the United Nations. The declaration by President Harry S. Truman before Congress in his State of the Union Address on 16 April 1945 comes to mind: "The responsibility of the great States is to serve and not to dominate the world."¹⁷

Recommendations by the Weapons of Mass Destruction Commission

This Conference will among other things study the possibilities of having yet another advisory opinion on the nuclear arms issue from the ICJ. Let us therefore look at the question through the prism of the Weapons of Mass Destruction Commission.

As you are all aware, on 1 June this year this Commission, chaired by Dr Hans Blix, presented its report "Weapons of Terror – Freeing the World of Nuclear, Biological and Chemical Arms" to the Secretary-General of the UN. Let me quote from Dr Blix' preface:¹⁸

"Some of the current stagnation in global arms control and disarmament forums is the result of a paralysing requirement of consensus combined with an outdated system of block politics. However, a more important reason is that the nuclear-weapon states no longer seem to take their commitments to nuclear disarmament seriously – even though this was a central part of the NPT¹⁹ bargain, both at the treaty's birth in 1968 and when it was extended indefinitely in 1995."

Blix also maintains that bringing the Comprehensive Nuclear-Test-Ban Treaty (CTBT) into force would significantly impede the development of new nuclear weapons.

It deserves to be recalled in this context the unanimous statement about nuclear disarmament by the ICJ in its 1996 advisory opinion:

"There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."

The Weapons of Mass Destruction Commission has presented a number of recommendations – 60 to be precise.²⁰

In this context, I would draw your attention in particular to the following recommendations:

- Recommendation 1 that all parties to the NPT need to revert to the fundamental and balanced non-proliferation and disarmament commitments that were made under the treaty and confirmed in 1995 when the treaty was extended indefinitely.
- Recommendation 20 that points to the special responsibility that Russia and the United States have in this context.
- Recommendation 4 on the establishment of a secretariat to handle administrative matters for the parties to the NPT.
- Recommendation 7 on legally binding negative security assurances by the nuclear-weapon states parties to the NPT to non nuclear-weapon states parties and similar assurances by non NPT states that possess nuclear weapons.
- Recommendation 14 on universal adherence to the International Convention for the Suppression of Acts of Nuclear Terrorism and to the Convention on the Physical Protection of Nuclear Material and implementation of UN Security Council resolution 1540.
- Recommendation 28 that states should sign and ratify the CTBT and the particular request to the United States to reconsider its position and proceed to ratify the treaty.
- Recommendation 57 that international legal obligations regarding weapons of mass destruction must be enforced.

However, most importantly, all these recommendations and the other recommendations by the Commission emanate from a body on which the world's leading experts on disarmament are represented. It would be irresponsible of the world community not to act upon their advice.

There is a need to strengthen multilateralism and the rule of law

Let us now against this background revert to the question of the role of public international law in a changing world. What further reflections could be offered as a point of departure for your work?

May I suggest that we focus briefly on three aspects: the existing law, the need for new law, and the intergovernmental organisations, n.b. the United Nations, and their members.

With respect to existing law, as it appears from what I have said, there is an impressive body of law that governs our society. With few exceptions, States realise that this law has to be followed and, indeed, they make great efforts to observe their international legal obligations. If these obligations are not complied with, the reason is more often than not lack of resources to implement them.

The need for the rule of law at the national and international level has also been identified as a major issue for the future. The latest global expression of support for the rule of law appears in the Summit resolution adopted by the United Nations General Assembly in September 2005.²¹

Systematic efforts should be made here to assist States that need help to implement a system under the rule of law. Assistance is given by the United Nations and its organs, the World Bank, the European Union and others.²² But more could be done.

Remarkable efforts are also made by non-governmental organisations. The International Bar Association and the American Bar Association are presently considering how to create a global rule of law network.²³

But those who assist should also set the example. Just look at the way in which the misnomer “war on terrorism” is conducted! The violations of human rights standards that has occurred in the name of this so called war – no matter how necessary it is to counter terrorism – is damaging our efforts to strengthen the rule of law. It will take a long time to repair this damage. Those who offer assistance to others for the establishment of the rule of law must be credible. How often do we not hear references to “double standards” these days?

With respect to the need for new law I will be brief. As things develop, there will always be situations where there is a need to regulate new phenomena. So it has been in the past, and so it will be in the future. The requirement at the international level is that States negotiate in good faith and that they abide by their commitments. *Pacta sunt servanda!* The field of disarmament is a case in point!

Finally, the intergovernmental organisations. Obviously, these organisations are indispensable for the interaction among States.

These days there is also much talk about new actors at the international level: transnational enterprises, civil society, and, for that matter, criminal organisations that operate regardless of borders.

While most of this development is positive – I refer in particular to the Global Compact, the increased attention to Corporate Social Responsibility and the work of the non-governmental organisations – the fact is that there is really no alternative to the sovereign nation state when it comes to governance.²⁴ As a matter of fact, States need strengthening; it is obvious that weak or failing States represent a threat to world order.

In this era of globalisation there will be an increasing need for States to cooperate. And this they must do through various intergovernmental organisations – in particular the United Nations with its overriding responsibility for international peace and security. I refer again to article 103 of the Charter.

The UN has been criticised for not being effective enough. This may be true. And certainly the UN could do better. But we should be clear about one thing: the UN cannot do better than its members permit.

For someone who has worked in the UN Secretariat for a period of time, this becomes so obvious. It is therefore mind-boggling to observe how the Organisation is literally undermined by its most powerful member as if its administration had lost their history books.

At the same time we must note with regret that many UN members are not democracies and that therefore many peoples of the world do not have a fully legitimate representation at the international level.

The combination of those two phenomena should also make us aware that the demands for UN reform to a certain extent is an excuse; it is a way of diverting attention from the fact that it is the members of the UN that are in greater need of reform than the Organisation itself. Actually, reform at the national level in certain States would automatically translate into a more effective United Nations!

New challenges: more people to feed, more energy consumption, and a different geopolitical situation

Let me close by pointing to two completely different phenomena that will present enormous challenges for the future.

The world population is today about 6.5 billion. According to the United Nations Population Division it will be 9.1 billion by 2050.²⁵ By that time it is also expected that China and India will have bypassed the European Union and the US in terms of Gross Domestic Product.²⁶ More people to feed, more energy consumption, and a different geopolitical situation!

Conclusion

The conclusion is obvious: the world needs statesmanship and a solid international legal order!

Thank you for your attention!

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The following is a summary of my brief remarks after the presentation by the members of the panel on “Nuclear policy concepts and self-defence”:

1. We must be realistic and take the existing situation with heavy nuclear armament in many States and the philosophy behind that as a point of departure.
2. States have an obligation to negotiate to achieve nuclear disarmament.
3. Where do we go from here? How can we identify the most effective way of getting States to the negotiating table?

4. How do we convince States that it is time that they re-evaluate their reasons for having nuclear arms? US Secretary of State Elihu Root's lecture upon receiving the 1912 Nobel Peace Prize is an interesting point of departure for this analysis.²⁷ Attention is drawn in particular to his comments about causes of war and his philosophy when dealing with demands from other States: "kindly consideration, temperate discussion and reasonable concession".
5. Complete disarmament is Utopia. As a matter of fact, a country needs armed forces – at a reasonable level. Sufficient deterrent, if that is the philosophy, could be marshalled without nuclear arms.

¹ <http://www.tallbergforum.org/>

² <http://www.un.org/law/counsel/info.htm>

³ <http://www.acia.uaf.edu/>

⁴ <http://www.un.org/aboutun/charter/index.html>

⁵ <http://www.un.org/rights/>

⁶ <http://www.un.org/Depts/los/index.htm>

⁷ http://www.antarctica.ac.uk/About_Antarctica/Treaty/

⁸ <http://www.uncitral.org/>

⁹ <http://www.un.org/icty/>

<http://69.94.11.53/default.htm>

¹⁰ <http://www.sc-sl.org/>

¹¹ <http://www.cambodia.gov.kh/krt/english/index.htm>

¹² <http://www.icc-cpi.int/>

¹³ <http://www.icj-cij.org/>

¹⁴ <http://www.icj-cij.org/icjwww/idocket/icn/icnframe.htm>

¹⁵ <http://www.un.org/News/Press/docs/2006/sg2113.doc.htm>

¹⁶ <http://www.whitehouse.gov/nsc/nss.html>

"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 attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively."

¹⁷ <http://www.trumanlibrary.org/ww2/stofunio.htm>

¹⁸ "Weapons of Terror – Freeing the World of Nuclear, Biological and Chemical Arms", p.

14. For electronic copies of the report, please visit <http://www.wmdcommission.org>

¹⁹ The Non-Proliferation Treaty.

²⁰ The report pp. 188-204.

²¹ A/Res./60/1 at <http://daccess-ods.un.org/TMP/7790790.html>

²² <http://www.un.org/law/technical/main.htm>

²³ <http://www.ibanet.org/>

<http://www.abanet.org/>

"The International Bar Association, in conjunction with the American Bar Association, will be holding a major symposium, entitled 'The Rule of Law – A Plan For Action' on 16-17 September 2006 in Chicago."

²⁴ With respect to the Global Compact, see <http://www.unglobalcompact.org>

Information about Corporate Social Responsibility can be found on many web sites.

²⁵ See the *2004 Revision of World Population Prospects* at

http://www.un.org/esa/population/publications/WPP2004/WPP2004_Volume3.htm

"By July 2005, the world will have 6.5 billion inhabitants, 380 million more than in 2000 or a gain of 76 million annually. Despite the declining fertility levels projected over 2005-2050 the

world population is expected to reach 9.1 billion according to the medium variant and will still be adding 34 million persons annually by mid-century.”

²⁶ See e.g. Keystone India in BusinessWeek August 22/29 2005.

²⁷ <http://nobelprize.org/peace/laureates/1912/root-lecture.html>