The Common Sense of the Right to Live in the Age of Weapons of Mass Destruction:

a paper on the intellectual and social history of doctrines of human rights

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***"Remember your humanity and forget the rest."*-- Bertrand Russell**[1]

***"You will not mistake my meaning or suppose that I depreciate one of the great humane studies if I say that we cannot learn law by learning law. If it is to be anything more than just a technique it is to be so much more than itself: a part of history, a part of economics and sociology, a part of ethics and a philosophy of life."* -- Lord Radcliffe, The Law and its Compass (1961), pp. 92-93.**[2]

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I. Introduction: The Source of this Paper's Reflections

In the late 1970's Louis Alvarez, the Nobel prize winning physicist, became interested in a 65 million year old, 5 centimeter thick stratum of ash containing an abnormally high percentage of the rare element iridium. All over the world, the layer forms the terminal boundary of the Cretaceus Period; before it, dinosaurs roamed the earth; after it, the land belonged to mammals. Because of its high iridium content, he hypothesized that the layer must contain the pulverized debris of a meteor impact. He made a computer model to determine how much iridium a 5 centimeter world envelope of the material would have to contain, whether that much iridium could have come from a meteor several miles across, whether the impact of such a meteor could have sent enough dust into the atmosphere to stop photosynthesis and lower temperatures around the world for a few months to a few years, and whether the combined effect would have been sufficient to kill off the plant species upon which herbivorous dinosaurs depended, and then to starve the carnivores. Basing his calculations on data such as that recorded on the eruption of Krakatoa, he concluded that a meteor could have ended the Age of Dinosaurs. Most geologists and paleontologists are now convinced that the meteor in question hit what is now northwestern Yucatan.

Immediately upon the publication of Alvarez's paper, physicists realized that calculations of the effects of nuclear war had never included the effects on the atmosphere of the simultaneous burning of hundreds of cities and forests. The Swedish Ambio Institute requested physicists, climatologists, and computer modelers to calculate, under a variety of assumptions, how many nuclear explosions, would create a similar effect. By 1982 more than a hundred studies presented at various conferences gave the conclusion: as few as 200 nuclear explosions could produce a nuclear winter capable of destroying all human life-- and probably all mammalian life-- on earth. As of 1995, the world had 23,000 active[3] nuclear warheads and bombs,[4] 94% of them owned by the U.S. and the Russian Federation, 6% by the U.K., France, and China.[5]

Throughout the Cold War no government had ventured to raise the issue of the legality of nuclear weapons in international court. The closest approach to this was the *Nuclear Tests Case*,[6] in 1973-74, in which Australia, New Zealand, and Fiji sought injunctions against France to prevent the continuance of its eastern Indian Ocean atmospheric nuclear test series, which was spreading radioactive fallout over their territories. The I.C..J. refused to hear the issue of damages and proclaimed the case moot on the basis of an ambiguous declaration by France, not that it would stop testing, but merely that its testing had advanced far enough that it no longer had any need of atmospheric tests. At the time of the decision, environmental damage was considered fanciful, the "Down Under" countries were considered negligible, much of the UN thought French tests sacrosanct because NATO supposedly needed strengthening, and the French wanted to reassert its lost imperial prestige by proclaiming that their nuclear forces were fit for war. All this the I.C.J. tacitly approved. Six justices dissented[7] on grounds that the case could not be ruled moot because the evidence of damages had not been heard. Berwick's dissent concluded, "In my opinion, there is no discretion in this court to refuse to decide a dispute submitted to it which it has jurisdiction to decide. Article 38 of its statute seems to lay upon this court a duty to decide."[8] The dissent

that the I.C.J. avoided issues it was duty-bound to decide was repeated by the dissenters in the *Nuclear Weapons Case.*

After the high regard the I.C.J. had shown for nuclear testing even when supported by no treaty at all, it is no wonder that no government ventured to address the issue of nuclear weapons for over twenty years.

Only in domestic courts were issues involving nuclear weapons ever raised. In the *Shinoda* case in Japan, a victim of the Hiroshima bombing demanded compensation from the Japanese government for starting the War in the Pacific which resulted in his disabilities. Mr. Shinoda received an apology and some compensation for his medical bills. In the U.S.A. and Britain anti-nuclear demonstrators tried, almost always at great personal risk and expense, and almost always fruitlessly, for thirty-five years to get international law, primarily on the Nuremberg trials, admitted in evidence in domestic courts in order to dramatize the idea that the weapons of mass destruction their national laws allowed was forbidden under international law.[9] But there was no reason to believe that the I.C.J. itself could or should be approached on the issue of nuclear weapons, and no government willing to try. Only after the demise of the U.S.S.R. and the failure of the vaunted U.S. "peace dividend" to materialize did neutral countries get around problems of standing[10] by seeking an I.C.J. advisory opinion through the General Assembly. So there is only one international decision on the legality of nuclear weapons, the *Legality of the Threat or Use of Nuclear Weapons,* requested in 1994 and pronounced on 8 July, 1996.

And so far, only one judge on the International Court of Justice, Justice Weeramantry, has adequately assessed the destructiveness of nuclear weapons.[11] Two others, Justices Shahabuddeen and Koroma,[12] also dissented from the majority view-- the nuclear weapons are not illegal-- but did so on less thoroughly expressed and analyzed grounds. Both agreed with Weeramantry that the I.C.J. had adequate grounds to decide the issue presented to it by the General Assembly, and that the I.C.J. should have held that nuclear weapons are now illegal under international law. The other eleven judges avoided offending the U.S., Russia, France, China, and U.K. by giving mere lip service to the facts of nuclear weapons, ignoring most of the evidence the dissenters discussed,[13] indulging in overgeneralizations, and using logical fallacies[14] to escape the conclusion that nuclear weapons are illegal. The eleven probably believed they were taking the only viable course for the Court;[15] if they had ruled that the most powerful governments on earth kept their weapons illegally, the Court could not expect more obedience than it received from the U.S. in the Nicaragua case and would only succeed in being itself discredited. But the politic decision was true to neither the law nor the facts.

The majority claimed that both the practice and principle of customary law is determined by the actions of 5 nuclear weapons states-- 2.7% of the membership of the UN, not by the 97.3% who are merely "subject to perverse and unremitting nuclear blackmail."[16] A much greater percentage of states in the Twentieth Century have had leaders who committed genocide, but that does not mean that genocide is approved by customary law. By the majority's standard, because more than 2.7% of most populations have criminal records, crime itself could be proclaimed to be approved by customary law. The only means by which customary law could be formed by such a standard would be if the world were perfect and had no need of law; in short, the majority defines customary law so that it is an effective non-entity in the case. The category of customary law is treated as though it can contain members in some portions of the text-- those that the standards of customary law are not met-- while it is treated as if it can not have members in others-- those that define the standards. "Customary law" is thus a subject of equivocation.[17]

Physicists generally hold that any country that has a nuclear power reactor has 90% of what it needs to produce a nuclear bomb-- which is the plutonium waste from the reactor. Forty-one countries either have nuclear power reactors or facilities for plutonium processing, uranium enrichment, or weapons production, research, or storage; even more have research reactors.[18] The fact that, by the time of the decision, only five of those 41 nations went the other 10% of the way to produce nuclear weapons, argues that creation and maintenance of nuclear weapons cannot be an international norm.

Article 51 of the Vienna Convention states that "A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."[19] By 1982 the Brookings Institution had already confirmed 36 cases in which the U.S. government had successfully used the threat of nuclear weapons in order to obtain specific goals. Each of the concessions the U.S. obtained by this means should have been ruled illegal, but the majority simply ignored the evidence and the issues it creates.

In a broader sense, rather than being content with the circular argument that because some states have nuclear weapons, it must be state practice under customary law, the Court could have analyzed state practice in the light of the *concepts* of duress in Article 51 and fraud in Article 49. The U.S. *began* its development of nuclear weapons under duress, but that duress terminated upon its capture of the team of Nazi physicists,[20] and for the subsequent 53 years, the U.S. has taken the initiative in the "arms race"[21] at every step. Certainly the U.S.S.R. developed nuclear weapons under duress; the Soviet government was acutely aware of McCarthyism in the late 1940's, knew that the U.S. had plans to bomb the U.S.S.R. by 1950, and was continuously conscious of overt and covert U.S. threats and plans for war. Certainly China developed nuclear weapons under duress-- the U.S. had threatened to use nuclear weapons against it as early as 1952 if it continued to assist North Korea, and by 1969 the U.S.S.R. was threatening it also. Britain and France argued that their nuclear weapons were a response to Soviet weapons, but besides that duress there was a strong element of national pride and competition for power in NATO. The only state for which it is certain that the practice of manufacturing nuclear weapons was not primarily a matter of duress is the U.S.A.. For the U.S. the primary issue should not be the legality of nuclear weapons, but the identification of the individuals who have clearly committed the crimes against peace which have had the effect of putting other nations under duress. Hence the actions of the 2.7% of states which the majority of the I.C.J. claims constitute customary international law's approval of the creation, maintenance, threat, and actual and potential use of nuclear weapons breaks down into those actions which may be invalid because of duress and others which constitute crimes against peace under the definitions of the Nuremberg Trials. Therefore those actions cannot constitute valid customary international law.

But it is not enlightening to discuss the *Nuclear Weapons Case* in detail for two reasons. The first is merely practical. Until the pleadings are published, no one can improve upon Justice Weeramantry's extraordinarily good dissent. When the pleadings are published, comprehensive analyses of the decision will begin to appear, and the consequences of the decision (or the lack of decision) will become more obvious in the form of continued nuclear proliferation if not nuclear war. World public and judicial opinion will shift toward Weeramantry's view in the same way that, from 1949 to 1990, opinion shifted against South Africa in the *South-West Africa Case*.[22] The role of the I.C.J. will not be identical because the legal crisis of the *South-West Africa Case* resulted from a decision by the Security Council, but in the *Nuclear Weapons Case* all the permanent members of the Security Council are the prime offenders, not just the U.S., as in the *Nicaragua Case*.[23] So not only is the necessary

material lacking for an exact analysis of the Nuclear Weapons Case, but there is no real prospect for change because of merely *legal* analysis of the opinion.

The conclusion that legal analysis cannot change anything in this case blends into the second, and essential reason for not allowing the I.C.J. case to divert attention from the underlying problems of the right to live and nuclear weapons. That reason is this: the I.C.J. decision was a foregone conclusion. And that is the reason this paper brings in philosophical and social scientific material.

Any observer of the UN and I.C.J. knew that the Court would not declare nuclear weapons illegal. The court dodged the question the General Assembly had actually asked it, namely, "Is the threat or use of nuclear weapons under any circumstance permitted under international law?"[24] The vote on the question was seven "no's" and six "yes's" until the President, Bedjaoui, decided to caste his negative vote, so that the answer to the General Assembly's question reads (italics added),

> It follows from the above-mentioned requirements[25] that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable to armed conflict, and in particular the principles and rules of humanitarian law;
> However, in view of the current state of international law, and of the elements of fact at its disposal, *the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence,* in which the very survival of a State would be at stake.[26]

But this pretends blithe ignorance of the fact that everybody knows: every nuclear weapon state has always claimed that the reason it must have nuclear weapons is because its very survival is at stake in world in which other states have nuclear weapons. The theory of deterrence itself-- from James Brodie's initial formulation of it in 1946 in order to combat Einstein and Russell's insistence that nuclear weapons made world government necessary-- claimed that nuclear weapons could create peace *because* they threatened the very survival of the opposing state. The notion that the weapons might be legal if survival is at stake creates the purest of self-contradictions: two states each have them *in order* to threaten each other's very survival, which is an *aggressive* intention, and this is supposedly justified because on the grounds that it is a *defensive need* because the other side is aggressive! So it is really a petitio principii, but with a pair of premises instead of one.[27] Is this supposed to be what we've learned since 12 July, 1945? James Brodie wrote in his original paper that deterrence was not likely to be successful for more than 40 years. So Brodie himself, whose theory the Court is still justifying, thought we were likely to get blown up before now by following his instructions. The Court's "solution" is the only the original problem. It's not even disguised.

The majority opinion is not worth taking seriously.

So I will go behind it.[28]

All the elements of the Nuclear Weapons Case have for many years been visible to anyone with enough curiosity. In 1990, Robert B. Rosenstock[29] stated for the Bush Administration that the United States recognized in international law no right to life applicable to the question of the legality of nuclear weapons. The U.S.A. had not yet ratified the International Covenant for Civil and Political Rights;[30] the U.S. claimed it could not recognize self-executing treaties;[31] and even if the U.S.A. did sign and ratify the ICCPR, Article 6 would apply only to capital punishment, not to issues of weapons of mass destruction.[32] Rosenstock's general attitude toward the ICCPR was contemptuous; he thought arguments relying upon it were silly. What he did take seriously was a pronouncement of the U.S. Supreme Court that international law recognized no right to life, which he read without citation. I knew the case. It was only in the following discussion that he was forced to admit

that the pronouncement was made in 1826 in the case of The Antelope,[33] a slave ship captured off the U.S. coast. Mr. Rosenstock believed the 164 year old dicta remained valid law although slavery had been illegal in the U.S.A. for 128 years, and in Britain for 181 years. He claimed he could see no connection between the fact that the lives the U.S. Supreme Court was discussing were the lives of slaves and the fact that its dicta could find no support for the right to life in international law. He said he was astonished at the thought that anyone could find such a connection. This in turn astonished me. If the lawyer responsible for interpreting such law for the U.S. government's UN mission can sincerely[34] believe that there was no relationship between the fact that the lives at stake were the lives of slaves[35] and the Court's ability to claim that international law gave their lives no protection, then the deficiencies of international law and international lawyers for coping with 20th Century problems are so profound that the issue of the right to life has to be discussed in a much broader context than legal thinking usually allows. Immediate legal solutions are impossible. The law has rigor mortis, so the problem of the right to life under international law must be approached first as a problem of social and intellectual history.

Mr. Rosenstock's sincerity, of course, is open to question. John Kenneth Galbraith argued that the greatest reason executive salaries are so high in the United States is that there is such an enormous sacrifice of personal mental freedom in occupations requiring that one speak for a large organization.[36] All the Reagan and Bush Administration officials I heard in person speak on international human rights issues spoke with similar contempt for substantive human rights whenever there was any implication that some constraints on U.S. policies might be appropriate. Abraham Sofaer turned the U.N. Charter upside down to argue that there was a right of preemptive attack when U.S. interests are at stake.[37] Myers MacDougal argued that the U.S. had violated none of the rights of Nicaragua or its citizens.[38] Administration officials and "think tank" analysts operating on government funds solidly for twelve years that nuclear war was both "winnable"[39] and perfectly legal[40] -- even that it was entirely moral under the Scholastic doctrine of the Just War.[41]

Mr. Rosenstock's position was mild in the midst of the company he keeps.

II. The Rationale for this Paper's Methodology

According to the ICJ, international law contains no right to life unequivocally applicable to the capacity of five powerful governments to end all life on earth. I want to know, "Why not?" I happen to believe that Justice Weeramantry has proven the majority wrong, but that is beside the point: the majority's decision is the law, and Weeramantry's is not. The majority scanned the index of available law, examining treaties, customary law, the UN Charter, humanitarian law, human rights law, and claimed nothing made the threat and use of nuclear weapons illegal. I disagree; I believe customary law would have been adequate, but, more importantly, that a right to live is assumed by *all* law. Because the authorities claim this is not so, I am driven to examine the underlying meanings and situations of law which seem to determine their conclusion.

The result is the very opposite of Kelsen's positivism, which assumes that law can be purified of extraneous and accidental elements. In this limiting case of the right to live (in a world with nuclear weapons) the law has no purity at all and the texts of the relevant laws do more to conceal the determinants of the legal outcomes than to reveal them. We cannot understand why the right to live is unprotected in the face of the greatest possible threat to it without understanding the forces acting *on* the law itself. In this I share assumptions of Jeremy Bentham, John Stuart Mill, Upendra Baxi, some American Realists, the Scandanavian Realists, some Marxists, and some of the Critical Legal Studies Movement. To this end I have assumed that anything that is known about human beings may be relevant to understanding

this lacuna in the law, and I have done all in my ability to bring various branches of social science to bear on the issue. This is primarily a study in sociological jurisprudence.

III. The Missing Right to Live

This first step is clarifying the novelty of the character of the right to live which is at stake in the issue of nuclear weapons. I use the infinite form "to live" because the right is a right to continue an *activity*, which is expressed by the verb form.[42] The conventional right "to life" appears to express a right to a *possession*. Life is not a possession, for if it is lost, there is no one to possess it, or to experience the lack of possession. The reification embodied in the legal term is typical of legal terminology because the law has been invented primarily to protect property. The disastrous stupidity into which the legal preoccupation with property (founded, as it is, on the denial of substantial equality) has led us becomes increasingly apparent in the law's inability to deal with the most essential issues.

The right to live is a right more basic than any explicitly enunciated in any legal regime because legal regimes were not designed to face the sort of challenge that nuclear weapons present. No such challenge existed when the UN Charter was signed on 26 June, 1945, though U.S. President Harry Truman was concealing his knowledge[43] that sixteen days later, on 12 July, the challenge would present itself. Physicists understood that the bomb "changed everything," but politicians, lawyers, and the general public did not. The general public, however, has shown signs of awakening because of the continuous prodding of the scientists, beginning with Russell and Einstein. But the consequences for the world as a whole, of which the nature of law is but a small part, are only beginning to be understood.

The closest available concept to the right to live is the right to life enunciated in Article 6 of the International Covenant of Civil and Political Rights, (the prime member of the "first generation" of human rights documents), Article 21 of the Constitution of India, and Amendment 5 of the U.S. Constitution, but all such rights are directed only against the powers of governments visa-vie individuals within state territory, and they were conceptualized originally only as protections against governmental abuse of the powers of criminal law. The right to live, however, is a right that must hold for large groups and even all of humanity, and which is not directly related to criminal procedure. The problem is that in 1945 the United States invented a new abuse of state power, because nuclear weapons are not directed against individuals, but potentially against everyone, and not against people who might be guilty of something, but against people for whom the issue of innocence and guilt has not arisen. Nuclear weapons are ostensively directed against "enemies," but they are so powerful that their actual effect is to make *everyone* "the enemy." The "second generation" International Covenant of Economic, Social, and Cultural Rights promised to protect more substantial rights, that is, protection from injuries for which governments themselves were not clearly responsible, but in its shift of focus away from governmentally-caused injuries, it neglected to protect people from the newly invented injuries of governments. In the "third generation" human rights treaties on the right to development and protection of the environment, the same oversight was made a third time.

In order to be effectively protected, the right to live should include the following rights, now unprotected:

1) The right of citizens of neutral states not to be injured by massive deadly effects from other states' wars;

2) The right of citizens to have governments which do not provoke wars;

3) The right of citizens not to be taxed in order to build up stockpiles of weapons which can have no effect other than to jeopardize or terminate all life on earth, for no one should be required to participate in his or her own destruction, or to expend labor in order to participate in the destruction of the world;

4) The right of persons not to be compelled by second persons (including government officials) to kill third persons, which right follows from the duty to respect third persons' right to live;

5) The right of future generations to inherit an earth free of insane destructiveness having no relationship to them, and the right of present generations to realistically expect that there is a future to build for; and

6) The right of persons to a superordinate world government with sufficient powers of legislation, adjudication, and enforcement to guarantee the elimination of weapons of mass and random destruction.

Arguing that the right to live cannot be secured without guaranteeing at least these six subordinate rights is beyond the scope of this paper. First, in Part IV, I will analyze the implicit structure of the right to live itself. Part V describes the classic situation of legal discourse which differentiates it from philosophical and scientific discourse. Part VI shows the change in the ontological status of life which requires an improved understanding of the character of the right to live. Part VII discuss seven reasons and circumstances that have prevented the right to live, necessary as it is, from finding any place in law. Consequences of the right to live await another paper.

IV. The Implicit Structure of the Right to Live, and the Oddity of Debating Whether Such a Right Exists

It is absurd to have to argue that a right to live exists.[44] The case for such a right can only require argument because someone finds it plausible that the right does *not* exist.[45] One can only argue consistently that someone *else* lacks the right to live; no one can generalize the negative argument to include him- or herself. So the argument that there is no right to live is *patent hypocrisy.*[46] This should be obvious to everyone. It isn't. Jurists, unlike normal people, do not think it obvious. Why?

The absurdity of the argument is not accidental. It pops up whenever one examines the logical status-- as well as the related practical uses-- of the international law of human rights.

Consider a jurist arguing that there is no right to live. Could he (probably *not* she) seriously believe he is making a general proposition-- that he is asserting that no person, including himself, has the right to live? If we believe he is sane, we would ordinarily assume he is simply excluding himself: he really means, "The defendant has no right to live," not "None of us have the right to live." And we would be correct. But if we assume the lawyer to be merely a hypocrite, we will misunderstand history. And we will fail to understand why lawyers make such strange arguments as if they were serious.

Considering the absurdity of two other hypotheticals will amplify the consequences of claiming there is no right to live. First, try a dialogical reduction to absurdity. Imagine that the denier of the right to live convinces its original affirmer that there is no such right. If there is no right to live, why shouldn't the ex-affirmer simply kill the denier and save his own neck?

And he might as well kill anyone. He has nothing to lose. Surely the denier of the right to live doesn't want to deal with this alternative. This shows that the denier of the right is actually relying on differential power: he is tacitly in control of the affirmer of the right. And that is why he isn't thinking seriously about whether there is actually a general right to live or not.

This sort of discourse is allowed in the law because it is inherent in the classical situation in which legal talk exists: two lawyers, both largely exempt from consequences, discuss the rights and duties of vulnerable individuals before a judge who has nearly total power within the small sphere of the case as it falls within his jurisdiction. This situation cripples any attempts of legal discourse to reach general truths; the basic facts of authority imply long trains of foregone conclusions. (In fact, it is exactly the assessment of these foregone conclusions that lawyers count as the legal knowledge they have the right to sell. Lawyers and jurists are so accustomed to this situation that they rarely notice that they are not really talking about general rights and duties, but only about the rights and duties of groups circumscribed in more dimensions than they normally need to count-- because the only situations in which their professional expertise counts are those that involve facing "The Law." Consequently lawyers ignore philosophers[47] and philosophers ignore lawyers.[48]

The conclusion from the first hypothetical is this: *if there isn't any right to live, there is no rule of law* at all, but absolute anarchy. Hence it is obviously preferable to believe there is a right to live, even for the person who believes he is so safely ensconced in the good graces of Authority that he believes he can proclaim with impunity that others have no right to live. The belief that there is a right to live promotes the Rule of Law even if it doesn't perfectly please all rulers.

For a second hypothetical series, consider these forms of denying the right to live: A) A woman wants a divorce. Her husband kills her, a permissible act. Consequence: she cannot enforce right to divorce. B) A student protests a war. A soldier shoots him, a permissible act. The student cannot enforce his right to petition the government. C) A newspaper boy rings Jeffrey Dommer's doorbell to ask for his weekly payment, but is dismembered. The boy loses his contractual rights. *If there is no right to live, there are no rights at all.*

Very odd. *Patent hypocrisy, no rule of law, no rights,* but still the argument goes on. Why? What does it mean? How can lawyers be so different from ordinary people? Why don't such obvious and fundamental implications make a dent in the law? Do lawyers really speak a completely different language from other people? (They're not supposed to; they have a plain meaning rule.) Are they then somehow exempt from logic, not to mention humanity?

V. The Situation Assumed by Legal Discourse is One of Differential Power.

Are legal professionals serious when they debate a question such as whether a right to live exists? In order for the people affirming the right to live to be serious, they have to be able to believe that the one denying it somehow is. So the one we have to examine is the one who makes of show of arguing seriously that there isn't a right to live.

Let us imagine that the man who says there is no right to live is serious: he does not believe there is a right to live, does not believe he has a right to live himself, does not believe anyone who can come before the court could have such a right. What could he mean? That the judge has the right to have anyone executed? In that case he would be asserting that the law has no need to be reasonable; he would be asserting, in effect, that *it is not law at all*, but merely arbitrary naked force. How could someone make such an assertion about law? *Because of the tradition that the law is supposed to represent the will of Sovereign Power.*

Monarchs did not wish to lose absolute power; they wanted to have absolute latitude to dispose of anyone in any way they chose. This freedom of theirs redounded to their glory and was *their right*.

That is, the reason lawyers and jurists find it plausible to argue that there is a right to live is because they find it *possible* that there is *no* general right to live, and the reason they find that possible is because the right to live is in strict competition with the sovereign right of a monarch to do absolutely anything to anyone on the basis of the myth that he personally represents the state[49] and that the state, in turn, must have no limitations placed on its prerogatives because *that* makes it subordinate to something else-- such as reason, law, natural law, humanity, or some international power. All of these possibly constraining powers, ideas, or bogeymen, are treated as if they were *stand-ins* for a *superior* sovereign power, i.e., at the time, *another state*. This happened, historically, because the doctrine of the absolute sovereignty of the monarch arose at a time when nations were very easily swallowed up by other nations: the king had to assert over and over again that he was not really a mere Earl or Duke, a vassal to someone else, but that he possessed the sovereign right to rule-- on pain of losing it. This was the doctrine. A very important doctrine, of course, and a bone of snarling contention, precisely *because* it was obviously false and arbitrary, and therefore had to be treated as though it were very serious.

The reality was different. Possessors of absolute sovereignty were generally people who never had to grow up. No one had the authority to convincingly confront them with their childishness: everyone except the monarch's father was his (rarely her) subject, and his subjects were the state's, and hence his (rarely her) possessions-- in effect, his slaves. One's social inferiors are poor proxies for reality, and only intimacy with reality compels one to grow up, a task involving some unpleasantness. This phenomenon is closer to home than monarchs: even the majority of inheritors of a mere million dollars can be seen to remain childish for this reason.[50] But, because lawyers and jurists make their living by staying on the right side of higher authorities, a large contingent of them are willing to let us all go on paying forever for the childish egocentricity of rulers.

Slavery and serfdom lasted so long[51] because they were only intensifications of the universally accepted condition of being the subject of a state. International law coalesced in 1648 in the Treaty of Westphalia, before the idea of natural law had taken on the sense of natural rights. Grotius, who made international law a comprehensible idea, held that there was no degree of injustice which could give citizens the right to repudiate a sovereign. To be the subject of a state in 1648 was therefore the same as being the permanent property of the monarch because the sovereign was held to own the state. It was not regarded as odd to own a person. In 1648 slavery was a perfectly acceptable and generally flattering idea to everyone except slaves-- and even some slaves, presumably in the bilious cause of self-hatred, held slavery to be proper. Grotius, like Aristotle, justified slavery, as did Puffendorf and Suarez-- which is why when their works are reprinted the sections on slavery are so delicately omitted, so that the pockmarks in their thinking should not disabuse our impressionable minds of the grandeur of international law. The first person to campaign against slavery in the British Colonies in America was the Quaker John Woolman, and he began his campaign a century after Westphalia, in 1746. When slave ships like the Antelope and Amistead were captured in the 1820's, the U.S. Supreme Court could find no objection to slavery in international law and hence thought itself bound to honor the right of one man to own another even when it 1) did not know who the owner was; 2) could not distinguish the original entitlement to ownership from assault and battery, kidnapping, and false imprisonment; 3) declined to refer to the law of the land where the abductions took place; 4) could not simultaneously cope with the notion that a person could own a person, the one over whom another claimed ownership might himself claim the right to own himself, and 5) could not explain why if ownership rights had

to be respected above all else, a slave had no ownership rights requiring respect. Logic has never been the law's strong point.[52]

That is no accident either. Law, historically was not supposed to be *logical,* though a dull and general *reasonableness* slowly came to be demanded of it as the liberal state encroached on monarchs. Reasonableness is really a demand for practicality; logic is a demand for the *validity* of the relationships of statements to each other. The demand for *logic* would severely restrict a monarch's (or his representative's) freedom of action by restraining him when he wished to contradict himself. Though the constraints of logic might bolster a government's claim to operate under the rule of law-- and improve the government-- they would prevent rulers and other officials from doing what they choose without explanation, and would render publicly visible people more vulnerable to embarrassment, which would be a serious injury to statesmanship. Consequently law colleges offer no course in logic even though every legal argument necessarily *uses* logic (though usually haphazardly, and often unconsciously.) One would think that the necessity for the use of logic would result in the desire to make logic careful, explicit and conscious, but a general administrative fear, steeped in the habits of sovereign monarchs, holds that sharp consciousness of logic might interfere with the proper lawyerly attitude toward Authority.

VI. The Change in the Ontological Status of Life and its Implications for Law

A) Before 12 July, 1945, the duration of human life was primarily the result of natural phenomena. Whenever its shortening was believed to be a result of human action, that action automatically became a moral and legal issue. At some time in the 1960's, but in any case between 1945 and 1982, when it became certain that the sort of war the U.S. and U.S.S.R. had prepared themselves for would result in nuclear winter, *the duration of life has become primarily a result of human action*, for all human life now depends upon continually renewed decisions not to launch nuclear weapons.

Although, under the rule of law, an individual death as the result of human agency is automatically a crime and a tort, the I.C.J. has just ruled that the law has nothing to say about the legality of creating and maintaining the ability to cause the death of *every* human being. Is this the rule of law?[53]

B) Before 1945 mortality was primarily an individual phenomenon, secondarily a group phenomenon, but not at all a species-wide phenomenon. *Now mortality is primarily species-wide, secondarily individual, and thirdly a group phenomenon.*

The I.C.J., nevertheless, has just ruled that the international laws which forbid the mass destruction of groups (genocide) do not forbid the maintenance of the situation is known to be capable of resulting in the destruction not only of *one* group, but of *all* groups, i.e., universal genocide.

C) Before 1945 it was normal and sensible to believe that some acts one performed in one's life would have some effect after one's death, and so could live consistently planning for one's descendants' future. Some Native American groups had a rule in tribal councils never to take an action without discussing of its effect on the seventh generation. No human beings are ever again likely to feel such confidence in the future. At present it is not possible to know whether we will ever have reason to sure any future will arrive. *The telos of human life is destroyed.*

These three changes in the status of life are ontological changes; they are fundamental alterations in the meaning and character of human existence.

If international law actually existed, it would clearly be its duty to restore as much as possible of the former normal status of human life upon which law was predicated.

A) The use of human agency to cause death is immoral and a crime. It does not become more moral or less criminal when its magnitude grows.

B) It is every human's natural burden to have to face one's own natural death. The law has been designed to relieve people as much as possible of the burden of having to face also the death of those who carry the memories and effects of one's actions, let alone the death of the civilization which is the condition for the law itself.

C) Article 26 of The Vienna Convention states that the basis of International Law is "Pacta sunt Servanda." The notion that promises are to be served relies on a prior notion that there is a future and that human actions are oriented toward the future. The first obligation of the law is to restore the promise of the future.

In the previous sections I have pursued the implications of the fact that everything so obviously stands to benefit from the notion that rights exist (and that, in particular, the right to live exists as a necessary foundation for all other rights), that it is absurd to dispute the right to live and think one is still having a serious discussion. If that is so, does this mean that lawyers are frivolous? No. It means something much worse.

Is the threat to the right to live genuine? Yes. Where does it come from? Governments. (First and foremost the United States of America, but secondarily the fragments of the USSR, plus Britain, France, China, perhaps South Africa at one time, Israel unofficially, and now even Pakistan and India.) The State, as all legal and political theorists have agreed since Hans Kelsen made it the centerpiece of his thinking, is a monopoly of force. When weapons of mass destruction became available, governments with the ability monopolized them-- and were eager to have them, reveled in them. There is now an extremely smooth, almost continuous, series of levels of force, from the lathi to the twenty megaton hydrogen bomb,[54] available to States that have Money.[55] There are chemical, bacteriological, and nuclear weapons of mass destruction. Those who wield state power do not want the prerogative to create, maintain, threaten to use, and actually use these weapons jeopardized. (In fact, most of them probably regard the ability to threaten mass destruction as more politically effective than the ability to carry out the act.[56])

Consequently every human being on earth is condemned to a new sort of universal slavery. We are slaves and hostages to terror (as well as to wages, most of us.) We all have to go to sleep every night not knowing if we will wake up in Nuclear Winter, or wake up burning, or breathing superheated radioactive air, or anthrax, or nerve gas-- or simply not wake up-- or wake up to find all our friends and relatives dead or dying in agony-- or not wake up having gone to sleep with the awareness unique to the last fifty years that not waking up might mean not only that we have died, but that everything has, and that anything we have ever done with the future in mind has had its effects obliterated for eternity. This, according to the general consensus of governments of the powerful countries, is not supposed to count as an injury or constraint to us.

It is not even supposed to count as an injury to us if we are commanded to spend money we have earned by our labor in order to produce this effect: when we pay taxes we are consenting to forge our own chains, and those of everyone else. In the United States we are even told we do this voluntarily[57] though 95% of us have taxes deducted by our employers before we ever see our checks. So our slavery will not be visible in any way. It is not

possible to complain of the lack of freedom we believe we have. We are told we have democracy: how can we complain?[58] This, for that matter, is generally the function of democratic ideology in the USA which, because of the general denial of referenda, multiparty coalitions, and weighted voting, has only vestiges of democracy even at the local level, functions with a continuously shrinking degree of republicanism up to the House of Representatives, but is wholly plutocratic in the Senate, and is an unaffectable imperial bureaucracy in the executive branch, which controls all foreign relations, and in the Federal Reserve Bank, in the government's fifty-seven investigative agencies, and in the military, a totally closed book. Public schools spread the myth of democracy in order to make children complacent-- i.e., "proud" of their country, and afraid to think about it or attempt to act on it. "Democracy" in the U.S. manages to go hand in hand with "You can't fight city hall" because both ideas are forcefully and repetitively conveyed to children well before the age of fifteen.[59]

The same lawyer who will argue with passionate conviction that contract law gives one the right to the fulfillment of one's bargained-for expectations and that the modern polity is based on a social contract will be draw a blank if asked, "Does that mean that because the social contract was somehow bargained for, that all citizens have a right to the fulfillment of their expectation that, even if they don't know what the future holds, there at least *is* a future? If I have a right to a $30,000 house if I pay $30,000, is that right satisfied by guaranteed access to the house standing upright on the land I bought it on, or will dubious access to a pile of radioactive rubble also satisfy my bargained-for expectation?"

The question of the right to live is a wild card, the joker that can show up in any hand. All other rights depend upon it. The rule of law depends upon it. All life now depends upon it. In a sense which is fundamental to legal thinking-- because legal thinking continually depends on the relation between expectation and outcome-- *we no longer live in a natural world*. The existence of the human future is now a human, not a natural product.

VII. Seven Circumstances and Types of Reasons that Prevent the Law From Recognizing the Change in the Ontological Status of Life which Requires Formalization of the Right to Live

Weapons of mass destruction have changed the ontological status of life on earth.[60] There are 1) philosophical, 2) logical, and 3) epistemological reasons, and 4) political-economic, 5) social, 6) psychological, and 7) legal institutional circumstances that prevent the international law of human rights from beginning to cope with the fact that the mortality of the human species is no longer a natural phenomenon.

A) The Philosophical Assumptions of the Law are Derived from an Arbitrary Metaphysics which Only Survived History because of its Appeal to Power.

Lawyers believe law does not have philosophical bases. This is false. It has multiple and conflicting philosophical bases[61] that underlie it like shifting tectonic plates supporting different geological strata. Most U.S. lawyers maintain the view that law does not have a philosophical basis because they are unexposed to philosophy. The single optional course in jurisprudence in most law schools does not begin to be sufficient to demonstrate that philosophical beliefs and methods have any actual effect on legal thinking and behavior. Consequently most lawyers regard philosophy as an antiquated and oddball activity ranging between a silly pastime and an obscurantist interference with their work. The idea that they, like everyone else, *use* philosophical assumptions and methods is irrelevant to them: they think it *unpragmatic*. And impolitic: the judge will not be interested. Jurists assume "ontology" is an infinitely and trivially debatable metaphysical word they don't need to know. Therefore the law grinds on out of touch with reality.

For the most part,[62] the assumptions of Plato and Aristotle still dominate jurisprudential thought; the Aristotelian conception of definition by genus and differentia has absolute command in questions de jure, while the inductive logic developed by Mill has made only the smallest inroads into some discussions of factual questions. Plato and Aristotle[63] were essentialists; they believed that the world consisted of substances which were to be known by definition, e.g., that the only important question to ask about anything was *what it was*. Physical science began to advance only when it began to ask instead *how things behave*, but social thought remained frozen in place by essentialist assumptions until the Twentieth Century. Jurisprudential thought lagged behind changes in philosophy and social thought,[64] and the actual thinking of lawyers has lagged behind jurisprudential thought. Social thought in the West made no advance until it was taken up by people who had no youthful commitment to Plato and Aristotle.

Plato and Aristotle had committed philosophy to the need either to dominate society or to escape from it, and hence made no serious effort to understand it. They wanted to view society only from the top down because the thought of empathy with the weak terrified them.[65] Much has been made of opposition between philosophy and the state, but the struggle arose because Plato and Aristotle took the position that if they could not dominate Athens, they would leave to dominate some other place, such as Sicily, or would conquer the rest of the world, if they could find a source of barbarian troops, such as the Macedonians. Plato and Aristotle advertised this struggle as one between purity and vain desire, rationality and irrationality. But it arose from a failure to understand other people deeply; the barrier to deep understanding was their inability to empathize with women. Because they couldn't understand women, they couldn't comprehend the basis of psychological life, which is the formation of personality in the interaction between mother and child.[66]

They used homosexuality to bond and rank men.[67] They advertised it by claiming it made men fierce in battle, which was true. But its source lay in the fact that in their childhood their fathers had denied them all affection and later grudgingly accepted them only, on pain of humiliation, they sacrificed all evidence of their ties to their mothers-- their warmth, sensitivity, receptiveness, kindness, imitativeness, and impressionability. Because they feared the reemergence of their dependent childhood personalities, they feared women, and, to conquer their fear, scorned women and denied them any honest expression of feeling. They were imperialists because they could not respect women enough to be able to love them or learn from them, and so were continually discontented at home. They were full of rage because of their fathers' callousness. They were given to secret esoteric doctrines because they were aristocrats accustomed to excluding slaves, commoners, foreigners, women, and children, because they had homosexual secrets, and because they wanted to be able to control public events by manipulating them through secret societies. They needed to believe in their superiority because interactions with women made them vulnerable to shame.

The historical dominance of the philosophies of Plato and Aristotle has been based on three main factors. First, they contemptuously destroyed the works of their competitors. Second, they offered a doctrine which gave the illusion of omniscience, and this justified aristocratic rule. Third, they offered a method by which the ignorant could control the knowledgeable-- the dialectical art of question and answer, whereby the one who purports to be ignorant and questions can dominate the one who purports to know by eliciting contradictions in his testimony. This art is necessary to the administration of conquered territories, for the administrator never knows as much as the native. Much healthier strains of Greek and Roman philosophy, such as the Stoics and Epicureans, were overlooked not because they lacked incisiveness or profundity, but because they were more egalitarian and

hence less useful for focusing the children of the rich and ambitious on the task of ruling the world.

The church hierarchy in which Aquinas thrived forbad marriage because priests and monks were more easily controlled from above if women and children could not compete for their allegiance. By reducing Platonic dialectics to the question and answer format of the liturgy, (with the congregation asking the questions and the clergy answering) Aquinas tamed dialectics in the interest of church stability; he intended, after all, to set up a thousand year Reich, which was to last until the Second Coming. Aquinas no longer needed the dynamic of dialectic because in order to make its conditioned power secure, the church had given up most of its claim to condign power. Monarchs at the time were not fascinated with the art of questioning because Europe was not yet expansive, so they could rule by simple command. Therefore all that was needed for the church was a way to bewilder the ignorant with the pretense of virtual omniscience, and a liturgical Aristotelianism with the top of its intellectual tent appearing to be hung from the heavens admirably suited the church's purposes. Aquinas' practical purpose, after all, was to train the clergy in sufficient worldly knowledge for them to impress the worldly children of monarchs and aristocrats, so that those with condign power would continue to give obeisance to the conditioned power of the church, thereby securing the church's basis in economic and political power. A closed system was better for this than an open one, so Aquinas mummified his predecessors, thereby preserving their intellectual corpus (or corpses) for us.

The Renaissance attempted to bring the corpses back to life because the increase in European trade renewed the need to learn to dominate people with superior knowledge, which can only be done by putting them on the defensive through questioning. Aquinas was adequate for conquistadors who wanted only to murder and rob in the name of God, but colonial administrators and entrepreneurs needed training in something more dynamic and practical, and so renewed interest in Aquinas' sources. But colonialism itself would never have required any advance over Aristotle, who was, after all, the teacher of the single most expansive imperialist until 1500-- Alexander. It was only the growth of technology that required a more honest method of thinking. The first certain fruit of this was Newton's, and social thinking began to change with Rousseau, Voltaire, Godwin, Bentham, and Mill, but Kant and Hegel and their successors could not free themselves. It was not until the subject-predicate logic of Aristotle and the arbitrary assumptions of Euclid were overthrown by mathematicians and logicians between 1850 and 1900 that relativity and quantum theory became possible.

Social thought, however, has been much more difficult to extricate from the Greek mode of categorical thinking. Although part of the reason for this was purely conceptual-- that semiotics, systems theory, and relational forms of thought have taken several generations to begin to filter down from theory to applications-- a greater difficulty has been emotional and social. In their aristocratic obsession with dominance, Plato and Aristotle were trapped on the surface of their skins, refusing themselves access to inner experience, and therefore to empathic understanding, and they therefore appeal to the pre-pubescent modes of experiencing the world which appeal to the powerful, most of whom cling to the view of the world they form in the womanless environment of competitive sports.

Human beings cannot be comprehended without empathy, and the only means of securing one's access to empathy is through prolonged experience of love. The crisis of social thought is whether we will be able to unite new forms of thinking with empathic forms of perception which depend upon access to feeling. The obstacles to doing this are not purely intellectual in the traditional sense because the traditional sense of intellectuality has been covertly tied to the operation of conventional power: what is thought to be intelligent is what

facilitates domination, rather than what facilitates growth. A vital ethic of egalitarianism is necessary to resist the force of inherited and conventional substitution of stereotyping categories for the relational dynamic of actual interpersonal knowledge. New thinking on jurisprudence will only develop out of the practice of viewing law from the perspective of those who suffer it. .

B) **The Logic the Law Unconsciously Assumes to be Necessary has not Entered the Twentieth Century. Even the Logic the Law does Acknowledge it Uses Haphazardly.**

Logic has traditionally been excluded from legal study. One cause of this is that Plato portrayed Socrates confounding one sophist after another. The sophists were lawyers. When Aristotle condescended to discuss their problems, he assigned them to the Rhetoric. Rhetoric used emphymemes, not syllogisms, which were in the province of logicians. The Stoics analyzed logical fallacies, one of the greatest gifts to the intellectual and moral inheritance of the world, and their analysis survived the Middle Ages because the Schoolmen took them seriously. Because clerics controlled schools, all elite British schools taught the fallacies to British aristocrats. Since only aristocrats had any real chance of becoming barristers, the British legal establishment accepted at least that adjunct of logic as a matter of course. But canny U.S. lawyers gave up on the undistributed middle, the argumentum ad miseracordium, and the principio principii, because discussions of fallacies only made juries-- and often judges-- hate their high-flown snobbish talk. The German and French legal systems have somewhat more consciousness of logic because of the cultural regard for different forms of Transcendental Idealism, which holds mental phenomena to be more defining than fact. But no legal system has ever attempted to use the resources of modern symbolic logic. And the use of logic as a device for systematizing ideas has never gone beyond the Aristotelian creation of categories, upon which the tradition of making outlines is based. Lawyers know how to make outlines. But they do not make whole portions of the law depend logically upon other portions, which is what is demanded by the issue of whether there is a right to live.

The right to live is a fundamental right. The Indian Constitution, which was drafted in view of the Universal Declaration of Human Rights and the discussions of its descendant conventions, is clearer about this than U.S. or British law. But not clear enough. The right to live is *the most* fundamental right: all the other fundamental rights depend upon it more than it depends upon them. No law anywhere reflects this logical reality. Law does not yet recognize the reality of logic.

In what sense is logic real? This has been the subject of much of the debate of Twentieth Century philosophy, and it will continue to be a subject of debate because Godel's Proof, Russell's Theory of Types, and Wittgenstein's writings have exposed possibly permanent ambiguities in the theoretical status of the degree of certainty available to logic and mathematics. But the debate covers a much more profound agreement: no one is willing to give up on the idea that mathematics and logic express truths applicable to the world. That is what *drives* the debate; everyone is concerned to understand the exact dimensions of the anomalies in the basic principles of logic and mathematics because they need to know exactly what can be saved from their effect. Their concern would not exist except for a prior almost immeasurable conviction regarding the importance and truth of logic and mathematics. That conviction is certainly sufficient to bear any weight the law's need of logic could put on it.

In 1945 Bertrand Russell advocated world government and the abolition of nuclear weapons and persisted in the struggle, through numerous jailings, for the rest of his life. Like Einstein, who adopted a similar position, Russell was one of the few people who in 1945 clearly understood the magnitude of nuclear power. But he was also the world's foremost

logician. He could not be fooled by the magical verbal formulae of lawyers and politicians. He always knew what was at stake.

What is at stake is the universal right to life. There is nothing more important. Jurists, in their inveterate servile obedience to precedent and authority, do not know how to adjust to this truth, which has both logical and factual components. The logical component may be paraphrased this way: *If any right, x, exists, the right to live exists.* Debates about logical formulation may go on for some time, but that basic hypothetical assertion will not yield. If legal thinking can't accommodate itself to that, it will just have to grow up and learn to.

C) **Law is Preoccupied with a Primitive Epistemology**

Charles Saunders Peirce, the forerunner of pragmatism, described four means of fixing belief: tenacity, authority, reason, and scientific method. If I fix my belief by tenacity, I simply determine to believe what it pleases me to believe. I may like frightening superstitions, or occult prophecies, the belief that I am the most succinct of men, or that men are better than women. If I fix my believes by the method of authority, I believe what the King, the President, the Pope, my Cousin Vinny, or my gym coach says *because* he says it. This is the beginning of socialization; I at least acknowledge that other people's views are something to be dealt with, that they legitimately compete with my own. In this stage, which is that in which the law and military[68] are frozen, the stage of "Black Letter Law," I try to resolve the problems created by this competition by capitulating to superior force and lining up on its side: "I was wrong, that big man over there is right." In the third stage, that of reason, I reassert the value of my own mind, which no longer has the entirely willful character it had in the first stage of tenacity, because it has admitted society into it: this is the move of Galileo, Descartes, Voltaire, Rousseau, and Hume. I then insist on the right to debate. Anything I cannot be convinced of, I reject. This is the stage in which most sophisticated people now live much of their professional lives. Competent practicing lawyers operate in this mode, though they must continually adapt themselves to legal requirements fixed by the method of authority, and must often struggle with many real people who function dominantly in the earlier two modes-- criminals, most of whom favor tenacity, and bureaucrats, who love authority-- and the rest of us, who make skirmishes armed with all four methods during a day, choice of method depending on our metabolism, employers and bank accounts, our families, our primal fears, our love of knowledge and desire for competence.

The problem jurists have in coping with the right to live derives from their inability to manage the transition from the third to the fourth method of fixing belief. When I begin to accept scientific method, I concede again, but in a new sense, that I will not let my own mind be the final arbiter of truth for me. I will hold the beliefs I have arrived at through reason tentatively until I can test them, and I will allow any number of tests. Reality, which is to some extent a consensual construct, will be the arbiter of my beliefs. On any particular matter, I cannot make this offer of genuine interest in reality unless I have freed myself entirely from the constraints of tenacity and authority-- and every scientist, like the rest of us, though less so, maintains little mental hinterlands occupied by issues on which scientific thought is not possible either because some authority figure is still too imposing there or because a fixed idea is still held firmly in the grip of an unappeasable passion. I have to first possess my own capacity. As a social institution, *law does not yet have a firm grip on its capacity to reason because it is preoccupied with the problem of making the tenacious obey authority. Because it cannot freely follow its own reasoning processes, it cannot begin to cope with the problem of actually confronting reality.* Compared to the patterns of thinking and acting which have created technological society, legal thinking is retarded. Extremely few lawyers-- including environmental lawyers-- grasp the basics of the scientific method.

Lawyers' mistakes and misunderstandings of even simple arithmetic are so common that the New York Bar Association requires that if an examinee in the Bar Examination adds two digits together, each detail of the calculation must be written on the final draft of the examination paper. Scientific method, which depends upon facility in logic and mathematics, is therefore not available as a means of deciding legal issues. Legal attempts to use science in different ways always founder upon confusions created by the fact that the goals and criteria which jurists want science serve and observe are decided by more primitive means of fixing belief. Lawyers consistently misrepresent the assumptions of scientists and so misinterpret the meanings of both their agreements and disagreements. This makes lawyers mistrust scientists. The fault is almost entirely the lawyers'.[69]

D) **International Institutions, including Legal Ones, are Created and Restrained by the Interests of Plutocratic Politics**

Why are the rulers of nuclear states so eager to have grossly unnecessary force? They are accustomed to a state of international anarchy. As Garry Davis[70] accurately and persistently argues, the United Nations did not solve the problem of international anarchy; instead, it institutionalized it. The "United" Nations will not in fact unite because despite the arguments of World Federalists and other U.N. reformers, the leaders of neither the large nor the small nations could imagine accepting the terms that would follow from their differences in size. China, for instance, will not allow itself to be outvoted by Vanuatu and Western Samoa if voting power is not based on population. Nor should it. If voting power *is* based on population, the U.S.A. will never allow itself to be outvoted four times over by India, though it *should* if human life matters. The "United" Nations will not unite in fact unless the larger states break apart, as the U.S.S.R. did, and the smaller states create federations. But the driving force behind fragmentation of the U.S.S.R. came from outside: the U.S.A., with a long-term fineness of calculation, drove the U.S.S.R. into bankruptcy by the arms race, thereby undeniably-- and with choruses of stage-whispered gloating-- winning the Cold War.[71] Because there is no outside pressure for the most dominant state, the U.S.A., to break apart, there is no possibility now of creating the conditions under which less powerful states would sensibly agree to give up more sovereignty. This is what the government of the U.S.A. wants: to keep the UN frozen as it is so that it can continue to use it as its own instrument, primarily as the wrapper for the World Bank, the IMF, and the WTO, which dwarf the UN while appearing to the quantitatively naive world public to be inside it. Consequently the rulers of all nations are keenly aware that their states exist in military, political, economic, and sometimes ideological, competition with more powerful states, and that their ability to rule their citizens depends on their citizens' perception of the leaders' resistance of foreign domination. In this game the possession of insane force is at a premium. The U.S.A. could easily change the terms by reducing its forces in tandem[72] with those of states other than the U.S.S.R.'s successor states. But it vastly prefers its present course for the sake of the money in it.[73] But it isn't just a question of strengthening or reforming the UN, for the U.S. purpose in keeping the sphere of public international law weak has been to keep the sphere of private international law-- and U.S. law-- unfettered.

The United Nations is a weak organization because the U.S.A. has always wanted it to be weak.[74] U.S. leaders knew that at the end of World War II the U.S. would have 5% of the world's people, 50% of the wealth, and 70% of the industry, and that the relative power of the US could never again be as great.[75] U.S. leaders therefore wanted do all they could to freeze that superiority in place. U.S. and British bankers knew perfectly well that the two basic factors in the economic destabilization of Germany, and the consequent rise of Fascism, were the reparations provisions of the Treaty of Versailles and inflation caused by the banking practice of loaning out more money than is taken in. They believed they could avoid a

repetition of Versailles, but they were absolutely resolved not to give up the ability of banks, in effect, to mint money.[76] So they wanted international institutions which would keep control of money in the hands of bankers, which would allow bankers to adjust exchange rates intentionally and gradually, thereby avoiding sudden catastrophic inflation while keeping that level of inflation which allows banks to behave like vacuum cleaners for money. Their first concern was therefore to insulate economic decisions from popular knowledge and participation. For this they used the concept Alexander Hamilton institutionalized in the US Federal Reserve Bank: the "Fed" by law cannot be controlled by any act the President or Congress, thereby preventing politicians who want to help the poor from gaining the economic power to do it. U.S. and British bankers initiated the creation of the Bretton Woods Institutions[77] -- the World Bank,[78] the IMF,[79] GATT, and the concept of the WTO--before the UN because the bankers knew that if they formed the UN first, non-millionaries could have some effect on the ground rules of the Bretton Woods Institutions.

The Bretton Woods Institutions are said to exist "under the auspices" of the UN, but this pretense is silly: they control hundreds of times as much money as the UN (which has less than the budget of New York City), and the Charter of the UN does not allow the vote of any part of the UN to affect a single decision of the economic institutions. Through the Bretton Woods Institutions the bankers of the G-7 countries, led by the U.S., control the world economy: those institutions constitute a low-profile unelected plutocratic world government[80] in which voting is proportionate to the amount of money invested. The purpose of the UN, from the point of view of its creators, is to give the people of the world the pleasing illusion that there is some element of democracy on a world level, but all important decisions must pass through the Security Council, where the U.S. can veto them. The Bretton Woods Institutions publicly appear to operate with a great deal of freedom because G7 bankers are in firm control of their decisions. In the UN the General Assembly has no power because it is the body the U.S. regarded as the most likely to upset the initial disproportion it relied on: that it had 5% (now 6%) of the people but 50% (now 28%) of the income. In the only UN organ capable of action, and the organ through which all amendments of the charter must pass, the Security Council, the US has used its veto more than all other permanent members put together. All other forces capable of disrupting U.S. control of the UN the U.S. handles by failing to pay its dues, by having half the U.S. employees report to the CIA, FBI, and State Department, and by relocating critical functions in other organizations.

So the UN and Bretton Woods Institutions belong to the US. Seen from the perspective of distance, the basic reason the Bretton Woods Institutions have more real governmental functions than the UN is that the U.S. government is so thoroughly controlled by business interests that the US wanted the purely political functions of this pseudo- or quasi-world government to be too weak to interfere with its purely economic functions. The irony is that the US now has exactly what it asked for: its international organizations can make money and punish countries by affecting their interest rates, their rates of exchange, their terms of trade, their balance of payments, and the credit of their governments, but they can't compel a country to sign, ratify, implement, or observe a treaty. Why? Because the U.S. didn't want any combination of countries to be able to compel ***it*** to sign, ratify, implement, of observe a treaty. ***That*** is the real reason the U.S. didn't want to create a real world government at the end of World War II-- which it had the power to do at the time. Instead it chose to institutionalize world anarchy because it wanted to keep its ***own*** freedom of action. And the reason it wanted ***that*** was because it wanted to keep 50% of the world's wealth though it only had 5% of the people.

The entire UN human rights legal staff consists of 79 lawyers-- less than half a lawyer per member state. But there is no shortage of five star hotels around the world for financial staff and practitioners of private international law. International law as a whole is designed to

protect the rich, and the rich regard human beings as expendable surplus. *This is the basic reason international law cannot find a way to protect the right to live.*

From 1945 to 1990 the U.S. government told its citizens that the reason for its massive military expenditures was the threat of the U.S.S.R.. But when the U.S.S.R. disintegrated, military spending decreased less than 4%. The U.S.S.R. was not the reason for the U.S. military; less than half of the U.S. military was even capable of fighting the U.S.S.R..[81] The actual purpose of the U.S. military and most of U.S. foreign policy since World War II has been to intimidate any Third World country that tried to use its own resources for its own people.[82]

The U.S.A. has used its military and the world's legal institutions to the same end: to promote the trade of rich countries by increasing the prices of their exports and decreasing the prices of their imports. Devaluation of Third World currencies is an issue an order of magnitude larger than the issue that normally masks it, that of Third World debt. When the U.S. uses military force for economic ends, as it did in Nicaragua and Panama, it kills people solely for corporate profit, just as clearly as the imperial powers it has replaced killed the inhabitants of their colonies solely for self-aggrandizement.

International law, despite a fragile and ineffectual superstructure of human rights, has a solid and effective institutional infrastructure of irrational sovereign power and private property rights which reflects the same priorities.

E) **The Adaptation of Social Structure to the Cold War and Extreme Specialization of Labor has Muted Protest Against Nuclear Terror, and the forms of Social Power acting on the Judges Lead to Conservative Results.**

1) *The Cold War*: In 1935 polls in the U.S. showed that 95% of citizens wanted no part in any politics which could lead to U.S. involvement in war. The diary of Henry Stimson, F.D.R.'s Secretary of State, in the last week of November, 1941, contains the line, "Now all they have to do is take the bait." The bait was the Pacific fleet, which Stimson and Roosevelt had anchored unprotected in Honolulu, because its destruction was the only way they could find to create popular willingness to enter the war Britain was losing so badly. From 1941 to 1990 no U.S. citizen experienced one day of authentic peace. By the demise of the U.S.S.R. only U.S. citizens nearing retirement age had any memories of peace. This situation was similar to that Thucydides complained of, that Athens' war with Sparta had lasted so long that no Athenian knew what peace was. Thucydides thought defeat preferable to that condition.

In the 1930's a group of psychoanalysts began to collaborate in a broad study of their Fascist clients.[83] One of their goals was to discover an effective means of distinguishing the psychological profiles of Fascists from those of non-Fascists. The result was an Authoritarianism Scale, which psychologists now administer to different groups around the world. In the 1980's one study compared German adolescents with American adolescents. The Americans scored as more authoritarian. This was not the result of any German revulsion against Fascism, for such revulsion was suppressed by U.S. authorities in the 1950's, who were afraid it would facilitate the rise of communism, and therefore kept many ex-Nazis in power,[84] while Douglas MacArthur kept Fascist Japanese in power in the Zaibatsu for the same reason. It is the Americans who have changed, not the Germans.

The adaptation of Americans to militaristic authoritarianism has two driving forces--first, the Cold War, with its generalized terror, rage, and paranoia, and second, the increasing

rigidification of U.S. society caused by the rapid growth of hierarchy in all three forms of power-- condign, compensatory, and conditioned.[85]

That the Cold War itself has eroded American life seems likely from standardized test scores. On October 24, 1962, John Kennedy publicly told Khrushchev that if ships bringing missiles to Cuba did not turn back, U.S. missiles would be launched against the U.S.S.R.. For two days no one knew whether or not there would be a nuclear war.[86] Scholastic Aptitude Test scores began to drop in the Spring of 1963, and fell every subsequent year until 1992 when, upon the demise of the U.S.S.R. and some initial implementation of SALT I, they finally began to rise again. Fifty other explanations for this thirty year decline have been offered by various researchers of education; none could be verified. Terror, most of it probably unconscious, and loss of confidence in the future, in adults, in authority, and in politics, is the only hypothesis that explains both the timing of the steady decline and the eventual rebound.

2) *Extreme Specialization of Labor*: Industrialized countries function by means of what Emile Durkheim[87] called organic solidarity, and lose that vital sense of community which is needed to confront great public dangers. American lawyers are among the most specialized of professionals: many now practice only under a single statute, such as the Fair Housing Act, or USC 1983, or even under only the Capital Gains sections of the Internal Revenue Code; and a law professor may seek the reputation of knowing more than anyone else about the Illinois Code of Civil Procedure or the California rulings on Professional Responsibility. Such a reputation makes its possessor secure; anxious customers believe that to get competent service, there is no one else they can go to. Such lawyers join a modern aristocracy: within the sphere of their activity, they become dukes or earls, able to keep challengers out of their fiefdoms, to set fees more or less at will, and to take the cases that will bring the greatest rewards in power, money, and professional or general reputation.

This conception of professional competence has four consequences for issues as basic as the right to live. 1) Mutual wariness among professionals makes them unwilling to make statements on issues which may be the specialty of another professional. So they avoid general statements and issues. 2) The professional's reputation and self-esteem depend upon the maintenance of distinctions between himself and others. Professionals find it impossible to shed their inveterate roles in order to address public issues as citizens or persons.[88] 3) The professional cultivates the belief that all issues have technical solutions.[89] American lawyers are trained to approach all issues as procedural matters if possible, and only to address substantive issues as a last resort.[90] This incapacitates them for thinking about basic issues. 4) Legal training insulates lawyers from their communities; their relationships with other lawyers-- including those they oppose-- are almost invariably stronger than their relationships with other members of their communities, and often even than with their families. This social detachment deprives them of the motivation to address issues of common concern.[91]

America's 970,000 lawyers[92] are the single professional group that has the greatest actual capacity to alter U.S. law[93] and policy, and consequently world law, on nuclear weapons. But they are so servile and detached they do virtually nothing toward that end. The total U.S. office staff of the concerned legal organizations, the International Association of Lawyers against Nuclear Arms and the U.S. Lawyers Committee on Nuclear Policy, is less than ten, and two lawyers do most of the work.[94]

3) *The Forms of Social Power Acting on the I.C.J. Judges*: The traditional roots of the hypocrisy of law are caste, class, sex, race, religion, place of birth, birth order, residence, length of residence, seniority, and language-- all those markers used to create hierarchies.

These markers allow those on top, who rule, to think of their rules and the applications of their rules as covering only those lower than themselves. With a degree of consciousness which usually depends upon the variety of social positions they have occupied through life, they exempt themselves and their superiors from generalizations about the rules on the grounds that they and their superiors are too moral (or in the Fascist sense, too superior, or in the bureaucratic sense, too responsible) to need to be bound by the rules. They believe that because they and their superiors must apply the rules, they must have all freedom of action that will assist them in the task of applying them, and that their freedom of action must include the right to have their own violations of the rules regarded in a different than the violations of their inferiors.

All societies use three forms of power-- condign, compensatory, and conditioned-- and each has its own distinctive effects on the character of hierarchies. Law is merely an instrument to systematize uses of condign power. When the law abolishes a hierarchical marker, the abolition directly affects only that class of the uses of condign power which can be effectively and publicly proven to be required or prohibited by the law. It does not affect any use of condign power which cannot be proven to be exercised because of the hierarchical marker. More importantly, it does not directly affect any use of compensatory or conditioned power, but is capable of such effect, if at all, only by the indirect means of changes in the use of condign power. Because the effect of law on compensatory and conditioned power are indirect, existing hierarchies can always use conditioned and compensatory power to defeat the purpose of legally mandated changes in the use of condign power. This generally includes systematic adjustments in the law, either by accommodations of procedure or by reinterpretation of substantive provisions. Hierarchies cannot be changed by exclusively legal means because they are not created by exclusively legal means; rather concatenated uses of compensatory and conditioned power created the laws which would consolidate condign power in the hands of those who already had the other two types of power. This is simply a clarification of Marx's observation that law is an expression of the will of the ruling class.

In the case of the legality of nuclear weapons, compensatory power is held internationally by the Bretton Woods Institutions, which express the will of the international banking system, and which has a symbiotic relationship with multinational corporations in general. Conditioned power is now held by 1) multinational corporations through the mass media, 2) academic systems, most of which are controlled through endowments based on privately accumulated wealth, 3) politically controlled government-sponsored institutions, and 4) traditional religious institutions. The likelihood that any international legal change can occur depends upon the Court's relationship to these forces, as well as to the political-legal forces which the Court, in its setting of condign power, officially recognizes.

None of these institutions is egalitarian. The Bretton Woods Institutions, the banking system, and multinational corporations function internally as totalitarian governments do; all control comes from the top, all benefits are designed to flow toward the top; all of the world is regarded as material for the profit of managers and shareholders. The institutions of conditioned power also establish elite control. The mass media alternately curries governmental favor and the favor of corporations. Academia generally persuades people that they are not qualified to think for themselves, and that they cannot make valid statements unless they restrict the scope of their interests and claims to narrow specialties. Government-sponsored institutions, educational and otherwise, train people in the ideological rationalization of the aims and methods of the elite of condign power. Traditional religious institutions teach conformity to the traditions of the elders.

The judges of the I.C.J. generally come from relatively wealthy backgrounds and thus received initial backing because the economic elite believed the young judges would not

offend their interests. The judges were trained in hierarchical academic institutions and learned to consider issues narrowly under the supervision of specialists whose sense of self-esteem was dependent on the opinions of their superiors, not their equals or inferiors, and who passed this dynamic on to their students. For their general information, the judges normally rely on elite sources, the mass media, or conversation with their professional peers and superiors, not on the perceptions of ordinary people, let alone children, the weak, or the disabled. For specific professional information, the judges must rely, directly or indirectly, on governmental sources. And if the judges have any independent social network for the residue of the conditioned power in their lives, it is likely to be a relatively conservative religious institution. So the major indirect sources of power acting on the judges are conservative and restrictive.

The social matrix of the three forms of power which surround the judges is not likely to lead to any inventive result. Only three of the I.C.J. judges seem, in the interests of the human race, to have escaped routine complacency. Considering the psychological difficulty of doing so discussed in the next section, it is amazing that so many have. All three, of course, are non-Western. No U.S. judge, for instance, with their views and perceptions could survive the selection processes of U.S. law schools, the U.S. bar, or U.S. government methods.

F) **The Psychological Inhibition to Experiencing the Vulnerability of Living in the Nuclear Age**

Among the psychologists, psychiatrists, and psychoanalysts who have studied how we accommodate ourselves to our knowledge of nuclear weapons, and how that knowledge affects our lives, are Robert J. Lifton, John Mack, Jerome Frank, Jane Pearce, Virginia Sapir, and Joel Kovel. Their work, and that of others associated with Physicians for Social Responsibility and the International Physicians Against Nuclear War, has made it clear that there are a distinctive set of reactions which we all go through in order to tolerate the precariousness of our lives by suppressing our awareness of weapons of mass destruction, and that those reactions restrict our intellectual and emotional capacities.

Robert J. Lifton, a psychoanalyst at Yale, studied Hiroshima survivors and found that they coped with their memories by a process of psychic numbing-- that they had made themselves indifferent to all those areas of their lives which were capable of arousing associations with the bombing. He also spent ten years talking to survivors of the Nazi concentration camps and studying the doctors of those camps, and found the same set of psychological mechanisms at work. He then did a series of psychiatric interviews with normal children of various ages, talking to them about their ideas of nuclear weapons, and found graphic evidence of the same processes. He had some of these interviews filmed. Four-year-olds in them describe how they imagine their bodies coming apart in little pieces and blood and mess being all over everything, and that nothing can ever be fit together again.[95] As the children become older they become more restrained. It is clear from the films that the reason adults believe children are not conscious of nuclear weapons is because the adults, out of their own desire to suppress their own terror about events they believe they are helpless to control, will not allow children to speak freely.[96]

The basic problem in talking about nuclear weapons in candid detail is that they are incomprehensibly terrifying to imagine. To attempt to talk about them without having allowed oneself to experience the emotions appropriate to them generates shallow, stupid, and evasive conversation. Many people become superficially bored and want to go to sleep. They act as if there is really nothing to talk about. In order to begin to penetrate that repression to reach the frustrated desires and emotions below it, it is necessary first to allow oneself to experience terror. It is the psychological barrier to the experience of terror that prevents the

articulation of intelligent thought. Barriers against experiencing terror, however, are extremely difficult to overcome[97] because they were erected in infancy to obviate the physiological disorganization that terror causes. Because infants are empathic, their primal source of terror is their mother's anxiety. When the mother is anxious, the empathic infant panics because the one on whom he is entirely dependent, the only one he believes can save him, is suddenly also the one who appears malevolent and unpredictable. The terror the infant feels is so great that he in crying he can swallow his tongue or black out from oxygen deprivation in hysterical crying, and this physiological danger makes the infant use a magical means of thought in order to reestablish enough emotional security to survive.[98] The infant imagines that there are two different people, a good mother and a bad mother or witch; that when he feels threatened by the bad mother, he can cry for the good mother to return and save him; and, that when he is with the good mother, there is no threat from the bad mother. The experience of terror is then attached to the image of the bad mother, and is repressed and forgotten as much as possible in order to allow restricted but not catastrophic physiological functioning most of the time. This pre-verbal means of coping by bifurcating the image of the mother is the primary means of dissociating discordant experience, and of subsequent inability to tolerate ambiguity. The stable structure of the conscious personality is created largely in order to avoid disorganizing anxiety enough to allow normal functioning in society. The unconscious portions of the personality accomplish this by editing out of conscious experience any elements which can arouse anxiety. This mechanism is called selective inattention. The artfulness of selective inattention is self-taught, and increases with age in order to accommodate the increasing demands of the conventional world. It is rare for a person after the age of 18 to be able to overcome selective inattention in order to tolerate enough anxiety to recross this infantile barrier and experience terror. Hence, without psychological training or assistance, most adults can not gain conscious access to the terror that nuclear weapons create. Instead, in normal day-to-day functioning, the terror of nuclear weapons merely reinforces that the infantile experience of terror of the anxious mother. The resulting increase in the quantity of unconscious terror then requires that a larger proportion of mental energy be devoted to selective inattention in order that disorganizing anxiety will not be aroused. The result of this that less energy remains for conscious thought and feeling, and it must be used within a set of narrower and more irrational restrictions. This is the phenomenon Lifton calls "psychic numbing." inability to gain access to the terror results in a general numbing with its postures of boredom, cynicism, vagueness, inability to fantasize, and inability to come to clear conclusions.

In cures of neurosis there is a crisis of panic when the individual begins to realize that his sacrifices of satisfaction for the sake of neurotic illusions has been unnecessary as well as destructive. The individual does not want to recognize that he has wasted his previous life and panics because he is afraid to experience the rage he feels toward family members whose behavior persuaded him his sacrifices were necessary.

Late in her life, Jane Pearce began to suggest that the human race may be experiencing a similar crisis.[99] Most restrictive patterns of life throughout the world have been able to maintain their power only because they could appeal to the plausible assumption that there was not enough to go around, and so most people must be required to sacrifice large portions of their desires in life. Through the Twentieth Century it has become increasingly evident that this traditional assumption of scarcity is no longer verifiable worldwide. Therefore myriad habits which have been built upon it, and which have caused us so much agony, can now be given up. But most of us are still willing to tolerate the unconscious terror of nuclear weapons because we do not wish to experience the rage, fear, and disorganization we must experience as we begin to recognize the freedom of which we are now capable. By adding to each person's reservoir of unconscious terror undischarged since infancy, nuclear weapons become a monumental force of conservative social control. One reason so many people are willing to

tolerate nuclear weapons is because it gives them an excuse to remain tied by archaic and unnecessary restrictions on their desires. The way out of this predicament requires the full experiencing of the emotions of frustrated desires.

The fact that there is a psychoanalytic route to a modicum of sanity in the Nuclear Age, however, does not solve the legal problem of the right to live because there is no requirement that diplomats, legislators, military officers, and jurists be psychoanalyzed. Therefore they are free to inflict the products of their unconscious terror on the rest of us. But the symptoms of this process should at least be remarked. Foremost among these in the Nuclear Weapons Case is the evidence that the majority opinion is the product of psychic numbing. The majority shows itself incapable of dealing with the material before it in one fifth the detail and clarity Justice Weeramantry has at his command. Their muting of their own experience of the testimony, their concealment of their anxiety behind overgeneralizations, cliches, and self-contradictions shows that they allowed the opinion to remain a sterile verbal exercise.

This was, of course, to be expected.

G) **The Constrained Position of the I.C.J.**

The force of Weeramantry's, Shahabuddeen's and Koroma's dissents argues that the real bases of the absence of protection for the right to live in the face of nuclear weapons is not legal in the primary sense of what laws actually say, but institutional in the sense of how laws will be interpreted given unspoken assumptions about relationships between the court and other institutions. It is because of the institutional features of the law that the Nuclear Weapons opinion could be said to be a foregone conclusion.

The right to live now conflicts with sovereign rights, and international law was designed to protect sovereign rights (where issues are explicitly political, not economic.) But since the demise of the U.S.S.R., the sense is growing, particularly in those countries which were neutral through the Cold War, that if the rationale for nuclear weapons was the Cold War, the weapons have lost their rationale and should now be destroyed. Were it not for this growing consensus, the General Assembly would not have asked for the advisory opinion. In the background of this consensus is the growing conviction that weapons of mass destruction represent a challenge to the legitimacy of the governments that maintain them. This conviction has several elements. First, the traditional justification of the liberal state was that it protected the lives of its citizens from aggression. Weapons of mass destruction seem to have lost this function; particularly because of documented incidents which nearly resulted in accidental war, the weapons now appear to *increase* the risk of death. Second, the nuclear weapons states have campaigned for decades for other states to observe the Non-Proliferation Treaty, but they have never convinced anyone that they themselves are trustworthy possessors of such weapons. This hypocrisy put a premium on the sovereignty of five nations while denigrating that of others, and therefore has made it easier to conceive of the idea that sovereignty might conflict with legitimacy. Third, the Nuremberg Trials were the greatest impetus to the creation of international human rights law. But the crimes against peace with which some of the Nazi war criminals were charged were no greater than the crimes against peace that the leaders of the U.S. and, to a lesser extent, the former U.S.S.R. committed, and the crimes against humanity the Nazis committed pale before those the leaders of the U.S. and Russia are still ready to commit at every minute. Without immanent threats from the U.S.S.R., the U.S. is losing its ability to discipline the allies it pretends[100] to have saved from the Nazis. Hence sovereignty increasingly conflicts with legitimacy.

So far, sovereignty has been successfully destroying both legitimacy and the right to live. But in doing so it has been creating the growing perception that the right to live and legitimacy belong together. This is a major force behind the mounting drive for the creation of effective international institutions. But the very basis of the law will have to be changed, because international law holds that individuals are objects, not subjects of the law, that only states of international legal personality, that only states have standing in cases involving their own citizens, and on and on in an inane litany to the glory of dead monarchs.

All of this has to be changed. But who can change it? Only a vote of the Security Council will do, and there must be no vetoes. The prime nuclear weapons states have vetoes.

The funding of the I.C.J. depends on the Security Council and the G7 countries. The U.S. has demonstrated that it is willing and able to withhold U.S. funds, which alone constitute 25% of the UN budget. The Security Council is needed to effectuate I.C.J. decisions, as much as they ever can be implemented. The nuclear weapons states are the permanent and veto-bearing members of the Security Council.

VIII. Conclusion:

The actual interests of humans--if not all beings-- on earth are now united as never before. This transformation occurred in fact on June 16, 1945, when J. Robert Oppenheimer set off the Trinity blast. For the following thirty-five years, despite the promptings of Albert Einstein, Bertrand Russell, and their like, only a tiny imaginative elite consisting primarily of scientists, but with a sprinkling of artists and social and political innovators (plus a larger number of terrified children unable to gain their psychically insulated parents' acknowledgement) were able, either intellectually or emotionally, to grasp the magnitude of the change in reality that occurred that day. Consciousness of this change cannot be said to have become publicly articulate among the literate population of the USA until 1982 when the New Yorker serialized Jonathan Schell's The Fate of the Earth. In the fifteen years that have elapsed since then, U.S. politicians have learned that they must, on some occasions, talk differently, but the dissolution of the U.S.S.R. has produced no political or legal change in our ability to make our collective activities reflect the transformation in the basis of our interests. Instead of the promised "peace dividend" class oppression has merely intensified. A common sense of the new status of the right to live is emerging, but it has yet to take the first step toward institutionalization of appropriate measures.

These institutional changes would be assisted by conceptual changes, such as recognition that some legal terms have necessary logical relationships, and that living must be conceptualized as a verb, not a noun. But their first prerequisite is the sacrifice of some quantity of sovereignty.

States must give up some degree of sovereignty for a sufficiently effective world government to begin. Small and weak states are willing to see the growth of international power. Large and strong states are not except when the growing international power is really their own power in disguise. Sovereignty has been given up for three reasons in the past-- to unite against larger enemies (the mechanism of alliances, the unification of the U.S.A.), to adjust to defeat (the disintegration of the U.S.S.R.), and to gain the advantages of scale (the unification of Europe.) The nation that makes most of the trouble, the U.S., has no larger enemy and will not be defeated except by fluke. To gain the advantages of scale it has used the device of separating economic and political functions so that it can rule the world economically without having to take account of it politically. This tactic has been successful for its ruling elite. The only way to accomplish the political sacrifices of sovereignty for the creation of effective international organizations is therefore to deprive the United States of its

illegitimate economic rule of the world. Poor countries should disaffiliate their economies with the Bretton Woods Institutions and with the financial systems of the G7 countries. Then the U.S.A. will lose its role as the world's front office and will be forced to choose between reindustrializing while reducing its waste of resources on the one hand and seeking more cooperative and less manipulative relationships with other countries on the other. Poor countries cannot control the UN, so it would be better if they managed more of their joint affairs separate from the UN until they have sufficient solidarity to avoid cooptation by the G7 countries.

The prime danger is American paranoia.[101] U.S. politicians are able to draw on a vast reservoir of irrational fear and preposterous grandiosity in the American character. The Fascism that has been growing in the U.S. since its repudiation of Jimmy Carter has its popular source in the fact that real income has been declining in the country since 1974. Most Americans cannot tolerate the effects of international competition, and U.S. corporations have developed no honest means to cope with it, but prefer to ship factories overseas, cannibalize corporations, and sabotage unions.
U.S. politicians can exploit xenophobia and misdirected contempt in order to start quick technological slaughters like the massacre of Iraq. U.S. behavior is likely to become more and more unpredictable as the right wing shift that has been going on for twenty years continues.

But the aspirations of all the world for the creation of substantive rights depends upon the poor countries becoming independent of the will of the rich.

In 1869 John Stuart Mill wrote this:

> We are entering into an order of things in which justice will again be the primary virtue; grounded as before on equal, but now also on sympathetic association; having its root no longer in the instinct of equals for self-protection, but in a cultivated sympathy between them; and no one now being left out, but an equal measure being extended to all. It is no novelty that mankind do not distinctly foresee their own changes, and that their sentiments are adapted to past, not to coming ages. To see the futurity of the species has always been the privilege of the intellectual elite, or of those who have learnt from them; to have the feelings of that futurity has been the distinction, and usually the martyrdom, of a still rarer elite. Institutions, books, education, society, all go on training human beings for the old, long after the new has come; much more when it is only coming. But the true virtue of human beings is fitness to live together as equals; claiming nothing for themselves but what they as freely concede to every one else; regarding command of any kind as an exceptional necessity, and in all cases a temporary one; and preferring, whenever possible, the society of those with whom leading and following can be alternate and reciprocal.[102]

It is evident that three elements of Mill's great egalitarian vision, the liberation of women, the decline of autocratic control over condign power, and the decline of the former equation of compensatory with condign power, have begun to materialize in some parts of the world over the last 130 years. But new forms of oppressive hierarchies have simultaneously been invented: modern totalitarianism; the enormous expansion of the power of hierarchies of wealth with their control of politics and culture; and the creation of a throbbing base note of universal terror by the spread of weapons of mass destruction; and these present new impediments to the dream of equality. Yet for the first time in history the world is able to provide a long and healthy life to every human being not specifically afflicted by disease or accident.[103]

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1 From "Act of Perish, A Call to Nonviolent Action" in his Autobiography, (London: Routledge, 1969) p. 634.

2 Quoted by M.D.A. Freeman at the top of page 1 of Lloyd's Introduction to Jurisprudence, 6th edition, (London: Sweet & Maxwell, 1994.)

3 There are probably another 17,000 inactive-- i.e., not immediately usable-- weapons; the total of 40,000 is a reduction from a peak of 50,000 in 1985.

4 Sivard, Ruth Leger, World Military and Social Expenditures 1996, 16th edition, (Washington, D.C., World Priorities, 1996), additive total of graph on p. 23.

5 Israel is widely believed to have two dozen hidden away; South Africa in the early 1980's purchased hot isostatic presses from Israel, the only purpose of which is to produce nuclear warheads; and since May, 1998, of course, India and Pakistan also boast of a few nuclear weapons. Brazil, Argentina, North Korea, and Iraq may be capable of producing nuclear weapons. Since a Princeton undergraduate with no special training demonstrated that in six weeks he could design a nuclear bomb from information on public library shelves, there has been much appropriate worry that low-grade nuclear weapons can be made by almost anyone with access to a few pounds of fissionable material. Because the dust-like form in which plutonium and uranium are often kept absorbs moisture easily, and therefore changes weight, it is difficult to be certain whether some is missing from installations around the world, some of which have reported discrepancies as high as 11 pounds, more than enough to make a "home-made" nuclear bomb.

6 See *Nuclear Tests Case, Australia v. France) Interim Protection Order of 22 June 1973*, I.C.J. Reports 1973, p. 99; *Nuclear Tests Case (Australia v. France) Judgment of 20 December 1974*, I.C.J. Reports 1974, p. 253; *Nuclear Tests Case (New Zealand v. France) 20 December 1974*, I.C.J. Reports 1974, p. 457; *Nuclear Tests Case (Australia v. France) Application to Intervene, Order of 20 December, 1974*, I.C.J. Reports 1974, p. 530; *Nuclear Tests Case (New Zealand v. France) Application to Intervene, Order of 20 December 1974*, I.C.J. Reports 1974, p. 535.

7 Justices Onyeama, Dillard, Jimenez de Arechaga, Sir Humphrey Waldock, F. de Castro, and G.E. Berwick.

8 The third case listed in note 6 above, at 454-455.

9 Francis Boyle's book Civil Resistance, (Dobbs Ferry, New York: Oceana Press, 1988) is a practical guide to negotiating the civil procedure and evidence laws of states in order to present juries with such evidence. The Meiklejohn Institute in San Francisco puts out its Peace Law Docket, which is a listing of all U.S. state and federal cases in which members of the peace movement have been tried for civil disobedience.

10 See note 22, page 8 below on standing in the *South-West Africa Case*.

11 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, International Court of Justice, July 8, 1996, pp. 429-555.

12 Id. at 375-428 and 556-582 respectively.

13 Probably the greatest source of inconsistencies and unresolved issues in legal discourse is that majority opinions cannot be compelled to systematically grapple with each of the issues raised by minority opinions. The simple avoidance of subjects is the practical basis of irrationality.

14 The most startling of these, coming from a judge, is Bedjaoui's statement on p. 269, para. 6, that "Man is subjecting himself to a perverse and unremitting nuclear blackmail." It would indeed be "perverse" if "man" were doing it, but this is a classic instance of the fallacy of accident: not "man" but a few, and almost entirely rich, powerful, and white men, are doing it, almost entirely through the medium of five governments, and the government of the United States of America has taken the lead in the "arms race" at every step. That a judge, whose entire career depends upon his ability to assign responsibility, should attribute the actions of a small elite to "man" can only be understood as servility. Several more fallacies are mentioned in the following three pages.

15 Richard Falk compliments them on this in "Nuclear Weapons, International Law, and the Supreme Court," *Am. Journal Int'l Law*, Jan. 1997, vol. 91, #1, p. 64. In saying that, if the majority had ruled that nuclear weapons are totally illegal, the I.C.J. would not have been obeyed, and that, therefore, the majority displayed good political sense in recognizing the consequences of their lack of enforcement powers, Falk compliments their political, not their legal acumen. But the I.C.J. is a *court*. One wants their *legal* opinion. The lack of critical analysis is strange for Falk.

16 See note 9 above. Bedjaiou is irrational in admitting that most nations are subject to unremitting nuclear blackmail at the same time that he asserts that treaties on nuclear weapons are evidence of the legality of the practice. Unremitting blackmail violates Articles 49 and 51 of the Vienna Convention and makes any treaties made under such circumstances void. Therefore the only customary usage which can be cited to legitimize the weapons is that of the five nuclear states, not the general consensus Bedjauiou pretends exists.

17 The concept acts like a Kline bottle, which is an object that appears to be a container but cannot contain anything-- a three dimensional version of a Mobius strip. If you try to insert something into a Kline bottle, the inserted object ends up back on its external surface, for its inside *is* its outside.

18 See Sivard, pp. 24-25.

19 *The Vienna Convention on the Law of Treaties*, (U.N. Doc. A/CONF.39/27) adopted May 22, 1969, is generally held to be a codification of customary law.

20 The sequence that led to the Manhattan Project began with Leo Szilard, a Hungarian physicist in the U.S.A., who read an article in German by the German physicist Otto Hahn, and realized that Hahn's analysis of the principle of a chain reaction meant that Hahn knew a fission bomb could be built, and, moreover, that competent physicists, knowing the principle and possessing enough resources, could eventually build a fission bomb. Szilard's first impulse was to attempt to find a way to destroy all copies of the article. Because he could not, he went to Einstein to have Einstein use his prestige to get Roosevelt's attention. Einstein wrote to Roosevelt saying it was likely that the Germans could build a fission bomb, and that therefore the U.S.A. had better build one first. To Roosevelt the likelihood was confirmed by intelligence reports of a German heavy water plant in Norway. Roosevelt therefore authorized the Manhattan Project. But commandos destroyed the heavy water plant and, in the Spring of 1945, the U.S. army captured the team of German physicists who were working on the bomb, and the European war ended. It turned out that Hitler had underfunded the project because first, it was competing for funding with V-2 rocketry and an early version of a space platform, which Hilter thought more devastating, and, second, because he thought he would win the war before the project could succeed. The physicists,moreover, had made a fundamental mistake in believing a chain reaction could be more easily achieved with heavy hydrogen than with uranium or plutonium. Consequently the threat of a German bomb had been an illusion. Having built up great momentum, however, the Manhattan Project continued to the Trinity test blast on 12 July, 1945, and the production of the "Little Boy" and "Fat Man" dropped on Hiroshima and Nagasaki on 6 and 9 August. Meanwhile, at Yalta, when Roosevelt notified Stalin of the bomb, rather than responding, Stalin ordered the beginning of the Soviet project that led to its first test blast in 1951.

21 It would have been more appropriately called the "arms *chase*," with all nations trying to catch up with the U.S..

22 On December 6, 1949, the General Assembly requested an advisory opinion first reported in I*nternational Status of South-West Africa*, Order of December 30th, 1949, I.C.J. Reports 1949, p. 270. Eleven years later the court collected twelve volumes of evidence, only to decide that Liberia and Ethiopia did not have standing to bring the case. The Court made no actual decision until 1970, in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970*), Advisory Opinion, I.C.J. Reports 1971, p. 16, and then it did so only because the Security Council had spoken. And the decision was not obeyed until 1990, after five years of international embargo and over forty years of actions by the A.N.C.

23 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits*, Judgment, I.C.J. Reports 1986, p. 14. For the I.C.J. to make a strong ruling against the permanent members of the Security Council would be structurally analogous to the U.S. Supreme Court ruling against the President in *U.S. v. Nixon*. The difference is that in *U.S. v. Nixon* a very powerful, united, and outraged Congress was seeking enforcement of its order, whereas in the Nuclear Weapons Case the request for an advisory opinion came from a *constitutionally* powerless General Assembly which was, moreover, divided, and actually *demanding* nothing.

24 *Nuclear Weapons Case* at 226.

25 A) that there is no international law authorization of the threat or use of nuclear weapons [no one ever supposed that there was]; B) that there is no comprehensive or universal prohibition of them [this is what the three dissenters most forcefully dispute]; C) that threats and uses must conform to Articles 2 (4) and 51 of the UN Charter [that they could do so is extremely implausible]; D) that uses and threats conform to humanitarian law [which is absurdly impossible because civilians are unavoidably affected.] Id at 266. Finally the Court adds insult to injury by saying that there is an obligation "to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament," with no mention of the mountains of evidence that negotiations between the U.S. and U.S.S.R. were *never* in good faith and that the U.S. had only a few days-- immediately after the Cuban Missile Crisis-- when it ever seriously considered nuclear disarmament.

26 Id at 266.

27 It is like a piece of paper which says on one side, "The statement on the other side of this paper is true" and which says on the other, "The statement on the other side of this paper is false."

28 From 1980, when I became aware of the stupidity and flippancy with which Ronald Reagan regarded nuclear weapons, until 1987 I worked in various capacities in the U.S. peace movement, then went to law school largely in the hope that some international legal solution was possible. By 1989, after courses under two UN legal staff and several international lawyers who knew the system well, I was certain that the problem was much deeper than the word magic of legal rationalizations. So I started studying the nature of law and its relations to social science and philosophy. This paper is a summary of nine years of thinking on those lines. I have wanted to understand why the legal response to nuclear weapons has been hopelessly inadequate even to protect the most basic and simplest right, the right to live.

29 Under the Clinton Administration, Mr. Rosenstock is the Minister Counselor to the Permanent Mission of the United States of America to the United Nations. When he spoke at the Law School of Pace University on the legality of nuclear weapons I believe his title was Legal Advisor to the Mission. The occasion was a forum on the destruction of the first few nuclear weapons in the U.S. and U.S.S.R..

30 The United Nations and Human Rights 1945-1995 (New York: United Nations Department of Public Information, DP1/1676, 1995) Document 32, p. 235-244 at 236. The U.S. ratified its first important human rights treaty (The Genocide Convention) only in 1988. Now when it does sign such treaties, it does so with so many "reservations, understandings, and declarations" that other signatories object that the ratification is not valid. See Thomas Buergenthal, International Human Rights in a Nutshell, (St. Paul, Minn., West Publ. Co., 1995) pp. 276-298, esp. 296.

31 Buergenthal argues that this is false in id., 295-297.

32 Even regarding capital punishment, the U.S.A. would not be bound because it would not sign the Second Optional Protocol.

33 I write this paper in India; nearly all of the resources upon which it is based remain in the United States, and I am not likely to have access to them for at least a year. The NLS library contains no U.S. Supreme Court cases prior to 1956, and almost none of the philosophical, political, and social scientific works I refer to. Therefore in this draft of this paper the documentation is inadequate.

34 Whether he believes it or not, he will argue it consistently, and no argument coming from the U.S. will be ignored by the I.C.J..

35 One of the issues to be decided in the case was whether the Africans on the Antelope had been properly reduced to slavery and, if so, by whom-- by Portuguese or by Spanish owners.

36 The Anatomy of Power, chapters on Conditioned Power. If it is true of corporate executives, how much more true of high government officials?

37 Speech at the New York Bar Association in February, 1990. Sofaer was then near the top of the U.S. State Department. At issue were Articles 2 (4) and 51. The U.S. has, of course, continued to act on Sofaer's position-- in Libya, Panama, Afghanistan, Iraq, and so on-- and Sofaer's blatant misinterpretation of the UN Charter can be regarded as official U.S. policy at present and for the foreseeable future.

38 He did so in response to Sofaer's speech. MacDougal prepared most of the U.S. arguments in the Nicaragua Case.

39 The barrage started with articles by Colonel Colin Gray in 1979. The Reagan Administration's idiocy on the subject is recorded in a dozen books, the most prominent being With Enough Shovels.

40 A conference in 1982 at Rutgers University in Newark, New Jersey, brought out more than 30 such articles from the Reagan Administration and organizations it funded.

41 This was properly repudiated by the Catholic church's Council of Bishops.

42 Buckminster Fuller entitled an autobiographical book, *I Seem to Be a Verb*.

43 Harry Truman's bad faith was not regarded as a crime against humanity because the norms of statesmanship were built on the assumption of international anarchy and because the U.S.A. was at its moment of supreme victory over other less successful international criminals. The extent of his bad faith, of course, is limited by the fact that no one yet knew about nuclear winter, but Roosevelt's interactions with Stalin at Yalta and Truman's with J. Robert Oppenheimer indicate that Roosevelt and Truman were absolutely aware of the magnitude of the issue they were keeping outside UN control, and of its impact on Articles 2 (4) and 51.

44 Justice Weeramantry, who shares this view, believes it has been held, in different ways, and for different reasons, by four others: H.L.A. Hart, John Rawls, B.S. Chimni, and Nagendra Singh (See I.C.J., *Legality of Nuclear Weapons* at 520-523.. He cites Hart's statement that laws are "social arrangements for continued existence, not with those of a suicide club" in the Concept of Law, p. 188. He cites Rawls' argument in A Theory of Justice that a state "could scarcely be expected to subscribe to [a system of international law] if it contained a rule by which legality could be accorded to the use of a weapon by others which could annihilate it." He cites Nagendra Singh's statement in Nuclear Weapons and International Law (1992, pp. 242-243) that "resort to such weapons is not only incompatible with the laws of war, but irreconcilable with international law itself." And from Chimni he cites the following paragraph-- which comes closest to my meaning-- from "Nuclear Weapons and International Law: Some Reflections" in International Law in Transition; Essays in Memory of Judge Nagendra Singh, 1992, p. 142 (emphasis is mine):

"No legal system can confer on any of its members the right to annihilate the community which engenders it and whose activity it seeks to regulate. In other words, there cannot be a legal rule, which permits the threat or use of nuclear weapons. In sum, nuclear weapons are an unprecedented event which calls for rethinking the self-understanding of traditional international law. Such rethinking would reveal that the question is not whether one interpretation of existing laws of war prohibits the threat or use of nuclear weapons and another permits it. ***Rather, the issue is whether the debate can take place at all in the world of law. The question is in fact one which cannot be legitimately addressed by law since it cannot tolerate an interpretation which negates its very essence.*** The end of law is a rational order of things, with survival at its core, whereas nuclear weapons eliminate all hopes of realizing it. In this sense, nuclear weapons are unlawful by definition."

Justice Weeramantry could also have used Henry Shue's Basic Rights for an extremely well structured similar argument on the status of the right to life.

45 U.S. State Department lawyers, presumably on orders, uniformly repudiate the existence of a right to live. They claim there is no evidence for it in international law. They make this claim in public debate, in domestic courts, and international courts. It is the official position of the United States government.

46 Historically the epistemological theories that have denied that rights exist have assumed a correspondence theory of truth: a right existed if one could find a right in the universe. Like Hume looking for a self and finding only a bundle of perceptions instead, people looking for rights found only preferences and demands. They were looking in the wrong place. They had assumed that the thing to be found was absolute. But it is relative. Rights exist not *in* people, but *between* them. They are to be discovered in the rules of dialogue and interaction, not in transcendental analysis of consciousness or the individual consciousness. The relevant classical theories of truth

are the theories of coherence and consistency, not the correspondence theory. The issue is whether a right can be denied in general without denying it to oneself.

This issue was hidden under the myth of the state and natural law. The idea that rights emanated from the state made people forget that no one can speak for the state without being a person. Natural law made people look away from actual human relationships, with their relative powers, when they searched for a source of rights. Rights are not transcendental, they are imminent. And they are not in individuals. They are in relationships measured against the norm of consistency, which derives from the need to assign truth value to general statements derived from particular assertions in the first, second, or third person.

47 This is much more true in the United States, where the legal positivist doctrine of the independence of law almost totally insulates law from philosophy. The only other jurisprudential doctrine in the U.S., legal realism, allows some social science to enter legal discourse, but has the actual effect of shutting philosophical discourse out. This is because legal realism is derived from pragmatism, which is generally known only by its doctrine that the truth is what works. This substitutes a belief in power for a belief in truth, and that suits U.S. law to a T, destroying any further need for thought.

48 Nearly all of what passes for jurisprudence in the United States has been done by law professors who learn some philosophy, not by philosophers who learn law. American philosophers are not unique in their willingness to ignore lawyers, of course. Most Americans ignore lawyers, for the sake of mental as well as financial economy, except when they believe they are running a costly legal risk. Since the lawyers are only technicians, they deserve to be ignored.

49 Actually Louis XIV's *"L'estat est moi"* implied more than representation-- it implied *identity,* an idea that has become absolutely intolerable.

50 Most psychoanalysts hold that the analysts of millionaires lose their integrity. The film "The Madness of King George" accurately portrays the hopeless task of treating a monarch surrounded by sycophants. In King Lear Shakespeare showed how impossible it is to reason with a man who has been trained from infancy that all people are his inferiors. The theme also appears in Julius Caesar, Anthony and Cleopatra, Henry V Part I and II, and Richard III.

51 European states abandoned them during the 19th Century, (Britain was the first to abolish slavery under pressure from the Africa Institute, in 1809; the U.S. in 1862) but were not so concerned to eliminate them in their empires (slavery lingered on in the Spanish and Portuguese empires until late in the century.) In Ecuador, the aristocracy maintained serfdom until 1964; the Rana family oligarchy kept it in Nepal until 1951; the monarchy of Bhutan is only giving it up now. Despite official disclaimers, however, slavery continues in such illegal but often unprosecuted forms as bonded labor, which the *1926 Convention on Slavery* and the *1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* are designed to eliminate.

52 How could it be when law begins with and continuously relies upon an argumentum ad baculum? This is the fact for which Holmes' famous statement that the "life of the law has been experience, not logic" is the euphemism.

53 Albert Szent-Gyorgyi, who won the Nobel prize for his discovery of Vitamin C, argued in The Crazy Ape that what is regarded as moral in international politics is exactly the opposite of what is regarded as moral in personal life. That is, the executive of a country thinks he is being moral if he lies, cheats, steals, threatens, blackmails, drives into bankruptcy, or murders people of another country because in doing such acts he is furthering the interests of people in his own country.

54 In On Thermonuclear War, Herman Kahn defined 46 levels of force.

55 The conspicuous exceptions to the rule that every state than can afford it does it are Japan and Germany-- and these are illusory because their economic stability depends on political relations established by their embarrassment in 1945. Canada and New Zealand may come closest to being genuine exceptions, but their status in the Commonwealth, NATO, and ANZUS muddies the issue. With the possible exceptions of Costa Rica and Iceland, the real limitation on the greed of the state for military power seems only to come from that degree of diminutiveness necessary to convince anyone that a particular small state has no means of creating even a credible defensive threat.

56 It is. By 1982 the Brookings Institute had already documented 36 instances in which the U.S. had threatened to use nuclear weapons for specific foreign policy goals, such as preventing the installation of Soviet missiles in Cuba and preventing the re-invasion of South Korea. All 36 threats succeeded in obtaining the goal sought.

57 The mission statement of the IRS states that citizens pay their taxes voluntarily as their contribution to their government.

58 I believe it was the emotional logic of being held hostage to nuclear terror that produced the general hysteria the U.S. public showed when fifty workers, largely intelligence agents or closely connected to them, were held hostage in Teheran in 1979? How outrageous that Americans can be held hostage, the whole country said-- after twenty-five years of willingly allowing the whole nation of Iran to be held hostage to the killers of Mossadegh. U.S. offense at the idea of Americans being held hostage came from a deeper source. The continuous decline in SAT scores (discussed below in section 5) from 1963 until 1992 is evidence of such a source. Its timing argues that it is the result of hopelessness about the future which began with the public awareness during the Cuban Missile Crisis that our leaders and the UN would not or could not protect us from nuclear war. Adolescents only began to hope again when the U.S.S.R. capitulated and dissolved and warheads began to be destroyed. Terror functions this way because it is too powerful to be allowed into consciousness undistorted: it is more comfortable to believe one is terrified-- and consequently outraged-- by something unreal, far away, or alien, than by something real, close, and patriotically approved. Popular horror movies show the same dynamic.

59 According to Jean Piaget, abstract operations normally become possible by that age in those children who will ever advance out of concrete operations. A contrary motion of emotional closure normally occurs between the ages of 16 and 18. This closure allows adolescents to blot out terror and other interferences to concentration so that they can organize their thinking. It also terminates the capacity for creativity. There is therefore a small "window of vulnerability" in which the emotional and intellectual components necessary for unconventional political thinking can join up; most middle class Americans who lack firm parental support for radical convictions either develop them on their own between the ages of 15 and 18 or not at all. Independently organizing unconventional political beliefs before 15 takes extraordinary intelligence; developing them after 18 requires the sort of disorienting shock which combat in the Vietnam War provided to some slightly older people,

60 Pollution may have changed it also, but in a slightly different way. At present rates of growth there is no doubt that we will drown in our own detritus, die of skin cancer and blindness from ultraviolet radiation reaching the earth because of the destruction of ozone, die of flooding, climatic change and crop failures because of the greenhouse effect, of cancer from carcinogenic organic compounds, and so on. But growth rates will eventually stop and some forms of amelioration are possible. If environmental degradation eliminates the human species, we will go "with a whimper, not a bang"-- some of us will be to some extent willing participants in our destruction. Nuclear winter offers total and unwilling destruction.

61 See Surya Prakash Sinha's What is Law? for the argument that the reason no definition of law has ever maintained general credibility among philosophers is that the various definitions reflect conflicting epistemological assumptions. A truncated form of the argument is one of the ordering principles of his Jurisprudence in a Nutshell (St. Paul, Minn.: West Publ. Co., 1993,) pp. 76-79.

62 Those sole substantial, but actually only partial, exception is positivism, which is a derivative of Aristotle by way of Kant in Germany and Britain, and by way of the Pragmatists in the United States. Positivism succeeds in the U.S. because it is what Russell calls a "power philosophy." See Russell's Power, (London: George Allen & Unwin, 1938, reprinted by Routledge, 1992,) pp. 173-178 and the his two essays, "Pragmatism" and "William James's Conception of Truth" in his Philosophical Essays, (London: George Allen and Unwin, 1910, reprinted by Routledge, 1994) pp. 79-130.

63 The main difference in their effect on Western lawyers has been that Aristotle has appealed more to "realists," (read conservatives) Plato more to "idealists," (read reactionaries) but between them, until at least 1850 (when Kant began to filter down to the level at which prospective jurists received their philosophical assumptions), and well through the formation of the common law tradition, the teachers of jurists in the West held Plato and Aristotle to hold the only available epistemological positions.

64 This effect has usually been accidental, but in the case of Kelsen, it is intentional. Kelsen sought to "purify" legal thinking because he wanted to make a permanent structure in the Platonic manner, and tried to use Kantian

methods, which pretended to derive from pure thought, to do this. Kelsen wanted to shut out the possibility of change, which meant shutting out knowledge from outside his rather autistic conception of law.

65 This theme in the following analysis derives from Philip Slater's The Glory of Hera and Robert Graves' The White Goddess.

66 See Harry Stack Sullivan's The Interpersonal Theory of Psychiatry, (New York: Norton, 195-) and Jane Pearce and Saul Newton's The Conditions of Human Growth,(Secaucus, N.J.: Citadel Press, 1963.)

67 This theme derives from a reading of Plato, particularly the Epistles, the Symposium, and the Phaedrus, from Herodotus and Thucydides, from Karl Popper's The Open Society and its Enemies, vol. I: Plato, (London: Routledge, 1945), from the role of Plato in British upper class society's understanding of itself, and from W.K.C. Guthrie's A History of Greek Philosophy, (Cambridge: Cambridge University Press, 1962.)

68 American law schools are intellectual boot-camps. The law and the military (and police) represent, respectively, the superstructure and the infrastructure of the condign power of the state's monopoly of force. See Russell and Galbraith on power.

69 Lawyers pretend that a scientist who cannot offer complete certainty cannot offer valuable testimony, whereas the truth is that the degree of certainty the scientist *can* offer far exceeds that anyone else can offer on the same issues. The scientist's perennial doubt derives from the discipline of *estimating* the degree of certainty, a discipline the lay person lacks. Jurists believe they have such a discipline because they attempt to distinguish among verbal formulae like "beyond a reasonable doubt" and "the preponderance of the evidence," but these formulae are primitive.

70 In 1948 Garry Davis gave up his U.S. citizenship and sought the U.N.'s recognition as a world citizen. The U.N. declined because it is an organization of nations, not of individuals, and those nations have not recognized that a stateless person can be a "world citizen." Davis proceeded to set up an organization dedicated to competing with the U.N. for recognition of the right to represent the world. He believes that within four hundred years people will eventually come to their senses and realize he is right that the central international organization should be comprised of people, not nations. I believe he is right, but I don't expect other people to take bets on results four hundred years away.

71 Mainstream US politicians like to let the Russians save a little face for fear of rousing a response analogous to that the Nazis showed to the Treaty of Versailles, but the economic damage to the successor states of the USSR is so great that it is not necessary to add insult to injury in order to guarantee the arousal of psychosocial pathology.

72 The US would have to offer greater absolute reductions than the other states, of course,in order to achieve relative parity-- which appears to be unthinkable to leaders of the US.

73 Seymour Melman has provided the best documentation of this motivation in such books as Pentagon Capitalism.

74 See Phyllis Bennis, Calling the Shots: How Washington Dominates Today's UN, (New York: Olive Branch Press, 1996.)

75 The implications of this were clearly spelled out by George Kennan in a 1947 article in Foreign Affairs published under the name Mr. X and in National Security Council document NSC 68. See Noam Chomsky, World Orders Old and New, (New York: Columbia University Press, 1994), especially Chapter 2, Section 3, "The Government of the World," pp. 120-129.

76 In the late 1920's C.H. Douglas developed the theory of social credit. The central thesis is that the cause of inflation is the banking practice of loaning out more money than has been taken in. This practice constitutes the equivalent of a theft from every user of the currency because the quantity of goods that was represented by the total amount of currency prior to the bank's invention of the money used in loans not backed up by deposits comes to be represented by the original currency plus the amount of the new loans, with the new imaginary

money being credited to the bank. Consequently banks transfer from every currency holder to bank owners a percentage of the right to control real value.

This is a destruction of a commonly held good-- i.e., access to the totality of values-- for private gain differing from what is ordinarily called theft in that ordinary theft deprives individuals or small groups whereas banks deprive all currency holders. It is comparable to environmental crimes such as polluting public waters for private profit and thereby stealing from everyone the right to fish, to bathe, to drink clean water, and so on.

In 1200, when money lenders were small-scale and were not respected, interest rates were high because the lender had no means to stop "a run on the bank," and therefore could not use the modern tactic of loaning out more than has been taken in. But the usury that the Medieval church forbad is mild compared to this modern means of theft, which relies on misplaced public trust. If it is necessary to have banks, it should be recognized that allowing a bank to lend out funds it does not have makes banking a public, not a private function. Because the enormous profits of banking actually derive from all holders of currency, not only from the loan recipients who receive a service, only the state should be allowed to bank. When the state is the banker, bank profits derived from unbacked loans function as a flat tax (one proportionate to wealth), while interest functions as a user fee. It is just that the resulting funds be controlled by elected representatives and be used for public purposes.

The power of the Bretton Woods Institutions is thus parasitical; it results from placing public goods in private hands. It is to protect this parasitism that public international law and legal institutions are kept weak.

77 See David C. Korten, When Corporations Rule the World, (West Hartford, Conn.: Kumarian Press, 1995.)

78 See Susan George and Fabrizio Sabelli, Faith and Credit (London: Penguin, 1994.)

79 See Latin American Bureau, The Poverty Brokers, (London: Latin American Bureau, 1983,) and Susan George, A Fate Worse than Debt, (Delhi: Public Interest Research Group, 1988.)

80 In February, 1991, in Quito, Ecuador, students threw molotov cocktails at armored cars loaded with police. Villagers in Cotapaxi turned over cars on the Pan American Highway and burned them to stop traffic. The reason: the government had raised bus fares and the price of gasoline; this would result in increased transportation and fuel prices, and consequently in the prices of everything that uses fuel and transportation.

In June, 1997, in Kathmandu, Nepal, students stopped buses, taxis, and tempos from running by throwing stones at any that tried to move. The reason: the government had raised the price of gasoline and kerosene, with the same results.

Why did two governments a world apart do the same thing? They needed to pay multinational energy corporations, and to earn and save foreign exchange to pay interest on debt to the IMF and World Bank. The government was simply obeying its superior, the world economic government. And the world economic government comes complete with legislation: because the price increases will cause protest, it recommends anti-civil liberties bills to increase the power of the police. And "aid" comes too: a half a million dollars in institutional support for the police.

These are the actions of a world government more effective and ubiquitous than the UN, and with goals and policies contrary to those the UN professes.

When the world economic government silently acts, there is no inefficient talk about sovereignty.

81 Randall Forsberg, leader of the Nuclear Freeze Movement, pointed out in 1982 that most U.S. military units were designed to fight in deserts or jungles, neither of which exist in Russia. The designer of the U.S. nuclear navy, Admiral Hymen Rickover, estimated in a congressional hearing in 1979 that in a war between the U.S. and U.S.S.R. the life expectancy of the navy's 13 aircraft carriers was 48 hours. The purpose of the aircraft carriers was not to fight the U.S.S.R..

82 Most of Noam Chomsky's writing from 1970 to 1985 was devoted to proving this proposition.

83 Benjamin Adorno, et. al., The Authoritarian Personality (New York: Norton, 195-.)

84 Christopher Spalding's The Splendid Blond Beast documents the U.S. use of Nazis to control Germany. The documentaries Shoah and The Nasty Girl show the status of ex-Nazi's in the interactions of ordinary German society in the 1980's.

85 The terms are J.K. Galbraith's in The Anatomy of Power, which clarifies Russell's three-way division in Power. The increase in the differentials of condign power is visible in increasing distance between citizens and politicians, the growth of the military budget, the increasing armaments of the police, and the lengthening of prison sentences for specified crimes. The increase in compensatory power differentials shows in the increase in the number of millionaires (360,000 by 1995) at the same time that the percentage of children living in poverty (already 40% by 1985) increases, the increase in the Gini Coefficient and in measures of surplus value, the increasing ratio of wealth and income possessed by the top percentiles of wealth and income, and the increasing number of unemployed and underemployed, particularly after 1981. The increase in differentials of conditioned power shows in the increasing power of the mass media, the proliferation of PhD's at the same time that basic literacy scores decrease and U.S. students score low among industrialized countries in mathematics.

86 Bertrand Russell, Unarmed Victory, (London: George Allen & Unwin, 1963.)

87 in The Division of Labor in Society, (originally published in French, approx. 1910.)

88 See Richard Sennett, The Fall of Public Man (New York: Vintage, 1980.)

89 See William Barrett, The Illusion of Technique, (New York: Doubleday Anchor, 197-.)

90 Much of the Critical Legal Studies Movement's critique of U.S. legal training is based on this. See the writings of David Kairys, Duncan Kennedy, and Mark Tushnet.

91 See Noam Chomsky, "Writers and Intellectual Responsibility," in his Powers and Prospects, (Boston: South End Press, 1996), pp. 55-69, and Class Warfare, (Delhi: Oxford, 1998.)

92 The figure as of 1987.

93 Well over 50% of U.S. legislators are lawyers.

94 I visited the offices in the late 1980's and talked to the staff and lawyers. Through the 1980's most of the actual initiative for such work came from Richard Falk at Princeton, Saul Mendlowitz at Rutgers, and Anthony D'Amato at Northwestern. Ramsey Clark took a leading role in related work during the Gulf War. But as a group on such issues U.S. lawyers are more servile toward the U.S. government than Nazi lawyers were toward Hitler (some Nazi lawyers were executed for their protests.) Other professions are more active. Doctors, despite their notoriously conservative politics, as expressed through the American Medical Association, can find a hundred times more activists among themselves than lawyers can.

95 I know from my own experience how terrifying it is for a small child to learn of nuclear weapons. I learned of them at the age of four at 9:00 p.m. one Sunday night late in 1952 when an adult cartoon about the H-bomb was aired after the Ed Sullivan Show. I had nightmares for weeks. In the early 1980's when I was a teacher, children of various ages told me their thoughts and feelings about nuclear weapons. An intensely creative eleven-year-old I tutored insisted one day that I listen to him for forty-five minutes while he figured out what he would see if a nuclear warhead exploded over New York. He would not be satisfied until he believed he could visualize exactly what he would see in the last moments of his life. As anyone watching children watch cartoons can observe, children can tolerate the thought of much more chaos than adults can.

96 This is similar to the Victorian conviction that children have no interest in or knowledge of sex. When Freud first challenged this complacent conviction a hundred years ago, it was difficult for him to get a hearing because most adults had repudiated their own childhood memories of sex and avoided any interactions with children on the subject. The adults used the myth of the innocence of children in order to avoid and conceal their own anxieties about sexuality.

97 The first clear statement I know of the difficulty is that of the German philosopher Gunther Anders in his letters to Claude Etherly, copilot of the Enola Gay, published in Burning Conscience in the mid-1950's. Anders gave Etherly a series of imaginative exercises to help Etherly comprehend the effect of the bomb he had helped to deliver. When I became aware of my own tendency to avoid issues of nuclear weapons, I approached it in 1985 by assembling three hours of videotape on Hiroshima and watching it daily for several months. Partly

because I had spent a summer with a good-hearted family in southern Japan, my familiarity made sorrow, pity, and anger replace some of the avoidance reactions based on terror.

98 The original observer and theoretician of this was Harry Stack Sullivan. See The Interpersonal Theory of Psychiatry, (New York, Norton, 194-.) This paragraph is a summary of one theme in the first hundred pages of Jane Pearce and Saul Newton's The Conditions of Human Growth, (Secaucus, N.J.: Citadel Press, 1963), the most readable presentation of the principles of Interpersonal Psychoanalysis.

99 Personal communications and published and unpublished articles,1987-93. She was keenly aware of the fallacy of composition, of thinking that what is true of individuals is true of the group, and wholly denied such popular theories as Desmond Morris's, which seek to account for the aggression of nations by attributing it to the aggressiveness of the individuals that compose the nations. She did not believe in collective guilt and did not think that nuclear weapons were created by nations as a whole in order to satisfy a group need; she recognized that they are created by a small and insulated elite for economic and political ends.

100 The U.S. lost 408,000 lives in World War II, more in fighting Japan than Germany. The U.S.S.R. lost 17 million, 41.67 times as many people, all of them fighting Germany alone. (Sivard, p. 18.) The U.S. policy was to let Germany and the U.S.S.R destroy each other, then arrive at the end when Germany was exhausted to prevent the U.S.S.R. from claiming as much of Europe as possible. Daniel Ellsberg, in the publication of The Pentagon Papers, also revealed that the determining factor in Truman's decision to bomb Hiroshima and Nagasaki at the moment he did was to end the war before Soviet troops could cross over from Sakhalin to the Kurile Islands and onto Hokkaido and simultaneously signal to Stalin that the U.S. was willing to use nuclear weapons when it was not necessary. Roosevelt knew Stalin would get the point because the U.S. then routinely passed on Stalin the decoded messages of the Japanese high command, which proved that the Japanese military had already decided to surrender. The U.S. strategy in World War II, from beginning to end, was to acquire the maximum amount of power at minimum cost, and to use the war to develop its industry and escape the Depression. In all four goals it succeeded.

101 See Daniel Hofstadter's The Paranoid Style in American Politics, (New York: Harper, 196-.)

102 The Subjection of Women in On Liberty, Representative Government, The Subjection of Women: Three Essays by John Stuart Mill, (London: Oxford University Press, 1969.) pp. 478-479.

103 The world gross product per capita in 1995 was $5,428 dollars per year adjusted for purchasing power parity. UNDP World Development Report 1996, p. 137.