

# DUTIES TO FUTURE GENERATIONS AND NUCLEAR WEAPONS DISARMAMENT

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## ABSTRACT

*There is no consensus among philosophers, including philosophers of law, whether the present generation has duties to future generations or whether future generations have rights for which the present generation is accountable. Where the moral or legal argument is advanced that we do have duties to future generations in view of their rights, that argument reasonably includes concern for the abolition of nuclear weapons. There is ample moral warrant (e.g., from the moral philosophy of John Rawls) and legal warrant (e.g., from the legal assessment of the International Court of Justice) in the present (1) to account for such duties and (2) for those of our generation to take requisite action that protects the rights of future generations against nuclear catastrophe. Hence, there is a reasonably defensible moral and legal argument in favor of nuclear disarmament.*

*Keywords: nuclear weapons, international law, future generations, Rawls, Weeramantry.*

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. . . There should be no niche in the legal principle, within which a nation may seek refuge, constituting itself the sole judge in its own cause on so important a matter. . .

It would be a paradox if international law, a system intended to promote world peace and order, should have a place within it for an entity that can cause total destruction of the world system, the millennia of civilization which have produced it, and humanity itself.

- Judge Christopher Weeramantry<sup>1</sup>

## I. INTRODUCTION

Are nuclear weapons today morally and legally indefensible in view of the supposed duties we in the present have to future generations? This is the question at issue here. The occasion

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<sup>1</sup> Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) (1996) [1996] ICJ Rep (ICJ) 226 (Dissenting Opinion of Judge Christopher Weeramantry).

and motivation for this question are given in current events in evidence that threaten present and future generations. Consider that, in its Yearbook 2023, the Stockholm International Peace Research Institute (SIPRI) warned that the nine nuclear-armed states continued ‘long-term force modernization’ even as ‘expansion plans progressed,’ including deployment of ‘new nuclear-armed or nuclear-capable weapons systems in 2022,’ many ‘kept in a state of high operational alert.’<sup>2</sup>

Significantly, this modernization occurs in the context of a series of withdrawals from treaties regulating nuclear weapons:

1. The USA withdrew from the *Anti-Ballistic Missile Treaty*<sup>3</sup> in 2002, with Russia responding by rejecting the terms of the *Strategic Arms Reduction Treaty II*.<sup>4</sup>
2. The US withdrew from the *Intermediate Range Nuclear Forces Treaty*, 1987, in 2019, along with a heightened threat to peace in Europe consequent to Russia’s invasion of Ukraine in February 2022, Russian President Vladimir Putin signaling his readiness to use nuclear weapons if necessary, given the prospect of a military response from North Atlantic Treaty Organization (NATO) member-states.
3. Russia then announced in February 2023 its suspension of the 2010 Treaty on Measures for the Further Reduction and Limitation of Strategic Offensive Arms (‘New START’—Strategic Arms Reduction Talks).<sup>5</sup> More recently, Sergei Karagonov, Chair of the Russian think-tank Council on Foreign and Defense Policy and advisor to Russian President Putin, asserted that, ‘the enemy must know that we are ready to deliver a pre-emptive strike...to prevent a slide into global thermonuclear war.’<sup>6</sup>

These developments, threatening international security and the future of humanity on the scale of an existential threat, are salient to the elaboration of a philosophical-practical and legal rationality that insists on a critique of the failures of efforts at international nuclear disarmament (notwithstanding occasionally negotiated arms reductions), both relative to the

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<sup>2</sup> Stockholm International Peace Research Institute, *SIPRI Yearbook 2023: Armaments, Disarmament and International Security* (Oxford University Press, 2009).

<sup>3</sup> *Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, Anti-Ballistic Missile Treaty*, signed 26 May 1972, [944 UNTS 13] (entered into force 3 October 1972).

<sup>4</sup> *Treaty Between the United States of America and the Russian Federation on Further Reduction and Limitation of Strategic Offensive Arms, Strategic Arms Reduction Treaty II*, signed 3 January 1993.

<sup>5</sup> Shannon Bugos, ‘Russia Suspends New START’ *Arms Control Association*, March 2023, <<https://www.armscontrol.org/act/2023-03/news/russia-suspends-new-start>> accessed 08 January 2024.

<sup>6</sup> Sergei Karaganov, ‘A Difficult but Necessary Decision’ *Russia in Global Affairs*, 13 June 2023, <<https://eng.globalaffairs.ru/articles/a-difficult-but-necessary-decision/>> accessed 06 January 2024.

concerns of the present generation and concerns for duties to future generations.<sup>7</sup> In contrast to concern for such duties with reference to the global environment, the moral problem of nuclear disarmament is not simply a matter of what philosopher Martin Heidegger calls ‘calculative thinking’ (*rechnendes Denken*).<sup>8</sup> Such calculation is all too often present in mitigation strategies focused on ‘technological fixes.’ Yet, the significance of nuclear disarmament for the human prospect is not a function of ‘trade-off’ between the value preferences of those who live today and what one may assume reasonably to be the value preferences of future generations, were they able to articulate those preferences in the present.<sup>9</sup>

The rights of future generations weigh upon the present and upon the assertion of the present generation’s duties to those future generations. This claim will be argued here through engagement of moral philosopher John Rawls’s thinking about justice with reference to the requisites of intergenerational justice.

## **II. UNTHINKABLE/INDEFENSIBLE, YET THINKABLE/DEFENSIBLE, WEAPONS?**

After the atomic bombing of Hiroshima and Nagasaki on 06 and 09 August 1945, respectively, many regarded the use of nuclear weapons to be both unthinkable and indefensible in view of a dire existential threat for global humanity and the prospect of an irrecoverable planetary-scale catastrophe. Already in 1945, e.g., scientists involved in the Manhattan Project at the Los Alamos Laboratory and test site for atomic bombs estimated it would take ‘only in the neighborhood of 10 to 100 Supers’ (meaning here thermonuclear weapons) to destroy life on Earth as we know it. As a declassified technical report from the Manhattan Project put it, ‘a uniformity of insight had grown up among the working scientists of the Manhattan District. They had come to realize that atomic warfare would prove

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<sup>7</sup> By ‘future generations’ the author means all those who may be born and live in time frames other than ‘the present generation,’ using a ‘cross-cultural estimation’ of a ‘human generation interval’ averaging thirty years. See, Jack N. Fenner, ‘Cross-Cultural Estimation of the Human Generation Interval for Use in Genetics-Based Population Divergence Studies’ (2005) 128 *American Journal of Physical Anthropology* 415.

<sup>8</sup> Martin Heidegger, *Memorial Address: Discourse on Thinking* (Harper & Row, 1966) at 46 (that calculative thinking is peculiar insofar as ‘whenever we plan, research, and organize, we always reckon with conditions that are given. We take them into account with the calculated intention of their serving specific purposes. Thus, we can count on definite results. This calculation is the mark of all thinking that plans and investigates. Such thinking remains calculation even if it neither works with numbers nor uses an addition machine or computer. Calculative thinking computes.’)

<sup>9</sup> The reality of ‘nuclear despotism’ makes the moral and legal problem of nuclear weapons far more dire than that of the prospect of environmental catastrophe. On this, see the later discussion of the problem of nuclear deterrence doctrine.

unendurable.’<sup>10</sup> Further, this group of scientists understood, ‘atomic bombs were offensive or retaliatory weapons, their existence was a threat to the security of every nation, which it could not venture, without the gravest risk, to meet on the military plane alone.’<sup>11</sup>

The above statement is salient for placing thermonuclear weapons (the destructive power of which is today measured in megatons of TNT explosive power)<sup>12</sup> in the category of offensive or retaliatory, rather than defensive, weapons. With the size and complexity of today’s nuclear arsenals, the existential threat to humanity is amplified by far greater magnitude than estimated in 1947. As of 2022, of approximately 12,700 nuclear warheads in stockpile worldwide (deliverable by way of land, sea, and air-based systems), it is estimated that the USA has 5,428 and Russia has 5,977.<sup>13</sup> Of these totals, the Federation of American Scientists estimates the USA has 1,644 ‘deployed/strategic’ and 1,964 ‘reserve/nondeployed,’ others retired, while Russia has 1,588 ‘deployed/strategic’ and 2,889 ‘reserve/nondeployed,’ and others retired,<sup>14</sup> even though some studies suggest several hundred such weapons are a sufficiently credible nuclear deterrent.<sup>15</sup> As an article in the Wall Street Journal put it, ‘the U.S. has enough nuclear warheads to destroy the world more than 10 times over.’<sup>16</sup>

That stark reality makes it clear: Worldwide thermonuclear war is today quite thinkable for politicians, military and security policy analysts, and physical scientists engaged in the technological innovations that lead to newer weapons designs and planned modernization of such weapons systems. And (rightly or wrongly), many deem the prior ‘indefensible’ thinking now morally and legally defensible (the latter more often than not by appeal to the principle of state sovereignty), even though innovations in weapons technologies contribute to perpetual global insecurity amidst unprecedented geopolitical complexity and calculative uncertainty in

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<sup>10</sup> ‘Manhattan District History’ *Los Alamos Project (Y)-Book Viii, Volume 2 Technical, Atomic Weapons Data Cy 2a*, Revision Date 29 April 1947, <<https://ia903409.us.archive.org/14/items/ManhattanDistrictHistory/MDH-B8V02P01-LosAlamos-Technical.pdf>>, accessed 27 March 2022.

<sup>11</sup> *Ibid.*, at XX-2.

<sup>12</sup> See, e.g., Owen Jarus, ‘The 9 most powerful nuclear weapon explosions’ *Livescience*, <<https://www.livescience.com/most-powerful-nuclear-explosions>> accessed 28 March 2022. See also, Alex Wellerstein, ‘An Unearthly Spectacle: The untold story of the world’s biggest nuclear bomb’ *Bulletin of The Atomic Scientists*, 29 October 2021, <<https://thebulletin.org/2021/11/the-untold-story-of-the-worlds-biggest-nuclear-bomb/>> accessed 28 March 2022.

<sup>13</sup> Hans Kristensen et al., ‘Status of World Nuclear Forces’ *Federation of American Scientists* <<https://fas.org/issues/nuclear-weapons/status-world-nuclear-forces/>> accessed 27 March 2022.

<sup>14</sup> *Ibid.*

<sup>15</sup> See Hans M. Kristensen, Robert S. Norris, and Ivan Oelrich, ‘From Counterforce to Minimal Deterrence: A New Nuclear Policy on the Path Toward Eliminating Nuclear Weapons’ (Occasional Paper No. 7, Washington DC: Federation of American Scientists & The Natural Resources Defense Council, April 2009), <<https://pubs.fas.org/docs/occasionalpaper7.pdf>>, accessed 28 March 2022.

<sup>16</sup> Wall Street Journal, ‘How Many Nukes Is Too Many?’ 13 February 2022, <<https://www.wsj.com/articles/china-nukes-nuclear-weapons-arsenal-11644614407>> accessed 27 March 2022.

the ‘nuclear decision calculus’ of both the USA and Russia.<sup>17</sup> Clearly, no one can imagine accurately the fate of humanity and Earth’s global ecology consequent to an actual employment of these weapons, except plausibly to predict an extinction-level eventuality for innumerable species—the latter eventuality consequent to destruction of much of the extant global built infrastructure, a long-term ionizing radioactive global environment in much of the northern hemisphere (with effects spreading south of the equator), subsequent nuclear winter,<sup>18</sup> and sheer devastation of most of the planet’s fertile agricultural lands, thus blocking future growth and productivity essential to human survival within the global ecosystem. All of this manifests an existential threat not only for the present generation, but also for future generations, hence the dire moral and legal problem being engaged here.

That stark prognosis contributes to questions about both the morality and legality of nuclear weapons. After the ostensible close of the Cold War (c. 1991), the 49<sup>th</sup> United Nations General Assembly (UNGA), in a resolution adopted on 15 December 1994 (A49/75K),<sup>19</sup> requested the International Court of Justice (ICJ) to opine on the legality of the threat or use of nuclear weapons. Referencing the UN Charter, the ICJ accounted for the rule of customary international law that States have a right of self-defense under conditions of necessity, howsoever constrained by the rule of proportionality. Further, examining extant treaty law, the

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<sup>17</sup> The position of the USA in 2018 was published in the U.S. Department of Defense’s ‘Nuclear Posture Review’ *Office of the Secretary of Defense*, February 2018, <<https://media.defense.gov/2018/Feb/02/2001872886/-1/1/2018-NUCLEAR-POSTURE-REVIEW-FINAL-REPORT.PDF> accessed 29 March 2022>. Russia’s position was expressed in a document published in 2020 (Principles of State Policy of the Russian Federation in the Sphere of Nuclear Deterrence), *see here*, <<http://publication.pravo.gov.ru/Document/View/0001202006020040?index=0&rangeSize=1>> accessed 29 March 2022. For elaboration, *see* Cynthia Roberts, ‘Revelations About Russia’s Nuclear Deterrence Policy’ *War on Rocks*, 19 June 2020, <<https://warontherocks.com/2020/06/revelations-about-russias-nuclear-deterrence-policy/>> accessed 29 March 2022. *See also*, Polina Sinovets and Bettina Renz, ‘Russia’s 2014 Military Doctrine and beyond: threat perceptions, capabilities and ambitions’ NATO Research Paper, No. 117, July 2015, NATO Defense College, Rome; Reuters, ‘Kremlin: Russia would only use nuclear weapons if its existence were threatened’ 23 March 2022, <<https://www.reuters.com/world/europe/kremlin-russia-would-only-use-nuclear-weapons-if-its-existence-were-threatened-2022-03-22/>> accessed 29 March 2022. More recently, the Trump Administration issued its policy, ‘National Security Strategy of the United States of America’ *The White House*, November 2025, <<https://www.whitehouse.gov/wp-content/uploads/2025/12/2025-National-Security-Strategy.pdf>> accessed 15 December 2025. The ‘strategy’ includes the USA having ‘the world’s most robust, credible, and modern nuclear deterrent, plus next-generation missile defenses, including a Golden Dome for the American homeland....’ At 23, the strategy document asserts that, ‘in the long term, maintaining American economic and technological preeminence is the surest way to deter and prevent a large-scale military conflict.’

<sup>18</sup> *See* Seth Baum, ‘The Risk of Nuclear Winter’ *Public Interest Report, Federation of American Scientists*, 29 May 2015, <<https://fas.org/pir-pubs/risk-nuclear-winter/>> accessed 30 March 2022. For a classical discussion, *see* R.P. Turco et al., ‘Nuclear Winter: Global Consequences of Multiple Nuclear Explosions’ *Science*, 222(4630) 23 December 1983, <<https://www.science.org/doi/10.1126/science.222.4630.1283>> accessed 30 March 2022.

<sup>19</sup> United Nations General Assembly, GA Resolution A/RES/49/75, 49<sup>th</sup> Session, Agenda Item 62, 09 January 1995, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N95/760/03/PDF/N9576003.pdf?OpenElement>> accessed 08 January 2024.

Court noted that it did not find ‘any specific prohibition of recourse to nuclear weapons in treaties expressly prohibiting the use of certain weapons of mass destruction.’<sup>20</sup>

The ICJ issued its advisory opinion on 08 July 1996, observing that, ‘in view of the current state of international law and of the elements of fact at its disposal [it] cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake.’<sup>21</sup>

The Court replied to the UNGA thus:

1. By unanimity: ‘There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons.’<sup>22</sup>
2. By vote of 11-3: ‘There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such.’<sup>23</sup>
3. By unanimity: ‘A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful.’<sup>24</sup>
4. By unanimity: ‘A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons.’<sup>25</sup>
5. By a divided vote of 7-7, with the court’s President casting in favor: ‘...the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law.’
6. ‘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 unlawful use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake.’<sup>26</sup>

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<sup>20</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Report 1996 226 at 248.

<sup>21</sup> *Ibid*, at 263.

<sup>22</sup> *Ibid*, at 266.

<sup>23</sup> *Ibid*, at 266.

<sup>24</sup> *Ibid*, at 266.

<sup>25</sup> *Ibid*, at 266.

<sup>26</sup> *Ibid*, at 266.

In short, the ICJ allowed for the possibility that a State could declare a ‘supreme emergency’<sup>27</sup> and, acting on ‘the rule of necessity’ (necessity knows no rules), therefore a State could legally (i.e., as a matter of positive law) wage a war with nuclear weapons on a claim of necessity of ‘State survival’—notwithstanding that the just war tradition and the law of armed conflict normally stipulate a principle of discrimination prohibiting military hostilities against non-combatant ‘innocent civilians.’ On the Court’s final statement—regrettably for those seeking the legal prohibition of the use of nuclear weapons and their eventual elimination—the principle of necessity prevails over the principle of discrimination to legitimate a war in which such weapons of mass destruction are used. Morally, of course, the appeal to supreme emergency and the principle of necessity is by no means without objection.

The ICJ advisory opinion was disappointing for the ambiguity it left in place. Notably, the Government of Japan, contributing to the legal proceedings at the time, opined that ‘the use of nuclear weapons is clearly contrary to the spirit of humanity that gives international law its foundation.’<sup>28</sup> On this view, a mere appeal to the authority of positive law (and thus to the letter of that law) fails to meet the stricter demands of the spirit of the law. In contrast, the Government of the United States (taking exception to the UNGA request as a matter involving ‘an abstract question’) opined, ‘in particular, the United States believes that the Court, in the exercise of the discretion provided by Article 65, paragraph 1, of its Statute, should decline to provide an opinion,’ arguing further that (a) ‘there is no general prohibition in conventional or customary international law on the threat or use of nuclear weapons,’ and (b) nothing in the body of international humanitarian law of armed conflict indicates that nuclear weapons are prohibited *per se*.<sup>29</sup> Representing the victims of the atomic bombings, of course, the Government of Japan argued against the legality of nuclear weapons;<sup>30</sup> while the Government of the USA (as the first to use such indiscriminate weapons) sought to preserve its legal right (not to say, moral right) to use its nuclear arsenal in the future, notwithstanding the peril of mutually assured destruction by warring nuclear-powered states and despite any legal appeal to the principle of necessity.<sup>31</sup>

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<sup>27</sup> See Michael Walzer, *Just and Unjust Wars* (Basic Books, 2<sup>nd</sup> ed, 1992).

<sup>28</sup> ‘Letter dated 14 June 1995 from Minister at the Embassy of Japan, together with Written Statement of the Government of Japan’, *Legality of the Threat or Use of Nuclear Weapons (Written Proceeding)* [1995].

<sup>29</sup> Letter dated 20 June 1995 from the Acting Legal Advisor to the Department of State, together with Written Statement of the Government of the United States of America’, *Legality of the Threat or Use of Nuclear Weapons (Written Proceeding)* [1995].

<sup>30</sup> Letter from Minister, above note 28.

<sup>31</sup> Letter from the Acting Legal Advisor, above note 29.

Indeed, even with ample effort after World War 2, successfully negotiating arms control treaties,<sup>32</sup> the threat of a global nuclear war today remains a real and growing probability.<sup>33</sup> Hence, it is of the utmost importance that, despite the earlier ICJ advisory opinion, the legality of nuclear weapons has now been settled by the entry into force of the *Treaty on the Prohibition of Nuclear Weapons*<sup>34</sup> in January 2021. This fact should give pause to all who are involved in nuclear security policy studies and who fail to account for the implications of this treaty for duties to future generations that those living today have, including the duty to avoid an irreversible global catastrophe caused by thermonuclear warfare.

The futurist Herman Kahn, writing in the latter half of the 20<sup>th</sup> century and engaging in thought-experiments (*Gedanken*) examining the consequences and ethical implications of nuclear weapons, wrote two provocative works for those concerned about global human security—*On Thermonuclear War*, 1960 and *Thinking about the Unthinkable*, 1962, the latter revisited in his *Thinking about the Unthinkable in the 1980s*, published in 1984. Kahn remarked in the latter volume, ‘much of today’s conventional wisdom preaches the inevitability of disaster—an “apocalyptic vision” that only radical disarmament, or a “freeze”, can prevent.’<sup>35</sup> Even so, Kahn noted in the latter book, ‘there are too many unknowns and uncertainties’ when a supposed ‘balance of power’—promoted by adherents of Realpolitik—gradually morphs into a ‘balance of terror.’ This remains so in the early 21<sup>st</sup> century. Furthermore, Kahn opined that one cannot prove beyond a reasonable doubt that such weapons are morally indefensible, at

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<sup>32</sup> Various declarations include: the *Nuclear Non-proliferation Treaty*, signed on 1 July 1968, 729 UNTS 161 (entered into force on 5 March 1970); the *Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on Certain Measures with Respect to the Limitation of Strategic Offensive Arms (SALT I)*, signed on 26 May 1972, 23 UST 3462 (entered into force on 3 October 1972); the *Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems*, signed on 26 May 1972, 944 UNTS 13 (entered into force on 3 October 1972); the *Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms (SALT II)*, signed on 18 June 1979; the Intermediate-Range Nuclear Forces Treaty, signed on 8 December 1987 (entered into force on June 1 1988); the *Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms and Associated Documents*, signed on 31 July 1991 (entered into force 5 July 1994); the *Treaty Between the United States of America and the Russian Federation on Further Reduction and Limitation of Strategic Offensive Arms*, signed on 3 January 1993; United Nations General Assembly, GA Resolution A/RES/50/245, *Comprehensive Test Ban Treaty*, 17 September 1996; the *Treaty between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms*, signed on 8 April 2010 (entered into force on 5 February 2011); and the *Treaty on the Prohibition of Nuclear Weapons*, signed on 7 July 2017, 3370 UNTS (entered into force on 22 January 2021).

<sup>33</sup> One measure is given in the Doomsday Clock set by the Science and Security Board of the *Bulletin of Atomic Scientists*, which in 2023 is set at ‘90 seconds to midnight.’ See Bulletin of the Atomic Scientist, ‘A time of unprecedented danger: It is 90 seconds to midnight’ <<https://thebulletin.org/doomsday-clock/current-time/>> accessed 24 January 2023.

<sup>34</sup> *Treaty on the Prohibition of Nuclear Weapons*, signed on 7 July 2017, 3370 UNTS (entered into force on 22 January 2021).

<sup>35</sup> Herman Kahn, *Thinking About the Unthinkable in the 1980s* (Simon & Schuster, 1984) at 17.

least not such as to arrive at a ‘categorical reference’ to right or wrong. Why so? Because, he claimed, ‘thinking about nuclear war means thinking about the impossible, the improbable, the implausible, and the unlikely’ all at once, even as ‘it also means making distinctions between scenarios that are more or less likely, more or less important, and more or less worrisome.’<sup>36</sup> All of this, of course, concerns a commitment to calculative thinking that can by no means settle the moral or legal dilemma in and of itself.

In today’s context of nuclear security assessment, the probability of nuclear war is no longer to be estimated as either ‘low’ (<0.5) or ‘remote,’ even as Kahn might today continue to use the paraphrastic ‘not improbable’ to describe the present. Indeed, the Science and Security Board (SSB) of the Bulletin of Atomic Scientists finds humanity ‘at doom’s doorstep’ in 2022, and in 2025 set the ‘doomsday clock’ at ‘89 seconds to midnight’—this clock ‘a universally recognized indicator of the world’s vulnerability to catastrophe from nuclear weapons, climate change, and disruptive technologies in other domains.’<sup>37</sup> Commenting on developments worldwide, the SSB cautioned, ‘upcoming decisions on nuclear policies could generate either salutary or dangerous modifications of an already uncertain and worrisome security situation.’ The SSB looked positively at the agreement between the USA and Russia in February 2021 to renew the *Strategic Arms Reduction Treaty* (START) for five years. Yet, Russian President Vladimir Putin’s war of aggression in Ukraine in February 2022, with his placement of the Russian strategic force system on high alert (‘a special regime of combat duty’) and concern for his threatened use of intermediate range (tactical, battlefield) nuclear weapons, has compounded the level of risk and added to global uncertainty while leaving many to think a third world war is ‘not improbable.’<sup>38</sup> Further, as noted earlier, in 2023, Putin decided to suspend Russia’s participation in the strategic arms reduction talks, thus increasing the uncertainty as to his intentions and thus the likelihood of ongoing modernization of weapons systems rather than movement in the direction of disarmament.<sup>39</sup> Hence, it is not surprising

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<sup>36</sup> Ibid, at 18.

<sup>37</sup> Bulletin of the Atomic Scientists, ‘At doom’s doorstep: It is 100 seconds to midnight: 2022 Doomsday Clock Statement’ 20 January 2022, <<https://thebulletin.org/doomsday-clock/current-time/>> accessed 27 March 2022; 90 seconds to midnight, above note 33.

<sup>38</sup> Shannon Bugos, ‘Putin Orders Russian Nuclear Weapons on High Alert’ *Arms Control Association*, March 2022, <<https://www.armscontrol.org/act/2022-03/news/putin-orders-russian-nuclear-weapons-higher-alert>> accessed 27 March 2022.

<sup>39</sup> Charles Maynes, ‘Putin says Russia will stop participating in its last nuclear treaty with the U.S.’ *NPR*, 21 February 2023, <<https://www.npr.org/2023/02/21/1158463688/putin-tells-russian-parliament-the-west-is-fighting-to-dismember-russia>> accessed 12 March 2023. For the position statement of the US State Department, see US Department of State, ‘Russian Noncompliance with and Invalid Suspension of the New START Treaty’ 15 March 2023, <<https://www.state.gov/russian-noncompliance-with-and-invalid-suspension-of-the-new-start-treaty/>> accessed 16 March 2023.

that on 28 January 2025 the SSB remarked: ‘In setting the Clock one second closer to midnight, the Science and Security Board sends a stark signal: Because the world is already perilously close to the precipice, a move of even a single second should be taken as an indication of extreme danger and an unmistakable warning that every second of delay in reversing course increases the probability of global disaster.’<sup>40</sup>

The ambiguity and uncertainty about both Russian and American posture and substance on the issue of the prospective use of nuclear weapons elicit further serious questions. Among these is the question whether such weapons are morally indefensible when assessed according to perceived ‘duties to future generations.’ Thus, the central question engaged here in the present essay, as noted at the outset, is: Are nuclear weapons today morally and legally indefensible in view of supposed duties we in the present have to future generations? This question, of course, requires some engagement of the prior moral-philosophical question of whether we have such duties, even though at present there is no philosophical consensus that such duties obtain.<sup>41</sup> This question also requires some philosophical assessment of the temporal context of moral-philosophical assessment, thus the interpretive position on time consciousness that is presupposed. These related questions are engaged in sequence in what follows to thereafter claim that time consciousness makes an important difference in the debate, such that when properly clarified, therefore, we in the present do indeed have duties to future generations in view of the rights they possess.

### **III. THE DEBATE OVER DUTIES TO FUTURE GENERATIONS**

#### **A. The Legal Disputation**

On the occasion of the entry into force of the Treaty on the Prohibition of Nuclear Weapons (TPNW) on 22 January 2021, the World Future Council issued a press release expressing ‘deep concern about the existential threat to humanity and the planet from the 14,000 weapons possessed by nine nuclear-armed States,’ calling upon nuclear-armed and allied states to ‘affirm that nuclear war cannot be won and must never be fought’ (consistent with the formal diplomatic position adopted by former American president Ronald Reagan and former Soviet

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<sup>40</sup> Bulletin of the Atomic Scientists, ‘It is now 89 seconds to midnight’ <<https://thebulletin.org/doomsday-clock/>> accessed 15 December 2025.

<sup>41</sup> See Joerg Chet Tremmel, ed. *Handbook of Intergenerational Justice* (Edward Elgar Publishing Inc., 2006).

premier Mikhail Gorbachev),<sup>42</sup> and to ‘stand down their nuclear forces and affirm policies never to initiate a nuclear war.’<sup>43</sup> More recently (26 March 2025), the Federation of American Scientists observed that, ‘in contrast to the overall inventory of nuclear weapons, the number of warheads in global military stockpiles—which comprises warheads assigned to operational forces—is increasing once again.’<sup>44</sup>

The statement from the World Future Council combines descriptive and normative claims, of course, since (a) it seems true empirically that a nuclear war cannot be ‘won’ (the word having connotation quite different from its sense when used with reference to armed conflict using conventional weapons having a localized lethality, hence the standard refrain that a nuclear war between the two superpowers would entail a cataclysmic ‘mutually assured destruction’); and since (b) because of that apparent fact, there is apparently no compelling moral or legal rationale to fight such a war, even if one accounts for the principle of necessity. That is, accounting for both elements of just war theory (the *jus ad bellum*, right to go to war, and the *jus in bello*, the right conduct of war) and international humanitarian law, it would not matter whether such a war were undertaken preemptively (as former American president George W. Bush considered legal as a matter of ‘preventive’ war), or on the dubious claim of employing these weapons as a matter of ‘necessity’ (‘State survival’). The latter is an oxymoronic appeal to the principle of necessity that makes a mockery of the very idea of a moral or legal principle. Even a ‘realist’ in political philosophy and international relations theory such as former American secretary of state Henry Kissinger understood this when he remarked, ‘the European allies should not keep asking us to multiply strategic assurances that we cannot possibly mean, or if we do mean, we should not want to execute because if we execute, we risk the destruction of civilization,’<sup>45</sup> not to mention the existential threat to the whole of the planetary ecosystem.

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<sup>42</sup> National Archives, ‘Joint Soviet-United States Statement on the Summit Meeting in Geneva’ *Ronald Reagan*, 21 November 1985, <<https://www.reaganlibrary.gov/archives/speech/joint-soviet-united-states-statement-summit-meeting-geneva>> accessed 07 September 2023.

<sup>43</sup> World Future Council, ‘Abolish Nuclear Weapons to Assure a Sustainable Future’ 18 January 2021, <<https://www.worldfuturecouncil.org/abolish-nuclear-disarmament-joint-statement/>> accessed 29 March 2022.

<sup>44</sup> Hans Kristensen, above note 13.

<sup>45</sup> Henry A. Kissinger, ‘NATO Defense and the Soviet Threat’ *Survival* (November-December, 1979) at 266 (as cited by Robert S. McNamara, ‘The Military Role of Nuclear Weapons: Perceptions and Misperceptions’ *Foreign Affairs* (1983) 59, <<https://www.foreignaffairs.com/articles/1983-09-01/military-role-nuclear-weapons-perceptions-and-misperceptions>> accessed 30 March 2022). Despite his commitment to a balance of power doctrine, in his *Nuclear Weapons and Foreign Policy* (Harper & Brothers, 1957) at 167, Kissinger understood a limited nuclear war would be illogical: ‘We would, therefore, be destroying the very people we were seeking to protect.’

It is in this context that Judge Christopher Weeramantry, former justice of the International Court of Justice (from 1991-2000), opined, in dissent from the ICJ advisory opinion on the legality of nuclear weapons, that the Court ‘must, in its jurisprudence, pay due recognition to the rights of future generations.’<sup>46</sup> Accounting for ‘philosophical insights,’ ‘one based on rationality, and the other on fairness.’ Weeramantry reminded: ‘[...] all the postulates of law presuppose that they contribute to and function within the premise of the continued existence of the community served by that law.’<sup>47</sup> Referring to the moral philosophy of John Rawls<sup>48</sup> and the question of what situation one would accept under a ‘veil of ignorance’<sup>49</sup> (i.e., not knowing one’s factual situation such as where one lives geographically, whether one lives in a nation having nuclear weapons or not, what status one has as a senior functionary of government or civilian, etc., thus as a question of justice as fairness), Weeramantry opined:

A nation considering its allegiance to such a system of international law, and not knowing whether it would fall within the group of nuclear nations or not, could scarcely be expected to subscribe to it if it contained a rule by which legality would be accorded to the use of a weapon by others which could annihilate it. Even less would it consent if it is denied even the right to possess such a weapon and, least of all if it could be annihilated or irreparably damaged in the quarrels of others to which it is not in any way a party. ... By this test of fairness and legitimacy, such a legal system would surely fail.  
...By either test [of rationality or fairness], widely accepted in the literature of modern jurisprudence, the rule of international law applicable to nuclear weapons would be that their use would be impermissible.<sup>50</sup>

Although his statement is subjunctive (‘would be’ impermissible) rather than assertoric (‘is’ impermissible), Weeramantry is unequivocal in his conclusion: ‘the use or threat of use of nuclear weapons is absolutely prohibited by existing law—in all circumstances and without reservation.’<sup>51</sup> Notwithstanding, even as he understood that extant law (*lex lata*) and not future

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<sup>46</sup> Nuclear Weapons, above note 20, dissenting opinion of Judge Weeramantry, at 455.

<sup>47</sup> Nuclear Weapons, above note 20, dissenting opinion of Judge Weeramantry, at 520.

<sup>48</sup> See John Rawls, *A Theory of Justice* (Revised ed, Harvard University Press, 1999). At 3 Rawls writes of ‘justice as fairness’ in view of the concept of a social contract, arguing, in contrast to a utilitarian calculus, that, ‘each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason, justice denies that the loss of freedom for some is made right by a great good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by the many.’

<sup>49</sup> Ibid, at 11 (‘Veil of ignorance’ is a theoretical device Rawls uses as part of his conceptualization of justice as fairness and the situation in which one must choose principles of justice, in which there is an ‘original position of equality’—not ‘as an actual historical state of affairs’ but ‘as a purely hypothetical situation,’ the ‘essential features’ of this original position being that: ‘no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like,’ nor do they know ‘their conceptions of the good or their special psychological propensities.’)

<sup>50</sup> Nuclear Weapons, above note 20, dissenting opinion of Judge Weeramantry, at 523.

<sup>51</sup> Nuclear Weapons, above note 20, dissenting opinion of Judge Weeramantry, at 553.

law (*lex ferenda*) mattered to the disposition of the ICJ advisory opinion, Weeramantry reminded that, '[R]ationality, humanity and concern for the human future are built into the structure of international law,'<sup>52</sup> in which case, the authority of *lex ferenda* cannot be ignored.

In subsequent writing, Weeramantry continued to assert that future generations of humanity have rights to 'the basic fundamentals of civilized existence,' even going so far as to consider violation of such rights a crime under international law.<sup>53</sup> For example, accounting for the fact of geographically widespread and protracted radioactivity following the detonation of nuclear weapons, Weeramantry observed: 'If the half-life of some of the radioactive elements that are being tinkered with deliberately when building nuclear weapons is 24,000 years, can any responsible legal system permit such acts to be committed, which will so grievously affect a thousand generations to come?'<sup>54</sup> The implicit argument is that: (1) this consequence of employment of strategic nuclear weapons causes nigh irreparable harm to the global environment; (2) that harm affects future generations (assuming any might yet live after such a global conflagration); and (3) such harm is manifestly a grievous violation of human rights to life, health and livelihood that future generations possess; in which case (4) a legal system operative today cannot but be expected to protect these rights; and (5) to do so in a way that is enforceable as a matter of international law. Weeramantry's judgment cannot be gainsaid: '[Nuclear] war is not one in which a nation, as we know it, can survive as a viable entity. The spirit that walks the nuclear wasteland will be a spirit of total despair, haunting victors (if there are any) and vanquished alike.'<sup>55</sup>

## **B. Philosophical Disputation: Views Contrary to Rawls's Position**

Referencing Weeramantry's opinion, a critical skeptic such as Oliver Marc Hartwich asks: 'Is there a basis for claims that future generations have rights?'<sup>56</sup> The question is one of moral, legal, and political philosophy, but rests on metaphysical and cosmological assumptions, including that of time consciousness. Precisely because these generations do not 'now' exist, so the 'non-existence argument' goes (and as Hartwich opines), it cannot be said that they have rights: 'Claiming that non-existing persons possess anything is so evidently absurd that it is

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<sup>52</sup> Nuclear Weapons, above note 20, dissenting opinion of Judge Weeramantry, at 553.

<sup>53</sup> World Future Council, 'Crimes against Future Generations Need to Become Taboo' 29 May 2009, <<https://www.worldfuturecouncil.org/crimes-future-generations-need-become-taboo/>> accessed 29 March 2022.

<sup>54</sup> If one adopts a lifespan of a generation to be thirty years rather than 20-25 years, in 24,000 years, this would amount to about 800 generations. The point is nonetheless salient to his argument as to the devastation to the Earth's planetary ecosystem.

<sup>55</sup> Nuclear Weapons, above note 20, dissenting opinion of Judge Weeramantry, at 24.

<sup>56</sup> Oliver Marc Hartwich, 'The Rights of the Future?' (2009) 25(3) *Policy* 3-8.

hard to understand how the notion of future generations' rights could ever be taken seriously.' And, if the claim of such rights is patently absurd, then 'the "rights" of future generations can only ever be a fiction that is administered by the present generation.' In short, setting aside this fiction, one who champions the non-existence argument may assert, without the slightest reservation, that only those alive today have moral or legal rights in *sensu stricto*, in which case those who violate these rights of living persons are reasonably to be held accountable under some framework of moral norms and extant national or international laws.

Further, Hartwich claims, 'legal capacity is always bound to something that exists.... It is not conceivable how either past or future generations can make their alleged rights heard today,'<sup>57</sup> although some living in the present claim to speak on their behalf, to be 'representatives' of these future generations (e.g., in claims for reparations for past harms; claims for preservation of the global environment against ecological catastrophe, etc.).<sup>58</sup> Indeed, Hartwich argues, even so-called 'caretakers' cannot speak for future generations, since they speak 'in accordance with their own present-day ideological predispositions' and with manifestly limited (empirically sourced, inductive) knowledge that has at best only a reasonably high probability of factuality.

Similarly, D. Clayton Hubin, engaging the question of justice vis-à-vis future generations, assumed that 'we do not owe obligations to future generations and that when we speak as if we do, we are speaking either metaphorically or elliptically.'<sup>59</sup> Hubin elaborates, 'I find it exceedingly hard, if we hold reasonable metaphysical views, to make sense of the claim that we now owe an obligation to a person who is not now a person.'<sup>60</sup> Hubin does not state what he means by 'reasonable metaphysical views,' what the criterion for 'reasonable' is, and why or how that criterion is satisfied in this context of argument. Hubin assumes that obligations make sense in a context of individuals having relationships of mutual benefit (reciprocity), such as may obtain 'from explicit or implicit agreement.' He seeks to make a technical distinction such that it is 'possible...to account for much of our duty to provide for future generations in terms of a duty of justice with regard to future generations (but not owed to them).' In short, for Hubin, one can manifest one's solicitude (concern or care), but not assert either a moral or legal obligation. Accordingly, Hubin recognizes that 'we must ask how it is that duties of justice can extend to include actions the intended beneficiaries of which do not

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<sup>57</sup> Ibid, at 4.

<sup>58</sup> See Richard Vernon, *Justice Back and Forth: Duties to the Past and Future* (University of Toronto Press, 2016).

<sup>59</sup> D. Clayton Hubin, 'Justice and Future Generations' (1976) 6(1) *Philosophy & Public Affairs* 70.

<sup>60</sup> Ibid, at 71.

yet exist.’<sup>61</sup> He makes reference to Rawls’s moral framework in his concern for ‘duties’ of justice.

We are reminded that Judge Weeramantry had referenced Rawls’s concept of an original position (in which, appealing to our moral intuition about justice as fairness, we must make decisions about our individual interests under a veil of ignorance). Weeramantry argued that international law is meaningful as an idea and as a practice, precisely insofar as it speaks to the interests of both present and future generations, thus to *lex lata* and to *lex ferenda*.<sup>62</sup> In the present context, e.g., arguments against the legality and morality of nuclear weapons are advanced with the understanding that we rightly and for good reason do not desire future generations to suffer the catastrophic effects of the use of such weapons. The moral judgment is that a future world without nuclear catastrophe is preferable (on any number of variables of assessment) to a future world devastated by such weapons of mass destruction. That said, however, one must remember that this is not a utilitarian calculation. It is a matter of the way in which principles of justice are operative in the moral and legal determination.

Hubin interprets Rawls as choosing ‘to represent the interests of all generations by allowing the veil of ignorance to extend to the agents’ knowledge of the generation to which they belong’—i.e., ‘the “present time of entry” interpretation.’<sup>63</sup> Both present and future generations are ostensibly parties to a ‘contract’ of social cooperation under a veil of ignorance, each individual having no information not only as to what his or her real interests, social position, etc., are, but also not knowing ‘the generation to which they belong’—be it the present, that of five generations from now, or that of one thousand generations from now. ‘Rawls,’ Hubin observes, ‘repeatedly speaks in this unqualified manner regarding the ignorance of the contractors about their place in time.’ What matters, then, is having moral and legal principles of decision that provide for justice as fairness for all generations.<sup>64</sup> One reasonably assumes that both present and future generations ‘have roughly similar needs and interests, or needs and interests in various ways complementary, so that mutually advantageous cooperation among them is possible,’ even as it is to be granted that these persons ‘have their own plans of life.’<sup>65</sup> In all of this, Rawls assumes a shared rationality of the contracting parties in an initial situation of equality, and where one does not sacrifice the good of the individual to a supposedly

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<sup>61</sup> Ibid, at 71.

<sup>62</sup> Nuclear Weapons, above note 20, dissenting opinion of Judge Weeramantry, at 441 (*lex ferenda* in the sense of a principle of illegality ‘waiting to be born’).

<sup>63</sup> Ibid, at 72.

<sup>64</sup> A Theory of Justice, above note 48, at 289, especially *see* Chapter III.

<sup>65</sup> A Theory of Justice, above note 48, at 110.

identified greater good. Yet, despite these propositions, it is unclear to proponents of the non-existence argument how the criterion of mutually advantageous cooperation obtains for those deemed members of future generations.

Obviously, those living in the present may prefer their own interests be satisfied first and foremost, rather than allow for the interests of future persons to have moral or legal standing, thus consideration, much less to prevail in any meaningful deliberation about the terms of the social contract. Yet, the proposition is that, if one is committed to justice as fairness under the veil of ignorance in which one does not know one's time of entry (i.e., being one among the present generation or a future generation), then one cannot simply privilege one's own (contemporary) interests to the exclusion of the interests of future persons on the assumption that one is among the former and not the latter. One cannot, in short, exempt oneself from the applicable principles of justice if it is correct that they extend to future generations.

It may be argued, thus, by parity of reason, that the present generation—if it is concerned to realize justice as fairness—cannot simply exempt itself from accounting for the reasonably known interests of future generations, i.e., interests that we may identify with a plausible degree of probability based on symmetry of interests. Rawls might characterize such a plea for exemption as a manifest collective egoism, given that he recognizes there can be 'irremediable injuries to the welfare of future generations.'<sup>66</sup> That means, presumably, that at minimum one should be concerned about the welfare of future generations and that, within that solicitude, there should be reasonable effort to avoid irremediable injuries to these generations, thus that there is room to argue for a moral and legal obligation *per se*. Accordingly, Rawls says, e.g., 'each generation must [...] preserve the gains of culture and civilization, and maintain intact those just institutions that have been established [...].'<sup>67</sup>

Clearly, any use of nuclear weapons has a very high probability of destroying the gains of culture and civilization that are the world's heritage from centuries of human history and identifiable civilizations, the loss of which heritage would amount to an 'irremediable injury' to the welfare of future generations. If one's time consciousness is limited to the empirically defined 'present,' then clearly both solicitude and obligation are readily, yet problematically, dismissed from the calculation. Likewise, international law—customary, declaratory, humanitarian, etc.—is accounted among the just institutions of contemporary society, howsoever imperfect such law may be, and even as we concede this body of law is yet subject

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<sup>66</sup> A Theory of Justice, above note 48, at 239.

<sup>67</sup> A Theory of Justice, above note 48, at 252.

to ongoing revision as an approximation of justice due. Weeramantry argued persuasively (notwithstanding questions that ensue from those critical of Rawls's theory of justice supposedly extending to future generations) that such an institution is to be preserved out of respect for the future of international peace and security, but also with a view to preserving the rights of future generations of humanity.

The UNGA was concerned in its ICJ request not merely for the present but also for the future of international peace and security. It is pertinent to the moral and legal argument that the UNGA, as a political representative of the global public through the participation of the Member States assembled, has spoken on numerous occasions in favor of nuclear disarmament, beginning with the UNGA's first resolution in 1946, in which it 'identified nuclear disarmament as a leading goal of the United Nations.'<sup>68</sup> Important to that resolution is the concern for disarmament, not nuclear arms reductions, such as have been the concern of both bilateral and multilateral treaties since then. Notably, 'the General Assembly included nuclear disarmament as part of the more comprehensive goal of general and complete disarmament under effective international control.'<sup>69</sup> It is the first General Assembly resolution ever to be sponsored by the entire membership of the United Nations.'<sup>70</sup> Given this historical fact, one can appreciate the motivation underlying the UNGA request fifty years later for an advisory opinion from the ICJ, notwithstanding objections from some Member States, including those possessing these weapons.

These UNGA resolutions constitute what Rawls may describe as part of 'the informed collective judgment of the present generation'<sup>71</sup>—without assuming certainty or necessity of the 'information' at hand. Multilateral institutions operating at the international level (i.e., international intergovernmental organizations) are thought to be representative of a global democratic framework of political decision speaking on behalf of the peoples of the world, notwithstanding the recognized sovereignty of each Member State.<sup>72</sup> As such, these multilateral institutions are interested in achieving in policy formulation and implementation

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<sup>68</sup> United Nations, 'International Day for the Total Elimination of Nuclear Weapons' 26 September 1946, <<https://www.un.org/en/observances/nuclear-weapons-elimination-day>> accessed 02 April 2022.

<sup>69</sup> United Nations General Assembly, GA Resolution A/RES/1378 (XIV), 14<sup>th</sup> Session, <<https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Disarm%20ARES1378.pdf>> accessed 07 March 2026.

<sup>70</sup> United Nations, above note 68.

<sup>71</sup> A Theory of Justice, above note 48, at 260.

<sup>72</sup> See, e.g., Dorothy Jones, 'The Declaratory Tradition in Modern International Law' in Terry Nardin and David R. Mapel eds, *Traditions of International Ethics* (Cambridge University Press, 1992) 2-61; Allen Buchanan, and Robert O. Keohane, 'The Legitimacy of Global Governance Institutions' in Joel H. Rosenthal and Christian Barry eds, *Ethics and International Affairs: A Reader* (Georgetown University Press, 2009) 155-183.

what they deem to be ‘the global public good,’ this normative framework balancing ‘the human interest’ (broadly conceived) against ‘the national interests’ that are pursued vis-à-vis the prevailing logic of statecraft and its central principle of sovereignty. These global institutions are grounded in a commitment to a global representative democracy and a more or less liberal world order. As such, they attempt to account for the legitimate interests of present and future generations, as is manifest currently, e.g., in deliberations aimed at requisite global action to mitigate climate change to avoid a global ecological catastrophe.<sup>73</sup> Rawls appreciates that one committed to the legitimacy of democratic institutions has a ‘conception of justice [that] includes a provision for the just claims of future generations.’<sup>74</sup>

Granted, Rawls’s statements about future generations retain some unsettled ambiguity. Claus Dierksmeier, e.g., engages Rawls directly on this issue, questioning the validity of Rawls’s remarks about ‘inter-temporal’ justice in Rawls’s *Political Liberalism*. Dierksmeier concludes, ‘Rawls’ theory cannot provide a satisfactory foundation for the rights of future generations [...].’<sup>75</sup> Dierksmeier’s critical account recalls the metaphysical issue present in such discourse, ‘since a generation (that is, a generation of people yet unborn) is, by its very definition, nothing but a metaphysical subject’<sup>76</sup>—not a ‘real’ or ‘actual’ moral or legal subject. Even so, Dierksmeier attends to the important element of Rawls’s theory: ‘what a society can distribute is limited by exactly the amount that it is to save for upcoming generations. In other words, trying to specify what society owes its present citizens requires one to first solve “the problem of justice between generations”...’<sup>77</sup> i.e., intergenerational justice. Dierksmeier thereby asks, consistent with Rawls’s normative logic: ‘So, why not place the decision makers in a position where they do not know to which generation they belong? Would it not then be in their interest to optimize the lot of any and all generations?’ But, he answers quite readily: ‘Not necessarily. As long as deliberating individuals know themselves to be contemporaries—which

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<sup>73</sup> See, e.g., Robyn Eckersley, ‘Ecological Intervention: Prospects and Limits’ in Joel H. Rosenthal and Christian Barry eds, *Ethics and International Affairs*, 131-152. Eckersley speaks of ‘the willful or reckless perpetration of mass extinctions and massive ecosystem destruction’ that could be regarded as ‘crimes against nature.’ The perspective here parallels that of concern for thermonuclear war, with the significant difference that while ecocide involves ‘destruction’ of ecosystems that may likely have viability to return to some measure of normalcy, thermonuclear war involves ‘devastation,’ blocking all future growth entirely, to the degree of untold generations of victimization.

<sup>74</sup> A Theory of Justice, above note 48, at 261.

<sup>75</sup> Claus Dierksmeier, ‘John Rawls on the rights of future generations’ Chapter 4, in Jeorg Chet Tremmel, ed, *Handbook of Intergenerational Justice* (Elgar Publishing Ltd., 2006) 72-85.

<sup>76</sup> Ibid, at 72, (Dierksmeier explains: ‘A distant future generation, other than one that overlaps with present generations, is an unspecified theoretical object... We do not know how, or not even whether, future generations will exist. Thus, future generations are (metaphysical) objects beyond our empirical reach, accessible only through (metaphysical) methods such as speculation.’)

<sup>77</sup> Ibid. at 74, citing A Theory of Justice, above note 48, at 252.

is imperative for them to deal effectively with every other aspect of their political lives—another problem remains. Pondering that, whatever their historic starting position, future (that is, yet unborn generations) cannot negatively affect them, they could come to the conclusion not to save at all, and so to maximize their interest.<sup>78</sup>

The key question in that statement, of course, is whether deliberating individuals do indeed know themselves to be contemporaries. But that allowance in the initial contractual arrangement seems immediately to defeat the concept of an original position of total ignorance in the moral-legal thought-experiment, which Rawls insists is essential to elucidating the consequences of the theory to achieve a distributive justice for any and all individuals, irrespective of their (unknown yet deliberately salient) temporal position. If they do not know the generation to which they belong, then their time consciousness is not limited to the ‘present’ in the usual sense. Dierksmeier notes that Rawls held to “the initial idea that ‘all generations are virtually represented in the original position’ under ‘the precept that what touches all concerns all’.”<sup>79</sup> Hence, it cannot be correct to say that deliberating individuals know themselves to be contemporaries. Instead, they must consider that they may indeed be among the future generations, whose interests they would be pressed to advance into fair account rather than ignore or defer; and that would include, in the matter concerned here, the problem of nuclear weapons and the task of nuclear disarmament.

Of course, if one is to include the interests of future generations, there remains the conceptual problem ‘that the logic of strictly symmetric exchanges of benefits fails when it comes to construing relations between persons whose life-times do not overlap.’<sup>80</sup> But, in Rawls’s ‘re-statement,’ Dierksmeier reminds, Rawls reformulates the idea by saying: ‘The correct principle [of justice], then, is one the members of any generation (and so all generations) would adopt as the principle they would want preceding generations to have followed.’<sup>81</sup> This formulation requires anyone engaged in an original position of deliberation about a social contract to account for a ‘contemporary’ interest in view of the decisions taken by preceding generations, with the understanding that those decisions were indeed hopefully but rightfully at least solicitous of the due interests of future generations. Nonetheless, Dierksmeier is correct to point out what remains problematic in Rawls’s later efforts to reformulate his theoretical stance: ‘Wherever there is need for unconditional commitments and duties, all that Rawls’s

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<sup>78</sup> Ibid, at 75.

<sup>79</sup> Ibid, at 76; John Rawls, *A Theory of Justice* (1971) at 256.

<sup>80</sup> Ibid, at 77.

<sup>81</sup> John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, 2001) at 160.

system can offer are merely conditional agreements of people who give only under the condition that they receive, who contribute only insofar as they benefit, who help only as long as it furthers their interests. In other words, Rawls cannot conceive of ethical obligations where no reciprocity is to be expected.<sup>82</sup> So much, then, for any genuine concern for the welfare of future generations, from whom there can be no manifest reciprocity in the usual sense of what Rawls means by mutually advantageous cooperation.

What, then, of the expressed concern for nuclear disarmament, as discussed above? It is clearly a normative concern of the present generation and, at minimum, with regard for the interests of future generations if not as a matter of what is owed them (in the strict sense of moral and legal obligation). It is not clear that Rawls would be supportive of this quest, at least given what he has to say in *The Law of Peoples*. Writing in 2013, Thomas E. Doyle II complains of the ‘nuclear despotism’ present in the nuclear deterrence doctrine that seeks to retain nuclear arsenals for some (such as the USA, Russia, UK), with negotiated reductions, but without a firm commitment to disarmament, as long as there is concerted effort to prevent proliferation. Doyle reminds that Rawls provides justification for ‘liberal democratic nuclear deterrence in the post-Cold War era.’<sup>83</sup> He rightly asks: ‘Can a liberal democracy retain nuclear deterrence without ultimately corrupting its democratic character?’<sup>84</sup> At issue here is not merely nuclear deterrence against a ‘superpower’ (such as between the USA and Russia) but ‘against rogue nuclear aspirant states’ (e.g., North Korea). Doyle cites the relevant passage from Rawls’s *The Law of Peoples*:

. . . among reasonably just liberal and decent peoples the control of such [nuclear] weapons would be relatively easy, since they could be effectively banned. These peoples have no reason for going to war with one another. Yet so long as there are outlaw states—as we suppose—some nuclear weapons need to be retained to keep those states at bay and to make sure they do not obtain and use those weapons against liberal or decent peoples.<sup>85</sup>

Clearly, Rawls accepts a limited nuclear weapons arsenal for some while opposing these for others, presuming upon the goodwill of those he characterizes as ‘liberal or decent peoples’ while presuming the ill will of those he denominates rogue states. However, even if one allows

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<sup>82</sup> John Rawls on the rights of future generations, above note 75, at 80.

<sup>83</sup> Thomas E. Doyle II, ‘Liberal Democracy and nuclear despotism: two ethical foreign policy dilemmas’ (2013) 6(3) *Ethics & Global Politics* 155-174.

<sup>84</sup> *Ibid*, at 156-157.

<sup>85</sup> *Ibid*, at 158, citing John Rawls, *The Law of Peoples, With ‘The Idea of Public Reason’ Revisited* (Harvard University Press, 1999) at 10.

that the former states would ‘ban’ such weapons, the fact is that a ban is not equivalent to disarmament *per se*. The former merely moves to constrain their use, not to eliminate or eradicate (i.e., dismantle) those weapons entirely. Rawls further assumes that, as Doyle says, ‘outlaw states lack any serious respect for international law’—‘certain regimes refuse to comply with a reasonable Law of Peoples.’<sup>86</sup> The prior assumption is that democratic states or decent (non-liberal but peaceful) societies acknowledge the importance of a law of nations (*jus gentium*), one that includes a doctrine of nuclear deterrence in the context of a nonproliferation regime.

Doyle refers us to Daniel H. Deudney’s position:

Nuclear explosives are intrinsically despotic for three related reasons: the speed of nuclear use decisions, the concentration of the nuclear use decision into the hands of one individual, and the lack of accountability stemming from the inability of affected groups to have their interests represented at the moment of nuclear use. Nuclear despotism increases the possibilities of nuclear use because of the inherent fallibility and corruptibility of the lone individual.<sup>87</sup>

This is a novel, yet stark, reminder that one cannot assume (as Rawls does) that supposedly liberal and decent peoples, vesting their power in ostensibly representative officials, can be trusted to make rationally defensible decisions about the use of nuclear weapons only for ‘defensive’ purposes. In the decision-making process in the USA and Russia, there remains the ‘lone individual’ authority for a decision to employ nuclear weapons—that of the President. In the case of the USA, there is no obligatory recourse to the US Congress for a prior declaration of war, no assurance that the decision is genuinely taken legally in view of a verified ‘imminent attack,’ no clarity that the President identifies a ‘supreme emergency,’ thus no assurance of a *bona fide* ‘existential threat’ to the survival of the nation.<sup>88</sup>

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<sup>86</sup> John Rawls, *The Law of Peoples, With ‘The Idea of Public Reason’ Revisited* (Harvard University Press, 1999) at 5.

<sup>87</sup> Thomas E. Doyle II, above note 82, at 159, citing Daniel H. Deudney, *Bounding Power: Republican Security Theory from the Polis to the Global Village* (Princeton University Press, 2007) 255-256.

<sup>88</sup> This became especially evident during the Trump Administration. See Andrew Bacevich, ‘Op-Ed: Gen. Milley did the wrong thing for honorable reasons. We need new rules for starting nuclear war’ *Los Angeles Times*, 16 September 2021, <<https://www.latimes.com/opinion/story/2021-09-16/mark-milley-china-donald-trump-bob-woodward-robert-costas>> accessed 03 April 2022. As narrated: ‘In the waning weeks of the Trump administration Gen. Mark Milley...twice called his counterpart, Gen. Li Zuocheng, of the People’s Liberation Army, offering assurances that the United States was not about to launch an attack against China... “If we’re going to attack,” Milley told Li, according to Woodward and Costa, “I’m going to call you ahead of time. It’s not going to be a surprise.”’ The point is clear as to rules for decision: ‘[A]nother Trump figure—or Trump himself—may win the White House again. Americans are not immune from conferring the presidency on figures who may not be models of stability and good sense.’

At the time of Russian President Putin's war of aggression against Ukraine initiated in February 2022, then Donald Trump commented that, if he were yet president, he would threaten Russia with launch of nuclear weapons from American submarines.<sup>89</sup> That a lone individual such as Trump could think to make such a decision, effectively ignoring the legitimate survival interests of the other peoples of the world, diminishes the validity of Rawls's assumptions about the legitimacy of nuclear deterrence for liberal democratic states. The mere fact of a liberal democracy is not a sure barrier to thermonuclear war when individuals such as Trump are prepared to behave irrationally relative to any number of national security criteria and the international law of armed conflict. Similarly, the apparent willingness of Russian national security officials to consider seriously the preemptive strike option is not to be ignored for the threat it presents.

From the vantage point of 'all other peoples,' nuclear despotism undermines the presumed commitment to a law of peoples that instantiates justice as fairness. Doyle states the point clearly: 'If Rawls's central point is that liberal political order must be secured from the nihilism of outlaw states, the paradoxical outcome is that nuclear despotism ultimately subverts liberal constitutionalism.'<sup>90</sup> Indeed, Doyle adds, 'Rawls did not foresee two important implications of his view—i.e., how the implementation of liberal nuclear deterrence can ensnare liberal peoples with an illiberal and immoral appetite for nuclear retaliation and how the need to secure the country against rogue state and terrorist nuclear espionage leads to the weakening of constitutional liberties.'<sup>91</sup>

Recalling Weeramantry's point about the significance of international law as both idea and practice working to the benefit of both present and future generations, it is patent that Doyle reminds of a related comportment: 'In addition to the ethical imperative to secure liberal society from illiberal aggression, liberal societies also assume that they have binding legal obligations to the international community and an ethical obligation to uphold the rule of international law generally as the legitimate method of international conflict resolution.'<sup>92</sup> If one takes this comportment seriously, one cannot defensibly restrict this obligation only to the concerns and interests of the present generation and the political order they structure through the nation-state system. All law is living law, necessarily futural in its scope of authority, hence its trans-temporal normativity. Nuclear disarmament thus remains a moral and legal obligation.

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<sup>89</sup> See Martin Pengelly, 'Trump: I would threaten Russia with nuclear submarines if still president' *The Guardian*, 23 March 2022, <<https://www.theguardian.com/us-news/2022/mar/23/donald-trump-nuclear-weapons-russia>> accessed 03 April 2022.

<sup>90</sup> Thomas E. Doyle II, above note 82, at 160.

<sup>91</sup> Thomas E. Doyle II, above note 82, at 161.

<sup>92</sup> Thomas E. Doyle II, above note 82, at 163.