(c) Case Analysis

Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons

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1.

The dichotomy of reason and passion is so deeply embedded in the construction of what is 'legal' that it seems difficult even to imagine an international law that would not be entrenched in it. The very identity of international law seems based on its capacity to set itself on the side of reason, in opposition to the passionate, the irrational. Is not reason practically synonymous with order, and passion with chaos? And what is law for if not to bring about order, and to allow exit from our slavery under passion? Is not reason what is universal and objective, while passion is particular and subjective? And is it not then the case that a law pretending to universality must perforce align itself with the forces of reason?

In the quest for a universally applicable law, international lawyers have always sought support from the universality of reason, developing theories and doctrines and engaging in debates about how to exclude from the law all that is subjective or partial. For some, this has meant trying to explain the law in terms of derivations from principles of universal validity or from internal relationships between rules. Others have sought to create as close a fit as possible between the law and the social processes it is supposed to reflect. Whether naturalists, formalists or realists, however, lawyers have derived their professional identity from their ability to manage a legal method enabling them to produce valid normative statements about the social world that bear no necessary connection to their personal beliefs.

The alignment of law with reason is under threat by the question of the legal status of the use or threat of use of nuclear weapons. As I hope to show below, a purely rational, legal-technical approach to the massive killing of the innocent - the crux of the questions posed to the International

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Court of Justice - cannot be pursued without unacceptable moral and political consequences. It fails to attain a determinate regulation of the matter, cannot come to grips with the political and moral dilemmas involved and, above all, fails to articulate a defensible conception of what it is to engage in international law as a professional commitment. As such, it participates in "a doctrinal practice that puts its hope in the contrast of legal reasoning to ideology, philosophy and political prophecy [and] ends up as a collection of makeshift apologies."[1]

2.

After intensive lobbying by an American-based non-governmental organization, the International Association of Lawyers Against Nuclear Arms (IALANA), and at the formal initiative of the caucus of non-aligned States, the UN General Assembly adopted a resolution in December 1994 by which it decided to urgently request the International Court of Justice to render an advisory opinion on the following question: "Is the threat or use of nuclear weapons in any circumstance permitted by international law?"[2]

The request followed another request that had been made by the Assembly of the World Health Organization (WHO) to the Court in May 1993, which had focused on the health and environmental effects of possible use of nuclear weapons and its conformity with international law and especially the WHO Constitution.[3]

The Court rendered its opinions on both requests on 8 July 1996. It dismissed the WHO Request on the ground that it had not been made within the competence of the organization.[4] However, no such formal obstacle was present in regard to the General Assembly's request. Having also rejected the other objections to its jurisdiction, the Court responded to the Assembly as follows:

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1. R. M. Unger, The Critical Legal Studies Movement 11 (1986).
2. UN Doc. GA/RES/49/75K (1994). For a good review of the handling of this controversial request by the General Assembly, *cf.* M. Lailach, *The General Assembly's Request for Advisory Opinion From the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, 8 LJIL 401-411 (1995).
3. WHO Res 46/40 (1993).
4. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 ICJ Reports.

1. there is in neither customary nor conventional international law any specific authorization for the threat or use of nuclear weapons;
2. there is in neither customary nor conventional international law any comprehensive and universal prohibition against the threat or use of nuclear weapons as such;
3. 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;
4. the threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly 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;
5. it follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; however, in view of the current state of international law, as well as the factual elements at its disposal, the Court could not definitively conclude whether the threat or use of nuclear weapons would be lawful under extreme circumstances of self-defence, in which the very survival of a State would be at stake; and
6. there exists an obligation to pursue in good faith, and bring to a conclusion, negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.[5]

Points 1, 3, 4, and 6 were unanimous; point 2 was decided by eleven votes to three; and point 5, the crucial part of the opinion, was decided by a split 7-7 decision, with President Bedjaoui casting the deciding vote.

The question and the Court's response raise a number of questions of theoretical and practical interest for international lawyers. Did the form of the question - looking for permission instead of a prohibition - prejudice the response and seek to overturn the 'Lotus principle'?[6] If it could not be

5. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, 1996 ICJ Rep., para. 105.
6. *I.e.* the principle of the plenitude of sovereignty, or that everything is permitted that is not

done here, when (if ever) is it feasible to object to the Court's exercise of advisory jurisdiction on the ground that a matter is 'abstract' or 'political'?[7] What significance has the dispositive character of advisory jurisdiction if a request falls within the competence of the requesting organ, is there any basis on which the Court should nonetheless decline such request? What is the consequence of the fact that the Court has now, for the first time, declared a *non liquet*.[8] Or more substantively: What is the normative meaning and relationship between the textbook categories (e.g., use of force, law of armed conflict, rules and principles of humanitarian law) to which the Court has now given an official imprimatur? What is the relationship between the dismissal of arguments from *jus cogens* (para. 83) and the Court's endorsement of "intransgressible principles of international customary law" (para. 79)? What does it mean to say that the use or threat of use of nuclear weapons "would be *generally* contrary to the rules of international law"? Is the obligation on states to achieve nuclear disarmament, which the Court characterized as an "obligation of result" (para. 99), merely the old obligation to negotiate in good faith, or does something more definite follow from it?

My intention, however, is not to focus on any such (or other) individual problems which the opinion raises. I wish to examine and articulate the intuition I have had that the Court should not have been asked the question at all; an intuition strengthened by the particular response the Court now has given. Having argued, and being still convinced, that there is no essential distinction between 'law' and 'politics', the door is not, however, open to me to argue that the Court should have dismissed the request because of its 'political' character.[9] Instead, I shall argue that the legal reasoning available to the Court is unable to reach the core of the request - the massive killing of the innocent - and that to think otherwise would pre-

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subject to a definite prohibition. The Court dismissed this question rapidly by noting that as even states possessing nuclear weapons admitted that their right to use these weapons was not unlimited, the question could be addressed through seeking out where, precisely, those limits were, *id.*, at paras. 20-22.

7. For the Court's rapid dismissals of these points, *cf. id., at* paras. 13 and 15.

8. It has been emphatically argued that there is a general principle prohibiting courts from declaring *non liquet*, even in the apparent absence of law on a matter. *See* H. Lauterpacht, The Function of Law in the International Community 63-65 (1933); *Some Observations on the Prohibition on 'Non Liquet' and the Completeness of the Law*, *in* J.H. Verzijl, Symbolae Verzijl 196-221 (1958). However, in advisory proceedings the issue "assumes a different complexion", *id.* at 199, note 2. *See also id.*, at 217-219.

9. *Cf. e.g.* M. Koskenniemi, *The Politics of International Law*, 1 EJIL 1 (1991).

sume an image of international law, and of ourselves as international lawyers, we have good reason to reject. The argument is not - although it first seems as if it were - about a tension between 'law' and 'politics' and our ability to manage it, but about what we can be certain about and, consequently, who we are.

I shall examine the limits of (legal) reason and thereby, inevitably, look beyond those limits, towards the 'subjective' element - passion - to which reason is, as Hume always insisted, but a humble slave. For it is in that realm that the issues of what we can know (faith) and who we are (identity) are settled and linked with how we understand and argue about the killing of the innocent. The *Nuclear Weapons* opinion raises existential questions of identity, community and responsibility that are prior to the conventional ways of legal reason and cannot beneficially be treated through it. To think otherwise, I shall argue, assumes a passive and tragic view of about the human condition, and particularly of the condition of the international lawyer.

3.

The most immediate problem raised by the *Nuclear Weapons* opinion concerns the apparent conflict between law and politics that it evokes and the difficulty in devising a convincing explanation of why the former should be able to overrule or encompass the latter. As a purely pragmatic, psychological matter, the political interests and values at stake in a decision to use or not to use nuclear weapons seem so overwhelmingly important that it is hard to believe that a statesman, having weighed them and having come to a conclusion one way or another, might still adopt for the contrary course of action because of a deviating legal assessment. On the other hand, if the legal assessment happens to coincide with the speaker's known political views, the doubt must always remain that the assessment is simply a rationalization, in legal language, of a political position. Reason - as manifested in the legal process - seems not only unable to produce a credible counterweight to politics but somehow compelled to succumb to it. This seems so no matter what the substantive outcome of the reasoning might be.

Imagine that the Court had declared the use and threat of use of force by nuclear weapons illegal in all circumstances. Because the killing of the

innocent is never allowed, and as nuclear weapons always entail that at least some non-combatants are killed, it is always illegal to use them. A threat to use them might have been prohibited on the simple *dictum* that it is always illegal to threaten to commit an illegal act. Quite apart from the fact that the law does accept the killing of the innocent in some circumstances (e.g., as an unintended but proportionate consequence of conventional self-defence), declaring such a rule would have put the Court and the whole system of law it represents in a collision course with the politico-military system of the nuclear age, i.e., the policy of deterrence. All nuclear powers base their policy on the eventuality of a strike at some extreme circumstance. In a conflict between the law (as declared by the Court) and the long-standing policy of the most powerful states, the law could hardly prevail. If (as argued above) it is pragmatically unthinkable that a statesman might be deterred from using the weapon in a situation of extreme national danger (for instance, in order to prevent the killing of his or her innocent compatriots) merely because of what the legal adviser might say, then an opinion underwriting an absolute prohibition would have condemned the law to irrelevance already in advance. This would hardly have been an appropriate consequence for the Court to attain, particularly as the defenders of deterrence could always formulate their dissent in legal terms as well. The opposition would then not have appeared as (good) law against (evil) politics but as one contested application of the law against another. The relative superiority between the two interpretations could not have been solved from within the (contested) law but have remained a battle of prestige and influence to be fought out between the Court and the nuclear powers. Surely the Court's possibility to prevail in such struggle would appear rather slim.[10]

The Court also envisaged a contrasting scenario, the possibility that "the 'clean' use of smaller, low yield, tactical nuclear weapons" might sometimes be permissible, or that the use of nuclear weapons might be permitted in an "extreme circumstance of self-defence in which the very survival of a State would be at stake."[11] In respect of all such scenarios,

10. The Court took a Delphic position, arguing, on the one hand, that it "does not intend to pronounce here upon the practice known as the 'policy of deterrence'" (para. 67), but observed, nonetheless, that the existence of this policy "hampered" the "emergence, as a *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such" (para. 73).

11. Paras. 94-95 and 97.

however, the Court declared a *non liquet*. It was unable to "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."

It is easy to see why this seemed advisable. Envisaging any possibility for the *lawful* killing of the innocent by nuclear weapons would have collided head-on with powerful moral and political sentiments, humanitarian principles deeply entrenched in modernity's political discourse. Again, a collision between law and politics would have ensued. Again, as a practical matter, it would hardly have resulted that world populations would have started to assume that some uses might, indeed, be lawful. In a conflict between the Court's view of the law and generally shared humanitarian sentiments, the Court would not have emerged as the victor. Again, it would have condemned itself - and the legal system it manages - into irrelevance.

In other words, both available solutions seemed excluded because of good pragmatic reasons. Both would have entailed a collision between law and politics, politics being understood either as the structure of the world's politico-military system or a generally shared politico-humanitarian ethics. In neither conflict could it confidently have been expected that the law would have prevailed. Nor can we be certain that the practical consequences of the law having been overridden by politics in one or another of its two disguises (power/ideas) would have been a less embarrassing outcome than the disappointment of its present indeterminate conclusion. Quite the contrary, open conflict with one or the other audience might have had a spill-over effect on the Court's less controversial jurisdiction, undermining whatever modest role it might seek to play in the world of diplomacy generally. The main issues at stake are not, however, about the pragmatic influence the Court (or its law). It is not a conflict between law and politics that is central to the case, but the law's inability to grapple with the killing of the innocent.

4.

There are a number of reasons for why the use or threat of use of nuclear weapons cannot successfully be treated by reference to formal rules and principles. The most obvious reason has to do with the banal fact that rules

and principles always appear through language. Their application requires the use of interpretative techniques, typically such as those listed in Articles 31-33 of the Vienna Convention on the Law of Treaties. These techniques, however, are considerably weaker than the values or interests at stake in the killing of the innocent whose conflict they seek to regulate. For example, even if there were agreement that the threat of use of nuclear weapons were illegal, such agreement would soon be dispelled by a controversy on what amounts to 'threat' in the first place. The normative force of such techniques is no match to the force of the values that demand a particular understanding of 'threat' in a particular context.

Would possession be 'threat'? Clearly, if it is intended to deter others, it is premised on the possibility of use and does amount to 'threat'.[12] On the other hand, the same is true of the possession of conventional (and chemical) weapons - without this having engendered the argument that it is in violation of Article 2(4) of the Charter. Should threat of *first use* and *counter-use* be treated equally? The latter might seem to be permitted under the exception of self-defence under Article 51 of the UN Charter, a possibility expressly left open by the Court's *non liquet*.[13] But if possession is allowed under that exception, is it not then allowed always: it is impossible to distinguish between possession in preparation for first strike and possession in preparation of counterstrike? Besides, intentions change: a state with a deterrence doctrine premised on a massive counterstrike capability might find it more advantageous to embark on a limited pre-emptive strike.

On the other hand, any rule that makes reference to self-defence is, of course, marred by the very large number of controversies regarding the scope of that concept. The application of self-defence is always premised on how the classical conditions of 'imminent danger' or 'proportionality' should be constructed and whether, for instance, a limited pre-emptive strike might be allowed in case that were the sole means to forestall a massive attack. As I will argue more fully below, these are matters that can be decided only by reference to concrete situations. The point here is only that no legal-technical argument that can be put forward to support one or another interpretation of the meaning of 'threat' or 'self-defence' can possibly attain the degree of determinacy and pedigree that it could effectively

12. *See also* H. Shue, *Conflicting Conceptions of Deterrence*, *in* E. Frankel Paul, F. D. Miller, J. Paul & J. Ahrens (Eds.), Nuclear Rights, Nuclear Wrongs 45 (1986).
13. Para. 97

structure the expectations on which the military doctrines of states are based or provide an argument so convincing that the moral views of the participants would be conclusively overruled. If that is so, then the dilemma about politics always overruling law is not only a consequence of pragmatic considerations but follows from a weakness internal to the law itself.

Aside from indeterminacy, however, an even more daunting problem is posed by the paradox of rules and standards. The paradox is this: you might think that the problem to be regulated is so grave that no interpretative difficulties should get in the way of the attainment of your objective, i.e., not killing the innocent. Therefore, you think it can only be dealt with by an absolute, unconditional prohibition, a rule that even a fool could unerringly apply.[14] Such absolute rules, however, are always both over determining and under determining: they will encompass situations you did not intend to be covered and exclude cases that you wished to cover. Therefore, absolute rules are usually accompanied by soft standards that allow the taking account of special cases and the balancing of interests. Such standards bring 'evaluation' within the law and highlight the position of law-applying agencies, courts in particular. The softer the standard, however, the greater the possibility of arbitrariness and political misuse and the more dramatic the consequences of the (mis)use of discretion. Let me illustrate the workings of the paradox in the field of the Court's opinion.

I have already argued that an absolute prohibition is not pragmatically workable: we cannot plausibly expect a politician always to sacrifice the innocent of his or her own country in order not to kill the innocent in the territory of a hostile neighbour. But I cannot see such an absolute rule as rationally justifiable either (or, indeed, justifiable by reference to recent history of warfare).[15] If the law's purpose is to protect the innocent (and it is hard to see a more basic purpose for it in a system that excludes reference to personal virtue), and the launching of a nuclear strike would be the only means to attain this, then I cannot see how it could be excluded. In this sense, at least *prima facie*, the use of nuclear weapons in self-defence could

14. Regarding such rules, *cf.* T. M. Franck, The Power of Legitimacy among Nations 67-83 (1990).

15. I mean justifiable under *legal* reason. I can perfectly well understand a moral argument to the effect that in the choice between utilitarianism and absolutism, the latter is always the better inasmuch as war and massacre are concerned. *Cf.* Th. Nagel, Mortal Questions 53-74 (1979).

not be excluded.

There is, of course, the argument that the use of nuclear weapons is "qualitatively different" from conventional warfare because of its "unpredictable and uncontrollable human and environmental consequences."[16] This is the bottom line to which defenders of an absolute rule return: that due to their potentially apocalyptic consequences, nuclear weapons are in a class of their own.[17] But I wonder about the strength of this argument. Quite apart from the (dubious) counter-examples of Hiroshima and Nagasaki, it fails to convince against using nuclear weapons in self-defence against a prior use. In such case, the extraordinary chain of causality postulated by the defenders of the absolute rule would already have been triggered by the adversary's action, and no *new* evil could ensue from trying to counter it. On the contrary, such use might perhaps have the 'unexpected' consequence of preventing Apocalypse! Secondly, it is also powerless against the (paradoxical) argument that possession and deterrence are the sole means of *preventing* their use. Whether this argument is causally true or not may be debated, but the absolute argument fails to address that causal assumption altogether. The conclusive point, however, against absolute view is that in fact it is only a relativist view in disguise. For the adherents of this doctrine, it is precisely their *consequences* that make nuclear weapons 'special'.[18] They rely (and must do so) on a relativist calculation - and cannot therefore be exempted from the kind of speculation about alternative 'scenarios' that they wish to do away with. In this way, they lose the knock-out force of their argument against those whose very point is to prove that in some cases a limited use might be less devastating than remaining a sitting duck. The debate is about causality and foreseeable consequences after all. Even absolutists are compelled to entertain utilitarian calculations about the ratio of the innocent being killed under alternative scenarios.[19]

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16. R. Falk, L. Meyrowitz & J. Sanderson, Nuclear Weapons and International Law 78 (1981). *See also* L. Meyrowitz, *The Laws of War and Nuclear Weapons*, *in* A.S. Miller & M. Feinrider (Eds.), Nuclear Weapons and Law 48 (1984).
17. This is also the argument in the dissenting opinions of Judges Shahabuddeen, Weeramantry and Koroma.
18. *Cf.* Shahabuddeen, dissenting opinion at 4-8; Weeramantry, dissenting opinion at 11 (Para. I.7), 13-31 (Para. II) and 58-62 (Para. IV); Koroma, dissenting opinion at 1: "Nuclear weapons are thus not just another kind of weapon, they are considered the absolute weapon and are far more pervasive in terms of their destructive effects than any conventional weapon."
19. The absolutist language of the 'Apocalypse' sometimes smacks of dogmatism: it sweeps

However, the defenders of absolutism are right to point out that such a deliberation in a field of technical and causal uncertainty, secrecy, and changing military-political contexts tends to water down any determinate rule. In order to prevent that, it might be conceived that the inevitable exceptions should be couched in as absolute a fashion as possible. A good candidate might be an absolute prohibition of any *first strike*. This would be an easy-to-apply criterion that would keep resort to nuclear weapons as a last alternative, to be employed only in the most extreme circumstance of self-defence, possibly only in retaliation of a prior nuclear attack.[20] However, I am not sure that such a rule would always be justifiable. It would exclude a non-dramatic first use - say, against a lone nuclear submarine in the Pacific - that might constitute the only means to prevent a foreseeable nuclear attack against your population centres.[21] Is it reasonable to expect a politician to commit suicide, together with large parts of the population, in deference to this kind of an absolute legal rule? Does the law allow the killing of the innocent by a nuclear attack conducted from a nuclear submarine in case the only means to forestall this would be a first use of nuclear weapons against it? Surely not. The application of the absolute rule would bring about precisely the consequences that its enactment was intended to prevent.

Regulation by absolute rules relies on the absolute value of rule-obedience. However, the application of a rule cannot always be detached from an examination of the presence of the reasons for which the rule was created. If those reasons are absent - as *ex hypothesi* they are in the case of the foreseeable attack on the lonely hostile submarine - then it cannot always be expected that the rule will be applied. Of course, in our daily lives we often expect that people obey rules even when their underlying reasons are absent. We expect drivers to stop at red light even in the middle of the night where no other car or person can be seen within five miles. We do so because of two reasons. To leave it for individual drivers to decide when

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aside the relativist's causal-technical points assuming (without argument) the correctness of its own causal-technical assumptions.

20. From the relatively undisputed criteria for the application of Article 51 of the Charter (the presence of an 'armed attack' and the proportionality principle) Singh deduces the rule that the first use of nuclear weapons is always prohibited and that its use in retaliation would be permissible only against a nuclear attack. N. Singh & E. McWhinney, Nuclear Weapons and International Law 86-103 (1989). *See also* D. Rausching, *Nuclear Warfare and Weapons*, 4 Encyclopedia of International Law 49 (1982).

21. An example also referred to in Schwebel, dissenting opinion at 7.

they might safely ignore the red light would, in some of the innumerable situations where red lights burn in the middle of distant crossings, create grave dangers anyway: perhaps a pedestrian in a dark coat is crossing the street but cannot be seen. Secondly, we want to honour the absolute character of the rules of the road in order not to induce people to judge for themselves. The proliferation of a sense that everything is up to individual decision might decrease general security on the roads and endanger the application of other, perhaps more important rules. From the permission to decide for themselves in respect of red lights in the desert, (some) motorists might draw the consequence that they could also freely decide when to respect speed limits, or perhaps when to obey the law in general. This might lead into a generalized non-obedience whose social costs would be considerably greater than the costs of stopping at night in distant crossings even if no harm would seem to follow from just driving ahead.

Now neither one of the explanations for honouring red lights in distant crossings is present in the hypothesis of the first use against the lonely submarine. The danger is not a consequence of the daily and repetitious character of the act, but arises from the single situation. It is not a generalized social conduct that is being regulated, but the behaviour of single individuals in a rare case of extreme gravity. The abstract, generalizing formulation of the rule against first strike (or of a full prohibition) fails to account for (at least) this case and the arguments from the need to prevent marginal dangers (the pedestrian in the dark coat) or from the gradual erosion of rule-obedience do not apply. The social need to honour the (empty) rule is considerably weaker than the social need to prevent the individual submarine from striking first now. No utilitarian calculation of gains and losses, however the gains of obedience in this case may be conceptualized, could possibly yield the consequence that it would be better to suffer the harm than to strike first.

An absolute rule (never a first strike) is unacceptable precisely because of its absoluteness, because its application might (as in the case of the nuclear submarine) bring about precisely the conclusion (the killing of the innocent) that it aims to avoid. And because, in this case, the rule is no more valuable than the reason for which it was enacted, we are led to the paradoxical but, I think, compelling conclusion that we must not apply it - a conclusion which, of course, undermines its absolute character.

Absolute rules are easy to apply but cannot be applied because social contexts are always more complex than the paradigm cases they are enacted

to deal with. Therefore, they must be softened by exceptions and broadly formulated standards that allow the taking account of circumstances. Although contracts are binding (absolute rule), it is sometimes necessary to release a party (standard of equity). Even if equidistance normally creates a just settlement of a maritime boundary delimitation, it is sometimes necessary to allow special circumstances to mitigate the harshness of that rule. The relationship between the non-use-of-force rule in Article 2(4) of the Charter and the exception of self-defence under Article 51 constitutes a similar case.

The problem in such cases is that even if the broad standard is originally introduced only as an exception to the absolute rule, it tends to devour the rule altogether. The introduction of equity into contracts or maritime delimitation tends to reverse the hierarchy between the two: inasmuch as equity demands a certain solution, there seems no good reason to avoid choosing it. The main rule is relegated to the status of a (rebuttable) presumption about equity. The same is true of the non-use-of-force/self-defence equation. In the absence of a criterion on when to apply the rule and when the exception, self-defence tends to be applicable in all conceivable situations in which force is being used, buttressed by the not-absurd argument that it must be up to the state itself to assess when its 'self' might be threatened.

The paradox of rules and standards is quite central in structuring the Court's opinion. The Court avoided stating an absolute rule either way: it found neither an absolute permission nor an absolute prohibition specifically for the use or threat of nuclear weapons.[22] There was no rule that would have put nuclear weapons in a special category of means of warfare. It then had two alternatives available to it: silence (which, in fact, it chose) or trying to find out whether a permission or a prohibition might be deduced from the way in which the use of nuclear weapons might violate other rules of law. This meant, automatically, moving from a *per se* (absolute) prohibition to a relativist one, looking at nuclear weapons in terms of their consequences, i.e., whether they might be 'poisonous' or create unnecessary and indiscriminate suffering.[23] Embarking on the latter course, the Court first enquired whether a violation of the right to life or the

22. Thus, the Court found that there was no specific prohibition of the use or threat of use of nuclear weapons in treaty law (paras. 53-63) or custom (paras. 64-73).

23. *Cf.* Rausching, *supra* note 20, at 46-49.

commission of genocide might be involved. Neither rule could, however, be constructed as absolute: the right to life prohibited only *arbitrary* killing, while whether or not genocide was involved could only be appreciated "after having taken account of the circumstances of the specific case."[24] Even environmental law merely indicated "important environmental factors" that were to be taken account in the overall assessment of the legality of any means of warfare.[25]

The bulk of the opinion deals with two fields of law: the law on the use of force and international humanitarian law.[26] Neither contains an absolute rule against the killing of the innocent. Both construct the law in terms of contextual determinants that sometimes allow the (foreseeable although perhaps not intended) killing of non-combatants. The exception of self-defence looks for a balance between the threatening harm and the force to be used, while humanitarian law subsumes the legality of military action under a number of requirements intended to ensure a justifiable relation between the military objective to be attained and the damage caused (i.e., the prevention of unnecessary suffering). In both fields, the law can briefly be stated in terms of a search for *proportionality*.

In order to assess the proportionality of a proposed use of nuclear weapons in self-defence, assumptions about the 'imminence' of the coming attack and the gravity of the risk are involved. Relevant factors include at least the foreseeable consequences of a strike, the types of weapon employed, the gravity and foreseeability of the threat (nuclear or non-nuclear, limited or unlimited), the timing of the strike, the quality of the target (military or civilian), what other means are available, and the costs or consequences of non-use.

Other, less technical considerations might also seem relevant. What, for instance, is the 'self' that is a permissible object of defence?[27] Would it also extend to the protection of others? After all, collective self-defence under Article 51 of the Charter is allowed, and it is hard to see the point of a rule that enables (an innocent) state to put its own life before that of the

24. Paras. 25 and 26.

25. Para. 33.

26. This consecration of two relatively autonomous fields of law is an important innovation by the Court and raises interesting questions about their relative superiority: what happened if the rule on the killing of the innocent were different under the two?

27. Answering this seems dependent on whether we identify the state in terms of its 'idea', its institutions, or physical base. *Cf.* B. Buzan, People, States & Fear 57-107 (1991).

aggressor's but not that of another's.[28] Nor can it be assumed that subjective criteria regarding the *intended objectives* of a strike or objective factors about the *foreseeable effects* are irrelevant. A killing of civilians that is neither intended nor foreseeable would come under a different moral category from a massive strike against population centres. Failure to make a legal distinction between a defensive attack on a lonely submarine and an aggressive strike on a capital city would not only encourage expansionist tyrants (by putting them on the same level with concerned politicians) but would be at odds with the very principle of protecting the innocent.[29]

Proportionality leads to an assessment of various alternative scenarios, taking account of technical data and making evaluations that cannot be carried out within any distinctly 'legal' form of reasoning. They involve highly abstract and contentious speculation about matters of uncertainty and grave political importance. Therefore, having first dismissed the argument that it was improper for the Court to give the opinion requested, as that would have necessitated the study of "various types of nuclear weapons and to evaluate highly complex and controversial technological, strategic and scientific information,"[30] the Court still came to the equivalent conclusion that:

> the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.[31]

It is easy to understand why the Court did not think it advisable to provide a determined response. Having outlined the relevant law in terms of 'proportionality', going any further would have required an appreciation not only of uncertain technical and factual information but also of alternative 'scenarios' involving 'factors' whose number cannot be limited and whose relevance cannot be assessed in advance. Had the Court arrived at

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28. *Cf.* B. A. Brody, *The International Defense of Liberty*, *in*: Frankel Paul, Miller, Paul & Ahrens, *supra* note 12, at 30-31.
29. On the other hand, a nuclear policy based on retaliatory attacks on military targets only makes little military sense. As Henry Shue puts is, "An adversary who has decided to launch a nuclear attack is unlikely to be very cooperative about saving targets for you," Frankel Paul, Miller, Paul & Ahrens, *supra* note 12, at 50. In order to constitute an effective deterrent, a second-strike based nuclear policy is pushed towards targeting noncombatants.
30. Para. 15.
31. Para. 95.

some listing of the relevant 'factors', that would have been, like the definition of aggression, "a trap for the innocent and a signpost for the guilty,"[32] opening a mine of argumentative possibilities for *mala fide* statesmen in search of justifications.

Through proportionality (or 'equity', 'reasonableness' or 'good faith'), not only does the rule vanish to the background but we seem no longer able to make *any* distinction between the rule and the reasons for which it was enacted. The political or military leader is simply called upon to use his or her best judgment - which he or she would probably, in any case, do during a situation of such extreme gravity. The 'softening' of the absolute rule by a flexible standard ('proportionality') leaves everything ultimately up to the person with the button.

There is a related and, I find, a conclusive reason for why the Court was not in a position to provide the requested response in terms of a contextual judgment. Had it done so, it would have instituted a public and technical discourse for the defence of the killing of the innocent. By lifting the matter from the realm of passion to that of reason, the Court would have broken the *taboo* against any use of nuclear weapons. It would have opened a professionally honourable and perhaps even a tragically pleasurable way of addressing the unaddressable. The (massive) killing of the innocent would have become another contextual determinant, a banal 'factor' in an overall balancing of the utilities, to be compared with the equally banal factors of sovereignty, military objective etc. As Thomas Nagel has observed:

> Once the door is opened to calculations of utility and national interest, the usual speculation about the future of freedom, peace and economic prosperity can be brought to bear to ease the consciences of those responsible for a certain number of charred babies.[33]

Unlike *taboo*, rational argument cannot put nuclear weapons in a class of their own, to be treated outside the normal logic of identity and difference, legal analogy, and 'distinguishing'. If the killing of the innocent by, say, conventional aerial bombing is allowed in some (exceptional) cases of self-defence, then reason insist that be allowed also by nuclear weapons in analogous cases, i.e., in cases where the proportionality rule yields the same

32. *Cf.* J. Stone, Conflict through Consensus. United Aproaches to Aggression (1977).
33. *See* T. Nagel, Mortal Questions 59 (1979).

ratio between gains and losses. *Thinking about the killing of the innocent in terms of gains and losses is not neutral, however.* It leads into a slippery slope of public discourse where deviating conceptions of 'gain' and 'loss' are constantly thrown against one another, and the final outcome always depends on a *fiat*, whether a tyrant's *Diktat* or - much more ominously - the anonymous routine of the bureaucrat.

Discussing the use, or threat of use, of nuclear weapons through legal reason results in a general law on the killing of the innocent whose boundaries we should constantly have to patrol not only against *mala fide* applications but genuine (though possibly mistaken) sentiments about the relative worth of values to be protected and destroyed. Only fear - the irrational image of the Apocalypse - puts nuclear weapons in a special category, detaching them from the banal logic of causes and consequences, gains and losses. If the prohibition against the killing of the innocent is not accepted as such - and it cannot be accepted as such within a legal reason that looks for proof - then it is always subjected to the balancing act of law's purposive-rational, bureaucratic ethos: "divesting the use and deployment of violence from moral calculus, and [...] emancipating the desiderata of rationality from interference of ethical norms or moral inhibitions."[34]

So whatever the reasons for the Court's silence, it was a beneficial silence inasmuch as it, and it only, could leave room for the workings of the moral impulse, the irrational, non-foundational appeal against the killing of the innocent.[35]

5.

The use of legal reason to determine the normative status of the use or threat of use of nuclear weapons collapses at this: there is no more fundamental certainty that could be referred to in order to support the belief that

34. Z. Bauman, Modernity and the Holocaust 28 (1989).

35. The argument for the limitation of law understood as formal rules and principles draws inspiration from Emmanuel Levinas' seminal but difficult philosophical work, especially as developed in Z. Bauman, Postmodern Ethics (1993); D. Furrow, Against Theory Continental and Analytic Challenhes in Moral Philosophy (1995), especially at 133-193; and (to a lesser extent, focusing on the continued relevance of judging actions by reference to their consequences) T. May, The Moral Theory of Poststructuralism (1995). The most accessible introduction to Levinas remains: Levinas, Ethics and Infinity. Conversations with Philippe Nemo (1985).

the massive killing of the innocent is wrong. However much we seek to find supporting reasons for this belief, no such reason partakes of an equivalent degree of convincing force as the statement itself. To the contrary, the more justifications are adduced to support the belief that the killing of the innocent is wrong, the weaker it starts to appear; the more it becomes contaminated by the uncertainties and qualifications that infect those justifying reasons. This is how rational argument breaks the *taboo* surrounding the use of nuclear weapons and thus, inadvertently, makes it easier to contemplate it.

This problem relates to an error regarding the status of the demand of not killing the innocent. If 'truth' is the quality of a proposition that can be supported by another proposition that is already known to be 'true', then the prohibition against massive killing of the innocent does not partake of it. Its validity is not dependent on the truth of any other proposition that could be cited as a justification for it. For a legal discourse that seeks the 'truth' about norms, this is a frustrating fact.

The truth (or validity) of legal norms is always derived from the truth of other propositions that deal with their source or authority. Instead of a prescription, law starts from a denotation, inserting the norm between inverted commas: According to the UN Charter (or some other convention, custom, or general principle of law) 'nuclear weapons are illegal'. The illegality of nuclear weapons - the *obligation* - is made conditional upon a cognitive argument about whether this is in fact what the Charter (or the other treaty, or custom, or a general principle) says. The denotation refers normally to either history or system. Can the proposed norm be proved by reference to a past legislative act? Can it be derived from a higher-level norm that we know to be valid? Neither avenue is open to verify the truth of the prohibition of the killing of the innocent. History is either too irrelevant or controversial to prove that the innocent ought not to be killed. Nor is the prohibition dependent on any more general or valuable norm or principle that would itself be more true than it. It cannot be 'derived' from a moral theory without becoming subject to apparently well-founded objections, derived from 3,000 years of argument in moral philosophy.

Legal reason is premised on the assumption that obligations exist (or are valid) by virtue of there having been an anterior fact of a certain sort: an agreement, a behaviour, or a principle that embodies it. The obligation is invalid if no such anterior fact can be proved. The authority of that anterior fact or norm must then be traced to another, even more basic, fact

or norm until we come to the law's ultimate justification that can no longer be proved but must be accepted as a matter of truth.[36] The prohibition of the massive killing of the innocent, however, cannot be derived in this way without losing its force. It is, in other words, not part of the linguistic practices of 'truth' or 'reason' as we know them and as we expect public authorities to follow. To think it is, is to subsume it under a set of particularly weak conventions that will cast doubt upon, and finally do away with, its binding force. Let me quote Lyotard from an analogous context:

> [t]he tribunal whose idiom is that genre of discourse which is cognition, which therefore accepts only descriptive phrases with cognitive value as acceptable, asks of the one who claims an obligation: which is the authority that obligates you [...]? The obligated is caught in a dilemma: either he or she names the addressor of the law and exposes the authority and sense of the law, and then he or she ceases to be obligated solely by the mere fact that the law, thus rendered intelligible to cognition, becomes an object of discussion and loses its obligatory value. Or else, he or she recognizes that this value cannot be expressed, that he or she cannot phrase in the place of the law, and then this tribunal cannot admit that the law obligates him or her since the law is without reason and is therefore arbitrary.[37]

The request concerning the legality of the use or threat of use of nuclear weapons gives rise to a situation where conflicting values are managed by reference to a cognitive idiom that not only fails to give effect to, but even to articulate, the meaning of the use of sophisticated modern technology to attain the massive and indiscriminate killing of the innocent living in far-off lands. In the legal argument about nuclear weapons, the enormity and the exceptional character, indeed the *unthinkability* of the threatening wrong finds no signification and therefore cannot be taken into account.[38] In Lyotard's theory of the *Differend*, this is typically the case of attempts to fit the Holocaust into the idiom of historical research and narrative and explains the frequent silence of concentration camp survivors. No historical explanation can possibly convey the experience - its personal or cultural significance. The sense in which the Holocaust transcends history is sup-

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36. This is, of course, what Kelsen called the 'transcendental hypothesis' - and Derrida the 'mystical foundation of the authority of law'. *See* H. Kelsen, Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik (1934), at 66-67 (Section 29), and J. Derrida, *Force of Law: The 'Mystical Foundation of Authority', in* D. Cornell *et al.*, Deconstruction and the Possibility of Justice 3 (1992).
37. J. F. Lyotard, The Differend. Phrases in Dispute (1988), at 117 (para. 176).
38. *Id.* at 9. *Cf.* Furrow, *supra* note 35, at 33-34 and 161-193.

pressed, cannot be expressed by the idiom of history. Hence, silence follows.

Or think about law's inability to give expression to the religious values of members of indigenous societies. The type of collective but transient linkage that Australian aborigine society has to land still remains largely unrecognized by a legal system that only acknowledges personal ownership to determined portions of territory. Remember, too, the argument about sexual violence against women being either completely outside the law or even at best recognized only in a limited and distorted way. Here as well, certain values cannot be translated to the idiom of legal reason.[39] Any settlement will in such cases fail to reflect the wrong subjectively suffered and may even be seen as a repetition, or rehearsal, of such wrong.

It is, of course, true that courts do not always follow the paradigm of legal reason but sometimes quite remarkably depart from the conventions of the juristic *genre*. In the *Reservations* case, for instance, the ICJ characterized genocide as a:

> a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is *contrary to moral law* and to the spirit and aims of the United Nations.[40]

And the Court added that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation."[41]

Such an argument about 'moral law' is unassailable from a technical point of view, because it is completely unsupported by technical argument. It can only be accepted or rejected because of what it says, not because of any evidence that was brought in to prove it. The Court appeals directly to the reader as a person who will immediately approve of the sentence and feels no need to prove it, to whom the illegality of genocide is not a matter of technical argument at all, to whom the contrary - the lawfulness of genocide - would be quite literally unthinkable. If the reader does not accept the

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39. *Cf.* C. Smart, Feminism and the Power of Law 26-49 (1989).
40. Reservations case, 1951 ICJ Rep. 21 (emphasis added). Note that the statement "even without any conventional obligation" addresses precisely the issue of propositional truth to which I referred earlier. But now the Court rejects the need for establishing it. The prohibition of genocide was not true because of the truth of any other ("conventional") proposition.
41. *Id.*

statement *as it is*, he or she will not be convinced of its truth by any additional argument. And the Court makes no such argument. The sentence propounds a self-evidence that any 'proof' could only serve to weaken.

Genocide - or better, the unthinkability of genocide - brings to the surface the limits of rational argument and the character of normative knowledge. Chains of argument and proof can always be traced to a point at which something can no longer be proved but must be axiomatic, as something that we know because we could not think otherwise. This is what Kelsen meant when he characterized the norm that justifies the legal order - the *Grundnorm* - as a transcendental hypothesis, something that cannot be proved but must be assumed in order for everything else we know about the law to make sense.[42] Wittgenstein addressed the issue of receding justification in the following way: "[i]f I have exhausted the justification I have reached bedrock, and my spade is turned. Then I am inclined to say: 'This is simply what I do'."[43]

In this way, reason and justification refer away from themselves, into what is accepted outside as a matter of faith, and in particular to the social practices in which what we do is constitutive of who we are. By making an assertion about 'moral law', the Court in the *Reservations* case assumed that a (rudimentary) community existed between the parties to the conflict, the reader, and the Court. Questioning the Court's statement would have been to set oneself outside this community. From that moment, the argument could not go on. What is being evoked is not only the meaning of the statement but also the self-evidence of that meaning. Asking for proof is, to revert to Wittgenstein, to play another language game, to participate in a form of life that is not the one defined by the unthinkability of genocide. Such a break in communication cannot be repaired by more technical argument; a 'differend' ensues in which no language can bridge a gap between the competing forms of life.

In the *Reservations* case, however, the Court stepped outside legal reason and argument in an issue (the exceptional character of genocide) that was not in conflict. The case related to a technical point about the legal meaning of reservations and objections to them, not to whether or when genocide might be prohibited. The moral community defined by the unthinkability of genocide was never threatened; its affirmation was irrel-

42. *E.g.* Kelsen, *supra* note 36.
43. L. Wittgenstein, Philosophical Investigations (1995), at 85a (para. 217).

evant for the technical argument regarding the operation of the object and purpose test which the Court outlined as the applicable rule. Its principal meaning was to reaffirm a constitutional value of the UN system in 1951 and to set up a mirror, less than a decade after the Holocaust, in which the members could recognize and redefine themselves.

In the *Nuclear Weapons* case, the situation was different. There was no anterior community that would have been defined by the agreement concerning the illegality or otherwise of the use of nuclear weapons. Any axiomatic statement about the impermissibility of the killing of the innocent would not only have been hypocritical (because unlike the commission of genocide, most states do accept the killing of the innocent in a number of circumstances), it would have set up a distorted self image and an ideological screen over the public facade of the international system. Like Rousseau once remarked against Grotius, such use of morality may not be logical, but it is certainly favourable to tyrants.[44]

6.

Let me conclude by reflexions on the implications of the request for legal faith and the identity of the lawyer by reference to the familiar story of Abraham and Isaac. One day an angel told Abraham to go to the mountain and prepare Isaac, his son, as a sacrifice for God. Abraham complied without question. He took Isaac to the mountain, never telling him why he was not bringing a lamb with them (we are not told whether Isaac knew what fate awaited him). As they arrived, Abraham put Isaac on the unlit pyre that he had set up on a sacrificial rock and raised his knife. At that moment, an angel's voice was heard: Lay down your knife; you have proved your faith in God.

The images this story conveys of Abraham can be used to illustrate the situation of the international lawyer in face of the god of law. Two very basic contrasting perspectives are open. One is the traditional, theological view of Abraham's behaviour as an act of ultimate faith, a heroic, relentless faith that is prepared to go any length to fulfil itself, regardless of any personal or human cost. This interpretation does not question Abraham's suffering as he prepares to sacrifice his only son. Suffering is the very point

44. J.J. Rousseau, The Social Contract (translated & introduced by M. Cranston, 1986), at 51.

of the act, proving as it does the strength of the faith. Had Abraham been indifferent, no angel might have intervened.

The other interpretation is the agnostic one for which the story is not one of redemption but of foolishness and tragedy. It focuses on Abraham's renunciation of personal responsibility and on his inability to protect the persons closest to him. In the face of an anonymous command, Abraham is immediately prepared to lay down human reason and conscience. His fate is sad, akin to that of Aischylos' Agamemnon who does sacrifice his daughter Ifigenia to demonstrate his piety towards Zeus. But where Agamemnon's sacrifice is a cold, calculating, purposive-rational act, comprehensible and condemnable precisely for that reason, Abraham appears simply as a lost human soul, living in a phantom land of subjectless voices. And yet it is Abraham that is the more frightening of the two because of the ease with which any of us might be led to complicity with cruelty induced by passive faith in authority and the bracketing of personal responsibility under an explanation of "just following the rules."[45]

The contrasting images of Abraham (heroic/tragic) depend, of course, from the reader's view of the status of the Angel's words. If we can be certain that they did represent God's authentic will, we can only admire Abraham. Only then is Abraham's act revealed as an example to be followed. But if our own faith is insecure and we can entertain the thought of the command not having come from God but from, say, the devil or from Abraham's own subconscious, or if the possibility cannot be excluded that the command was unclear or that Abraham misunderstood it, then his behaviour starts to seem as the height of foolishness, or dogmatic insanity.

The request concerning the lawfulness of nuclear weapons recalls the story by putting international lawyers in the position of Abraham, waiting passively for the command of the court, ready to suspend any requirements of personal conscience in order to execute it faithfully. Such an absolute loyalty may be a proper posture if we have faith in the law and in the court's ability to know it. But inasmuch as the law may seem uncertain, full of exceptions and qualifications, references to contextual judgment - and this is what the previous sections have argued - the existence of such faith can not be taken for granted. Discretion and 'evaluation', even error

45. For a famous experiment to this effect, *cf.* S. Milgram, Obedience to Authority. An Experimental View (1974). *See also* the discussion of its implications in Bauman, *supra* note 34, at 151-168.

and misjudgment, are parts of the law, however much it is dressed in the voice of universal reason.

But I do not think that many international lawyers feel themselves in the position of Abraham - though that is how the request portrays them/us. Many of us were never ready to accept and execute any statement the court might have given, but were quite prepared to condemn the court in case it gave the wrong opinion. The request dressed international lawyers as true believers in the image of Abraham. But this was a dress of hypocrisy. Most international lawyers would have been prepared to sacrifice the court, and the law it propounded, but not their intuition because, in fact, we hold that intuition (instead of faith in the law) so central to our own self-image and identity as liberal 'progressives'.[46]

Such an attitude of hypocrisy has two perverse consequences. Firstly, it reconfirms a structure of normative authority in which many lawyers do not believe and have no reason to believe. The court and the legal technique available to it are in no position to determine the status of the massive killing of the innocent. Portraying ourselves as faithful servants of the law, we in fact buttress the court as a puppet authority, and we are ready to reject it the moment it oversteps the moral walls around its paper castle. The image our behaviour conveys of the court, and of ourselves, is profoundly distorted. We know this, yet keep the truth secret, because revealing it might altogether undermine a structure of authority which otherwise is so beneficial for ourselves and our public identity as the technicians of an objective legal reason.

Secondly, this attitude perpetuates the illusion of the existence of a privileged (legal) rationality that is able to resolve any political conflict without becoming political itself. Its bureaucratic attachment to legal technique allows the abdication of personal responsibility for anything that can be supported by this technique - and anything can. This is the path of Auschwitz and the key lesson expressed in Zygmunt Bauman's powerful dictum that

> [t]he Holocaust was not an irrational outflow of not-yet-fully eradicated residues of pre-modern barbarity. It was a legitimate resident in the house of

46. This point was made, somewhat more diplomatically, by Judge Oda, arguing that the request did not really seek the Court's opinion but the "endorsement of an alleged legal axiom", dissenting opinion, para. 3.

modernity; indeed one who would not be at home in any other house.[47]

The *Nuclear Weapons* request emanated from an inability to articulate and to take seriously the moral impulse against the killing of the innocent. We may have been embarrassed for such impulse and regard it as a matter of 'subjective evaluation', incommensurate with competing moralities. Perhaps we feel that such an impulse is, as Alasdair MacIntyre has suggested, only a fragment of a consciousness of a past civilization whose language is no longer with us so that we cannot publicly address our moral beliefs.[48] Perhaps we feel that fraudulence or hypocrisy are our only (unappealing) alternatives and that, even as we occasionally set arguments aside to refer to 'moral law', we remain puzzled about why this would not be ethnocentrism in sheep's clothes.

But this is so only under the assumption that the language of the law is a universal language, amenable to statements of rational principle that can be uniformly applied in essentially similar situations. This is, of course, the faith needed to sustain a legal technique through which the identity of the lawyer has been constituted *vis-à-vis* politicians, diplomats, or moral theorists. It is a faith created through the mistrust of politics, ideology, and the passions that have created so much human suffering. It is a faith, however, that never acknowledged itself as such, but was presented as the natural flow of an objective, impersonal reason.

So I come back to the story of Abraham and Isaac and the sense in which the issue of nuclear weapons relates to faith and identity of international lawyers. The 'theology' of the law has prevented lawyers from seeing to what extent personal responsibility is involved, to what extent in every legal act - including the act of becoming a lawyer - a 'decision' and some kind of faith are implicated.[49] The fact that the massive killing of the innocent cannot be comprehended by reason is surely not a compelling argument against continuing to think of it as an extraordinary wrong. To say this is to recognize that at least one central fact of our existence is not the capacity to reason. But that capacity includes also the ability to recognize massive human suffering and to feel bound by the need to combat it without any more fundamental reason for feeling so.

Critical theory insists that identity is not something fixed but also, and

47. Bauman, *supra* note 34, at 17.
48. A. MacIntyre, After Virtue (1985).
49. *See also* M. Davies, Delimiting the Law 93-99 (1996).

simultaneously, a project.[50] This is true of the identity of the lawyer as well. Is it better (for there is no more fundamental linguistic convention than the normative through which to address this question) to identify oneself on the basis one's ability to manage a legal technique, one's unconditional loyalty to formal authority, or on the basis of one's sensitivity for the call of the innocent not to be killed? To look for rules, techniques or authority is to think of oneself as Abraham, sad and dangerous. As lawyers, we need to be able to say that we know that the killing of the innocent is wrong not because of whatever chains of reasoning we can produce to support it, or who it was that told us so, but because of who we are. Without so defining ourselves, how could we possibly be trusted to do the right thing in the unique and precarious situations in which that passion is triggered?

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50. J. Habermas, Autonomy and Solidarity 243 (1992).

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