

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,  
ADVISORY OPINIONS AND ORDERS

OBLIGATIONS CONCERNING NEGOTIATIONS  
RELATING TO CESSATION  
OF THE NUCLEAR ARMS RACE  
AND TO NUCLEAR DISARMAMENT

(MARSHALL ISLANDS *v.* PAKISTAN)

JURISDICTION AND ADMISSIBILITY

JUDGMENT OF 5 OCTOBER 2016

**2016**

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,  
AVIS CONSULTATIFS ET ORDONNANCES

OBLIGATIONS RELATIVES À DES NÉGOCIATIONS  
CONCERNANT LA CESSATION  
DE LA COURSE AUX ARMES NUCLÉAIRES  
ET LE DÉSARMEMENT NUCLÉAIRE

(ÎLES MARSHALL *c.* PAKISTAN)

COMPÉTENCE ET RECEVABILITÉ

ARRÊT DU 5 OCTOBRE 2016

## DISSENTING OPINION OF JUDGE CANÇADO TRINDADE

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### I. PROLEGOMENA

1. I regret not to be able to accompany the Court’s majority in the Judgment of today, 5 October 2016 in the present case of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)*, whereby it has found that the existence of a dispute between the Parties has not been established before it, and that the Court has no jurisdiction to consider the Application lodged with it by the Marshall Islands, and cannot thus proceed to the merits of the case. I entirely disagree with the present Judgment. As my dissenting position covers all points addressed in it, in its reasoning as well as in its resolutive points, I feel obliged, in the faithful exercise of the international judicial function, to lay on the records the foundations of my own position thereon.

2. In doing so, I distance myself as much as I can from the position of the Court’s majority, so as to remain in peace with my conscience. I shall endeavour to make clear the reasons of my personal position on the matter addressed in the present Judgment, in the course of the present dissenting opinion. I shall begin by examining the question of the existence of a dispute before the Hague Court (its objective determination by the Court and the threshold for the determination of the existence of a dispute). I shall then turn attention to the distinct series of UN General Assembly resolutions on nuclear weapons and *opinio juris*. After surveying also UN Security Council resolutions and *opinio juris*, I shall dwell upon the saga of the United Nations in the condemnation of nuclear weapons. Next, I shall address the positions of the Contending Parties on UN resolutions and the emergence of *opinio juris*.

3. In logical sequence, I shall then, looking well back in time, underline the need to go beyond the strict inter-State dimension, bearing in mind the attention of the UN Charter to peoples. Then, after recalling the fundamental principle of the juridical equality of States, I shall dwell upon the unfoundedness of the strategy of “deterrence”. My next line of considerations pertains to the illegality of nuclear weapons and the obligation of nuclear disarmament, encompassing: (a) the condemnation of all weapons of mass destruction; (b) the prohibition of nuclear weapons (the need of a people-centred approach, and the fundamental right to life); (c)

the absolute prohibitions of *jus cogens* and the humanization of international law; (d) pitfalls of legal positivism.

4. This will bring me to address the recourse to the “Martens clause” as an expression of the *raison d’humanité*. My following reflections, on nuclear disarmament, will be in the line of jusnaturalism, the humanist conception and the universality of international law; in addressing the universalist approach, I shall draw attention to the principle of humanity and the *jus necessarium* transcending the limitations of *jus voluntarium*. I shall then turn attention to the NPT Review Conferences, to the relevant establishment of nuclear-weapon-free zones, and to the Conferences on the Humanitarian Impact of Nuclear Weapons. The way will then be paved for my final considerations, on *opinio juris communis* emanating from conscience (*recta ratio*), well above the “will”, — and, last but not least, to the epilogue (recapitulation)

## II. THE EXISTENCE OF A DISPUTE BEFORE THE HAGUE COURT

### 1. *Objective Determination by the Court*

5. May I start by addressing the issue of the existence of a dispute before the Hague Court. In the *jurisprudence constante* of the Hague Court (PCIJ and ICJ), a dispute exists when there is “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons”<sup>1</sup>. Whether there exists a dispute is a matter for “objective determination” by the Court; the “mere denial of the existence of a dispute does not prove its non-existence”<sup>2</sup>. The Court must examine if “the claim of one party is positively opposed by the other”<sup>3</sup>. The Court further states that “a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not be necessarily be stated *expressis verbis*”<sup>4</sup>.

<sup>1</sup> *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11.

<sup>2</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74.

<sup>3</sup> *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328; case of *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 40, para. 90.

<sup>4</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89.

6. Over the last decade, the Court has deemed it fit to insist on its own faculty to proceed to the “objective determination” of the dispute. Thus, in the case of *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Jurisdiction and Admissibility (Judgment, I.C.J. Reports 2006, p. 6)*, for example, the ICJ has recalled that, as long ago as 1924, the PCIJ stated that “a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests” (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11*). It then added that

“For its part, the present Court has had occasion a number of times to state the following:

‘In order to establish the existence of a dispute, ‘it must be shown that the claim of one party is positively opposed by the other’ (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328*); and further, ‘Whether there exists an international dispute is a matter for objective determination’ (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 74; East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 100, para. 22; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 17, para. 22; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 122-123, para. 21; Certain Property (Liechtenstein v. Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005, p. 18, para. 24*).’” (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 40, para. 90*).

7. Shortly afterwards, in its Judgment on preliminary objections (of 18 November 2008) in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, the ICJ has again recalled that

“In numerous cases, the Court has reiterated the general rule which it applies in this regard, namely: ‘the jurisdiction of the Court must normally be assessed on the date of the filing of the act instituting proceedings’ (to this effect, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 613, para. 26; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the*

*Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, *Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 26, para. 44).

.....  
 (It is normally by reference to the date of the filing of the instrument instituting proceedings that it must be determined whether those conditions are met.

.....  
 What is at stake is legal certainty, respect for the principle of equality and the right of a State which has properly seised the Court to see its claims decided, when it has taken all the necessary precautions to submit the act instituting proceedings in time.

.....  
 [T]he Court must in principle decide the question of jurisdiction on the basis of the conditions that existed at the time of the institution of the proceedings.

.....  
 However, it is to be recalled that the Court, like its predecessor, has also shown realism and flexibility in certain situations in which the conditions governing the Court's jurisdiction were not fully satisfied when proceedings were initiated but were subsequently satisfied, before the Court ruled on its jurisdiction." (*Judgment, I.C.J. Reports 2008*, pp. 437-438, paras. 79-81.)

8. More recently, in its Judgment on preliminary objections (of 1 April 2011) in the case of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* (hereinafter *Application of the CERD Convention*), the ICJ saw it fit, once again, to stress:

“The Court recalls its established case law on that matter, beginning with the frequently quoted statement by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case in 1924: ‘A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons’. (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11). Whether there is a dispute in a given case is a matter for ‘objective determination’ by the Court (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74). ‘It must be shown that the claim of one party is positively opposed by the other’ (*South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328); and, most recently, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 40, para. 90). The Court's determination must turn on an examination of the facts. The matter is one of substance, not of form. As the Court has recognized (for example, *Land and Maritime Bound-*

ary between Cameroon and Nigeria (*Cameroon v. Nigeria*), *Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89), the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for. While the existence of a dispute and the undertaking of negotiations are distinct as a matter of principle, the negotiations may help demonstrate the existence of the dispute and delineate its subject-matter.

The dispute must in principle exist at the time the Application is submitted to the Court (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, *Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 25-26, paras. 42-44; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, *Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 130-131, paras. 42-44” (*I.C.J. Reports 2011 (I)*, pp. 84-85, para. 30).

9. This passage of the 2011 Judgment in the case of *Application of the CERD Convention* reiterates what the ICJ has held in its *jurisprudence constante*. Yet, shortly afterwards in that same Judgment, the ICJ has decided to apply to the facts of the case a higher threshold for the determination of the existence of a dispute, by proceeding to ascertain whether the applicant State had given the respondent State prior notice of its claim and whether the respondent State had opposed it<sup>5</sup>. On this basis, it has concluded that no dispute had arisen between the Contending Parties (before August 2008). Such new requirement, however, is not consistent with the PCIJ’s and the ICJ’s *jurisprudence constante* on the determination of the existence of a dispute (cf. *supra*).

10. Now, in the present case of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, the three respondent States (India, United Kingdom and Pakistan), seek to rely on a requirement of prior notification of the claim, or the test of prior awareness of the claim of the applicant State (the Marshall Islands), for a dispute to exist under the ICJ’s Statute or general international law. Yet, nowhere can such a requirement be found in the Court’s *jurisprudence constante* as to the existence of a dispute: quite to the contrary, the ICJ has made clear that the position or the attitude of a party can be established by inference<sup>6</sup>. Pursuant to the Court’s approach, it is

<sup>5</sup> Cf. paras. 50-105, and esp. paras. 31, 61 and 104-105, of the Court’s Judgment of 1 April 2011.

<sup>6</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, *Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89:

“a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be



not necessary for the respondent to oppose previously the claim by an express statement, or to express acknowledgment of the existence of a dispute.

11. The respondent States in the present case have made reference to the Court's 2011 Judgment in the case of the *Application of the CERD Convention* in support of their position that prior notice of the applicant's claim is a requirement for the existence of a dispute. Already in my dissenting opinion (para. 161) in that case, I criticized the Court's "formalistic reasoning" in determining the existence of a dispute, introducing a higher threshold that goes beyond the *jurisprudence constante* of the PCIJ and the ICJ itself (cf. *supra*).

12. As I pointed out in that dissenting opinion in the case of the *Application of the CERD Convention*,

"As to the first preliminary objection, for example, the Court spent 92 paragraphs to concede that, in its view, a legal dispute at last crystallized, on 10 August 2008 (para. 93), only *after* the outbreak of an open and declared war between Georgia and Russia! I find that truly extraordinary: the emergence of a legal dispute only *after* the outbreak of widespread violence and war! Are there disputes which are quintessentially and ontologically *legal*, devoid of any political ingredients or considerations? I do not think so. The same formalistic reasoning leads the Court, in 70 paragraphs, to uphold the second preliminary objection, on the basis of alleged (unfulfilled) "preconditions" of its own construction, in my view at variance with its own *jurisprudence constante* and with the more lucid international legal doctrine." (*I.C.J. Reports 2011 (I)*, p. 305, para. 161.)

13. Half a decade later, I was hopeful that the Court would distance itself from the formalistic approach it adopted in the case of the *Application of the CERD Convention*. As it regrettably has not done so, I feel obliged to reiterate here my dissenting position on the issue, this time in the present case of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*. In effect, there is no general requirement of prior notice of the applicant State's

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stated *expressis verbis*. In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party."

intention to initiate proceedings before the ICJ<sup>7</sup>. It should not pass unnoticed that the *purpose* of the need of determination of the existence of a dispute (and its object) before the Court is to enable this latter to exercise jurisdiction properly: it is not intended to protect the respondent State, but rather and more precisely to safeguard the proper exercise of the Court's judicial function.

14. There is no requirement under general international law that the contending parties must first "exhaust" diplomatic negotiations before lodging a case with, and instituting proceedings before, the Court (as a precondition for the existence of the dispute). There is no such requirement in general international law, nor in the ICJ's Statute, nor in the Court's case law. This is precisely what the ICJ held in its Judgment on preliminary objections (of 11 June 1998) in the case of *Land and Maritime Boundary between Cameroon and Nigeria*: it clearly stated that "Neither in the Charter nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court" (*I.C.J. Reports 1998*, p. 303, para. 56).

15. The Court's statement refers to the "exhaustion" of diplomatic negotiations, — to discard the concept. In effect, there is no such a requirement in the UN Charter either, that negotiations would need to be resorted to or attempted. May I reiterate that the Court's determination of the existence of the dispute is not designed to protect the respondent State(s), but rather to safeguard the proper exercise of its own judicial function in contentious cases. It is thus a matter for objective determination by the Court, as it recalled in that same Judgment (para. 87), on the basis of its own *jurisprudence constante* on the matter.

## 2. *Existence of a Dispute in the Cas d'Espèce* (*Marshall Islands v. Pakistan Case*)

16. In the present case opposing the Marshall Islands to Pakistan, there were two sustained and distinct courses of conduct of the two Contending Parties, evidencing their distinct legal positions (as to the duty of negotiations leading to nuclear disarmament in all its aspects under strict and effective international control), which suffice for the determination of the existence of a dispute. This dispute concerns Pakistan's compliance with its obligation under customary international law 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.

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<sup>7</sup> Cf., to this effect, S. Rosenne, *The Law and Practice of the International Court (1920-2005)*, 4th ed., Vol. III, Leiden, Nijhoff/Brill, 2006, p. 1153.

17. On 14 February 2014, in its declaration at the aforementioned Conference of Nayarit, the Marshall Islands publicly expressed its view concerning the obligation on nuclear disarmament. Pakistan did not react to that declaration, nor did it change its conduct. Thus, one can already infer an opposition of legal views. In its subsequent submissions to the ICJ, Pakistan sustained its position, opposing that of the Marshall Islands in its Note Verbale of 9 July 2014, Pakistan challenged the Marshall Islands' arguments, referring to what it regarded as an exaggerated and unfounded interpretation of Article VI of the NPT, which is in its view inapplicable to States that are not parties to the NPT, and which does not have an *erga omnes* character. In its Counter-Memorial, Pakistan submits that the Marshall Islands' claims are manifestly without legal merit or substance (paras. 4.1-4.6), clearly challenging the legal basis of the Marshall Islands' claim (para. 4.5).

### 3. *The Threshold for the Determination of the Existence of a Dispute*

18. In the present cases of *Marshall Islands v. India/United Kingdom/Pakistan*, the Court's majority has unduly heightened the threshold for establishing the existence of a dispute. Even if dismissing the need for an applicant State to provide notice of a dispute, in practice, the requirement stipulated goes far beyond giving notice: the Court effectively requires an applicant State to set out its legal claim, to direct it specifically to the prospective-respondent State(s), and to make the alleged harmful conduct clear. All of this forms part of the "awareness" requirement that the Court's majority has laid down, seemingly undermining its own ability to infer the existence of a dispute from the conflicting courses of conduct of the Contending Parties.

19. This is not in line with the ICJ's previous *obiter dicta* on inference, contradicting it. For example, in the aforementioned case of *Land and Maritime Boundary between Cameroon and Nigeria* (1998), the ICJ stated that

"[A] disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. In the determination of the existence of a dispute, as in other matters, the position or attitude of a party can be established by inference, whatever the professed view of that party." (*I.C.J. Reports 1998*, p. 315, para. 89.)

20. The view taken by the Court's majority in the present case contradicts the Hague Court's (PCIJ and ICJ) own earlier case law, in which it

has taken a much less formalistic approach to the establishment of the existence of a dispute. Early in its life, the PCIJ made clear that it did not attach much importance to “matters of form”<sup>8</sup>; it added that it could not “be hampered by a mere defect of form”<sup>9</sup>. The PCIJ further stated that “the manifestation of the existence of the dispute in a specific manner, as for instance by diplomatic negotiations, is not required. (. . .) [T]he Court considers that it cannot require that the dispute should have manifested itself in a formal way.”<sup>10</sup>

21. The ICJ has, likewise, in its own case law, avoided to take a very formalistic approach to the determination of the existence of a dispute<sup>11</sup>. May I recall, in this respect, *inter alia*, as notable examples, the Court’s *obiter dicta* on the issue, in the cases of *East Timor (Portugal v. Australia)*, of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, and of *Certain Property (Liechtenstein v. Germany)*. In those cases, the ICJ has considered that conduct post-dating the critical date (i.e., the date of the filing of the Application) supports a finding of the existence of a dispute between the parties. In the light of this approach taken by the ICJ itself in its earlier case law, it is clear that a dispute exists in each of the present cases lodged with it by the Marshall Islands.

22. In the case of *East Timor* (1995), in response to Australia’s preliminary objection that there was no dispute between itself and Portugal, the Court stated: “Portugal has, rightly or wrongly, formulated complaints of fact and law against Australia which the latter has denied. By virtue of this denial, there is a legal dispute”<sup>12</sup>. Shortly afterwards, in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (preliminary objections, 1996), in response to Yugoslavia’s preliminary objection that the Court did not have juris-

<sup>8</sup> *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34.

<sup>9</sup> *Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14.

<sup>10</sup> *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, pp. 10-11.

<sup>11</sup> Cf., e.g., Advisory Opinion on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, pp. 28-29, para. 38; case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 428-429, para. 83. Moreover, the critical date for the determination of the existence of a dispute is, “in principle” (as the ICJ says), the date on which the application is submitted to the Court (*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 442, para. 46; case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea, Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 27, para. 52); the ICJ’s phraseology shows that this is not a strict rule, but rather one to be approached with flexibility.

<sup>12</sup> *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 100, para. 22.

diction under Article IX of the Convention against Genocide because there was no dispute between the Parties, the Court, contrariwise, found that there was a dispute between them, on the basis that Yugoslavia had “wholly denied all of Bosnia and Herzegovina’s allegations, whether at the stage of proceedings relating to the requests for the indication of provisional measures, or at the stage of the (. . .) proceedings relating to [preliminary] objections”<sup>13</sup>. Accordingly, “by reason of the rejection by Yugoslavia of the complaints formulated against it”<sup>14</sup>, the ICJ found that there was a dispute.

23. In the case of *Certain Property* (preliminary objections, 2005), as to Germany’s preliminary objection that there was no dispute between the parties, the ICJ found that complaints of fact and law formulated by Liechtenstein were denied by Germany; accordingly, “[i]n conformity with well-established jurisprudence” — the ICJ concluded — “by virtue of this denial”, there was a legal dispute between Liechtenstein and Germany<sup>15</sup>. Now, in the present proceedings before the Court, in each of the three cases lodged with the ICJ by the Marshall Islands (against India, the United Kingdom and Pakistan), the respondent States have expressly denied the arguments of the Marshall Islands. May we now take note of the denials which, on the basis of the Court’s aforementioned *jurisprudence constante*, evidence the existence of a dispute between the Contending Parties<sup>16</sup>.

#### 4. *Contentions in the Marshall Islands v. Pakistan Case*

24. The Marshall Islands argues that Pakistan has breached the customary international law obligation to negotiate nuclear disarmament in good faith by engaging in a course of conduct that is contrary to the objective of disarmament. The Marshall Islands further contends that Pakistan, by its conduct, has breached the customary international law obligation regarding the cessation of the nuclear arms race at an early date<sup>17</sup>. For its

<sup>13</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 595 and 614-615, paras. 27-29.

<sup>14</sup> *Ibid.*, p. 615, para. 29.

<sup>15</sup> *Certain Property (Liechtenstein v. Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 19, para. 25, citing the Court’s Judgments in the cases of *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 100, para. 22; and of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 615, para. 29.

<sup>16</sup> As the present proceedings relate to jurisdiction, the opposition of views is captured in the various jurisdictional objections; it would be even more forceful in pleadings on the merits, which, given the Court’s majority decision, will regrettably no longer take place.

<sup>17</sup> *Application instituting proceedings of the Marshall Islands*, p. 34, paras. 52-55.

part, in its Counter-Memorial, Pakistan discloses a dispute about the existence of the customary international law obligations asserted by the Marshall Islands as well as its own compliance with such obligations<sup>18</sup>.

25. In Part 4 of its Counter-Memorial, e.g., Pakistan states that it emerges from the Application instituting proceedings and the Memorial of the Marshall Islands that its “claims are based upon: (1) multilateral treaties to which Pakistan is not a party; (2) non-binding General Assembly resolutions; and (3) a non-binding Advisory Opinion of the Court”. And it adds:

“As to (1), although the RMI seeks to present its claims as founded in customary international law, the obligations which it identifies are said to be ‘rooted’ and ‘enshrined’ in Article VI of the NPT, a treaty provision to which the 22-page Application refers at least 15 times. Pakistan is not a party to the NPT. As to (2) and (3), due to their non-binding status, these cannot give rise to obligations binding on Pakistan. None of the above-referenced sources invoked by the RMI is opposable to Pakistan.

Even if Pakistan (and the Court) were to accept the facts as alleged by the RMI to be true, these do not give rise to any breach by Pakistan and, as explained below, the RMI’s asserted injuries and claims are not redressable. As a result, the RMI’s case against Pakistan is inadmissible and manifestly without any legal merit or substance and the Court must decline jurisdiction.”<sup>19</sup>

### 5. General Assessment

26. Always attentive and over-sensitive to the position of nuclear-weapon States [NWS] (cf. Part XII, *infra*) — such as the respondent States in the present cases — the Court, in the *cas d’espèce*, dismisses the statements made by the Marshall Islands in multilateral *fora* before the filing of the Application, as being, in its view, insufficient to determine the existence of a dispute. Moreover, the Court’s split majority makes *tabula rasa* of the requirement that “in principle” the date for determining the existence of the dispute is the date of filing of the application (case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, *Preliminary Objections, Judgment*,

<sup>18</sup> For example, Part 4 of the Counter-Memorial of Pakistan is titled “The RMI’s Claims against Pakistan Are Manifestly without Legal Merit or Substance”; cf. Counter-Memorial, p. 14.

<sup>19</sup> Counter-Memorial of Pakistan, p. 14, paras. 4.4-4.6.

*I.C.J. Reports 2016 (I)*, p. 27, para. 52); as already seen, in its case law the ICJ has taken into account conduct post-dating that critical date (cf. *supra*).

27. In an entirely formalistic reasoning, the Court borrows the *obiter dicta* it made in the case of the *Application of the CERD Convention* (2011) — unduly elevating the threshold for the determination of the existence of a dispute — in respect of a compromissory clause under that Convention (wrongly interpreted anyway, making abstraction of the object and purpose of the CERD Convention). In the present case, opposing the Marshall Islands to Pakistan, worse still, the Court’s majority takes that higher standard out of context, and applies it herein, in a case lodged with the Court on the basis of an optional clause declaration, and concerning an obligation under customary international law.

28. This attempt to heighten still further the threshold for the determination of the existence of a dispute (requiring further factual precisions from the applicant) is, besides formalistic, artificial: it does not follow from the definition of a dispute in the Court’s *jurisprudence constante*, as being “a conflict of legal views or of interests”, as already seen (cf. *supra*). The Court’s majority formalistically requires a specific reaction of the respondent State to the claim made by the applicant State (in applying the criterion of “awareness”, amounting, in my perception, to an obstacle to access to justice), even in a situation where, as in the *cas d’espèce*, there are two consistent and distinct courses of conduct on the part of the Contending Parties.

29. Furthermore, and in conclusion, there is a clear denial by the respondent States (India, United Kingdom and Pakistan) of the arguments made against them by the applicant State, the Marshall Islands. By virtue of these denials there is a legal dispute between the Marshall Islands and each of the three respondent States. The formalistic raising, by the Court’s majority, of the higher threshold for the determination of the existence of a dispute, is not in conformity with the *jurisprudence constante* of the PCIJ and ICJ on the matter (cf. *supra*). Furthermore, in my perception, it unduly creates a difficulty for the very *access to justice* (by applicants) at international level, in a case on a matter of concern to the whole of humankind. This is most regrettable.

### III. UN GENERAL ASSEMBLY RESOLUTIONS AND *OPINIO JURIS*

30. In the course of the proceedings in the present cases of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race*

and to *Nuclear Disarmament*, both the applicant State (the Marshall Islands) and the respondent States (India, United Kingdom and Pakistan) addressed UN General Assembly resolutions on the matter of nuclear disarmament (cf. Part VI, *infra*). This is the point that I purport to consider, in sequence, in the present dissenting opinion, namely, in addition to the acknowledgment before the ICJ (1995) of the authority and legal value of General Assembly resolutions on nuclear weapons as breach of the UN Charter, the distinct series of: (a) UN General Assembly Resolutions on Nuclear Weapons (1961-1981); (b) UN General Assembly Resolutions on Freeze of Nuclear Weapons (1982-1992); (c) UN General Assembly Resolutions Condemning Nuclear Weapons (1982-2015); (d) UN General Assembly Resolutions Following up the ICJ's 1996 Advisory Opinion (1996-2015).

### 1. UN General Assembly Resolutions on Nuclear Weapons (1961-1981)

31. The 1970s was the First Disarmament Decade: it was so declared by General Assembly resolution A/RES/2602E (XXIV) of 16 December 1969, followed by two other resolutions of 1978 and 1980 on non-use of nuclear weapons and prevention of nuclear war<sup>20</sup>. The General Assembly specifically called upon States to intensify efforts for the cessation of the nuclear arms race, nuclear disarmament and the elimination of other weapons of mass destruction. Even before that, the ground-breaking General Assembly resolution 1653 (XVI), of 24 November 1961, advanced its *célèbre* "Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons" (cf. Part V, *infra*). In 1979, when the First Disarmament Decade was coming to an end, the General Assembly, disappointed that the objectives of the first decade had not been realized, declared the 1980s as a Second Disarmament Decade<sup>21</sup>. Likewise, the 1990s were subsequently declared the Third Disarmament Decade<sup>22</sup>.

32. In this first period under review (1961-1981), the UN General Assembly paid continuously special attention to disarmament issues and to nuclear disarmament in particular. May I refer to General Assembly resolutions A/RES/2934 of 29 November 1972; A/RES/2936 of 29 November 1972; A/RES/3078 of 6 December 1973; A/RES/3257 of 9 December 1974; A/RES/3466 of 11 December 1975; A/RES/3478 of

<sup>20</sup> Namely, in sequence, General Assembly resolutions A/RES/33/71B of 14 December 1978, and A/RES/35/152D of 12 December 1980.

<sup>21</sup> Cf. General Assembly resolutions A/RES/34/75 of 11 December 1979, and A/RES/35/46 of 3 December 1980.

<sup>22</sup> Cf. General Assembly resolutions A/RES/43/78L of 7 December 1988, and A/RES/45/62A of 4 December 1990.



11 December 1975; A/RES/31/66 of 10 December 1976; A/RES/32/78 of 12 December 1977; A/RES/33/71 of 14 December 1978; A/RES/33/72 of 14 December 1978; A/RES/33/91 of 16 December 1978; A/RES/34/83 of 11 December 1979; A/RES/34/84 of 11 December 1979; A/RES/34/85 of 11 December 1979; A/RES/34/86 of 11 December 1979; A/RES/35/152 of 12 December 1980; A/RES/35/155 of 12 December 1980; A/RES/35/156 of 12 December 1980; A/RES/36/81 of 9 December 1981; A/RES/36/84 of 9 December 1981; A/RES/36/92 of 9 December 1981; A/RES/36/94 of 9 December 1981; A/RES/36/95 of 9 December 1981; A/RES/36/97 of 9 December 1981; and A/RES/36/100 of 9 December 1981.

33. In 1978 and 1982, the UN General Assembly held two Special Sessions on Nuclear Disarmament (respectively, the Tenth and Twelfth Sessions), where the question of nuclear disarmament featured prominently amongst the themes discussed. In fact, it was stressed that the most immediate goal of disarmament is the elimination of the danger of a nuclear war. In a subsequent series of its resolutions (in the following period of 1982-2015), as we shall see, the General Assembly moved on straightforwardly to the condemnation of nuclear weapons (cf. *infra*).

34. In its resolutions adopted during the present period of 1972-1981, the General Assembly repeatedly drew attention to the dangers of the nuclear arms race for humankind and the survival of civilization and expressed apprehension concerning the harmful consequences of nuclear testing for the acceleration of such arms race. Thus, the General Assembly reiterated its condemnation of all nuclear weapon tests, in whatever environment they may be conducted. It called upon States that had not yet done so to adhere to the 1963 Test Ban Treaty (banning nuclear tests in the atmosphere, in outer space and under water) and called for the conclusion of a comprehensive test ban treaty, which would ban nuclear weapons tests in all environments (e.g. underground as well). Pending the conclusion of such treaty, it urged NWS to suspend nuclear weapon tests in all environments.

35. The General Assembly also emphasized that NWS bear a special responsibility for fulfilling the goal of achieving nuclear disarmament, and in particular those nuclear weapon States that are parties to international agreements in which they have declared their intention to achieve the cessation of the nuclear arms race. It further called specifically on the Heads of State of the USSR and the United States to implement the procedures for the entry into force of the Strategic Arms Limitation agreement (so-called “SALT” agreement).

36. At the 84th plenary meeting, following the Tenth Special Session on Disarmament, the General Assembly declared that the use of nuclear weapons is a “violation of the Charter of the United Nations” and “a crime against humanity”, and that the use of nuclear weapons should be

prohibited, pending nuclear disarmament<sup>23</sup>. The General Assembly further noted the aspiration of non-nuclear weapon States [NNWS] to prevent nuclear weapons from being stationed on their territories through the establishment of nuclear-weapon-free zones, and supported their efforts to conclude an international Convention strengthening the guarantees for their security against the use or threat of use of nuclear weapons. As part of the measures to facilitate the process of nuclear disarmament and the non-proliferation of nuclear weapons, it requested the Committee on Disarmament to consider the question of the cessation and prohibition of the production of fissionable material for weapons purposes.

2. *UN General Assembly Resolutions on Freeze of Nuclear Weapons (1982-1992)*

37. Every year in the successive period 1982-1992 (following up on the Tenth and Twelfth Special Sessions on Nuclear Disarmament, held in 1978 and 1982, respectively), the General Assembly adopted resolutions also calling for a nuclear-weapons freeze. May I refer to General Assembly resolutions A/RES/37/100A of 13 December 1982; A/RES/38/73E of 15 December 1983; A/RES/39/63C of 12 December 1984; A/RES/40/151C of 16 December 1985; A/RES/41/60E of 3 December 1986; A/RES/42/39B of 30 November 1987; A/RES/43/76B of 7 December 1988; A/RES/44/117D of 15 December 1989; A/RES/45/59D of 4 December 1990; A/RES/46/37C of 6 December 1991; and A/RES/47/53E of 9 December 1992.

38. These resolutions on freeze of nuclear weapons note that existing arsenals of nuclear weapons are more than sufficient to destroy all life on earth. They express the conviction that lasting world peace can be based only upon the achievement of general and complete disarmament, under effective international control. In this connection, the aforementioned General Assembly resolutions note that the highest priority objectives in the field of disarmament have to be nuclear disarmament and the elimination of all weapons of mass destruction. They at last call upon NWS to agree to reach “a freeze on nuclear weapons”, which would, *inter alia*, provide for “a simultaneous total stoppage of any further production of fissionable material for weapons purposes”.

39. Such nuclear-weapons freeze is not seen as an end in itself but as the most effective first step towards: (a) halting any further increase and qualitative improvement in the existing arsenals of nuclear weapons; and (b) activating negotiations for the substantial reduction and qualitative limitation of nuclear weapons. From 1989 onwards, these resolutions also

<sup>23</sup> Cf. General Assembly resolutions A/RES/33/71B of 14 December 1978, and A/RES/35/152D of 12 December 1980.

set out the structure and scope of the prospective joint declaration through which all nuclear-weapons States would agree on a nuclear-arms freeze. Such freeze would encompass: (a) a comprehensive test ban; (b) cessation of the manufacture of nuclear weapons; (c) a ban on all further deployment of nuclear weapons; and (d) cessation of the production of fissionable material for weapons purposes.

3. *UN General Assembly Resolutions on Nuclear Weapons  
as Breach of the UN Charter  
(Acknowledgment before the ICJ, 1995)*

40. Two decades ago, when UN General Assembly resolutions condemning nuclear weapons were not as numerous as they are today, they were already regarded as authoritative in the views of States from distinct continents. This was made clear, e.g., by States which participated in the advisory proceedings of 30 October to 15 November 1995 before the ICJ, conducive to its Advisory Opinion of 8 July 1996 on the *Threat or Use of Nuclear Weapons*. On the occasion, the view was upheld that those General Assembly resolutions expressed a “general consensus” and had a relevant “legal value”<sup>24</sup>. Resolution 1653 (XVI), of 1961, e.g., was invoked as a “law-making” resolution of the General Assembly, in stating that the use of nuclear weapons is contrary to the letter and spirit, and aims, of the United Nations, and, as such, a “direct violation” of the UN Charter<sup>25</sup>.

41. It was further stated that, already towards the end of 1995, “numerous” General Assembly resolutions and declarations confirmed the illegality of the use of force, including nuclear weapons<sup>26</sup>. Some General Assembly resolutions (1653 (XVI), of 24 November 1961; 33/71B of 14 December 1978; 34/83G of 11 December 1979; 35/152D of 12 December 1980; 36/92I of 9 December 1981; 45/59B of 4 December 1990; 46/37D of 6 December 1991) were singled out for having significantly declared that the use of nuclear weapons would be a violation of the UN Charter itself<sup>27</sup>. The view was expressed that the series of General Assembly resolutions (starting with resolution 1653 (XVI), of 24 November 1961) amounted to “an authoritative interpretation” of humanitarian law treaties as well as the UN Charter<sup>28</sup>.

<sup>24</sup> CR 1995/25, of 3 November 1995, pp. 52-53 (statement of Mexico).

<sup>25</sup> CR 1995/22, of 30 October 1995, pp. 44-45 (statement of Australia).

<sup>26</sup> CR 1995/26, of 6 November 1995, pp. 23-24 (statement of Iran).

<sup>27</sup> CR 1995/28, of 9 November 1995, pp. 62-63 (statement of the Philippines).

<sup>28</sup> CR 1995/31, of 13 November 1995, p. 46 (statement of Samoa).

42. In the advisory proceedings of 1995 before the ICJ, it was further recalled that General Assembly resolution 1653 (XVI) of 1961 was adopted in the form of a declaration, being thus “an assertion of the law”, and, ever since, the General Assembly’s authority to adopt such declaratory resolutions (in condemnation of nuclear weapons) was generally accepted; such resolutions declaring the use of nuclear weapons “unlawful” were regarded as ensuing from the exercise of an “inherent” power of the General Assembly<sup>29</sup>. The relevance of General Assembly resolutions has been reckoned by large groups of States<sup>30</sup>.

43. Ever since the aforementioned acknowledgment of the authority and legal value of General Assembly resolutions in the course of the pleadings of late 1995 before the ICJ, those resolutions continue to grow in number until today, clearly forming, in my perception, an *opinio juris communis* as to nuclear disarmament. In addition to those aforementioned, may I also review, in sequence, two other series of General Assembly resolutions, extending to the present, namely: the longstanding series of General Assembly resolutions condemning nuclear weapons (1982-2015), and the series of General Assembly resolutions following up the ICJ’s 1996 Advisory Opinion (1997-2015).

#### 4. *UN General Assembly Resolutions Condemning Nuclear Weapons (1982-2015)*

44. In the period 1982-2015, there is a long series of UN General Assembly resolutions condemning nuclear weapons. May I refer to General Assembly resolutions A/RES/37/100C of 13 December 1982; A/RES/38/73G of 15 December 1983; A/RES/39/63H of 12 December 1984; A/RES/40/151F of 16 December 1985; A/RES/41/60F of 3 December 1986; A/RES/42/39C of 30 November 1987; A/RES/43/76E of 7 December 1988; A/RES/44/117C of 15 November 1989; A/RES/45/59B of 4 December 1990; A/RES/46/37D of 6 December 1991; A/RES/47/53C of 9 December 1992; A/RES/48/76B of 16 December 1993; A/RES/49/76E of 15 December 1994; A/RES/50/71E of 12 December 1995; A/RES/51/46D of 10 December 1996; A/RES/52/39C of 9 December 1997; A/RES/53/78D of 4 December 1998; A/RES/54/55D of 1 December 1999; A/RES/55/34G of 20 November 2000; A/RES/56/25B of 29 November 2001; A/RES/57/94 of 22 November 2002; A/RES/58/64 of 8 December 2003; A/RES/59/102 of 3 December 2004; A/RES/60/88 of 8 December 2005; A/RES/61/97 of 6 December 2006; A/RES/62/51 of 5 December 2007; A/RES/63/75 of 2 December 2008; A/RES/64/59 of 2 December 2009; A/RES/65/80 of 8 December 2010; A/RES/66/57 of 2 December 2011; A/RES/67/64 of

<sup>29</sup> CR 1995/27, of 7 November 1995, pp. 58-59 (statement of Malaysia).

<sup>30</sup> Cf., e.g., CR 1995/35, of 15 November 1995, p. 34, and cf. p. 22 (statement of Zimbabwe, on its initiative as Chair of the Non-Aligned Movement).

3 December 2012; A/RES/68/58 of 5 December 2013; A/RES/69/69 of 2 December 2014; and A/RES/70/62 of 7 December 2015.

45. In those resolutions, the General Assembly warned against the threat by nuclear weapons to the survival of humankind. They were preceded by two ground-breaking historical resolutions, namely, General Assembly resolution 1 (I) of 24 January 1946, and General Assembly resolution 1653 (XVI), of 24 November 1961 (cf. *infra*). In this new and long series of resolutions condemning nuclear weapons (1982-2015), at the opening of their preambular paragraphs the General Assembly states, year after year, that it is

“*Alarmed* by the threat to the survival of mankind and to the life-sustaining system posed by nuclear weapons and by their use, inherent in the concepts of deterrence,

*Convinced* that nuclear disarmament is essential for the prevention of nuclear war and for the strengthening of international peace and security,

*Further convinced* that a prohibition of the use or threat of use of nuclear weapons would be a step towards the complete elimination of nuclear weapons leading to general and complete disarmament under strict and effective international control.”

46. Those General Assembly resolutions next significantly *reaffirm*, in their preambular paragraphs, year after year, that

“the use of nuclear weapons would be a violation of the Charter of the United Nations and a crime against humanity, as declared in its resolutions 1653 (XVI) of 24 November 1961, 33/71 B of 14 December 1978, 34/83 G of 11 December 1979, 35/152 D of 12 December 1980 and 36/92 I of 9 December 1981”.

47. Still in their preambular paragraphs, those General Assembly resolutions further *note with regret* the inability of the Conference on Disarmament to undertake negotiations with a view to achieving agreement on a nuclear disarmament convention during each previous year. In their operative part, those resolutions reiterate, year after year, the request that the Committee on Disarmament undertakes, on a priority basis, negotiations aiming at achieving agreement on an international convention prohibiting the use or threat of use of nuclear weapons under any circumstances, taking as a basis the text of the draft Convention on the Prohibition of the Use of Nuclear Weapons.

48. From 1989 (forty-fourth session) onwards, those resolutions begin to note specifically that a multilateral agreement prohibiting the use or threat of use of nuclear weapons should strengthen international security and help to create the climate for negotiations leading to the complete

elimination of nuclear weapons. Subsequently, those resolutions come to stress, in particular, that an international convention would be a step towards the complete elimination of nuclear weapons, leading to general and complete disarmament, under strict and effective international control.

49. Clauses of the kind then evolve, from 1996 onwards<sup>31</sup>, to refer expressly to a time framework, i.e., that an international convention would be an important step in a phased programme towards the complete elimination of nuclear weapons, within a specific framework of time. More recent resolutions also expressly refer to the determination to achieve an international convention prohibiting the development, production, stockpiling and use of nuclear weapons, leading to their ultimate destruction.

*5. UN General Assembly Resolutions following up  
the ICJ's 1996 Advisory Opinion (1996-2015)*

50. Ever since the delivery, on 8 July 1996, of the ICJ's Advisory Opinion on *Nuclear Weapons* to date, the General Assembly has been adopting a series of resolutions (1996-2015), as its follow-up. May I refer to General Assembly resolutions A/RES/51/45 of 10 December 1996; A/RES/52/38 of 9 December 1997; A/RES/53/77 of 4 December 1998; A/RES/54/54 of 1 December 1999; A/RES/55/33 of 20 November 2000; A/RES/56/24 of 29 November 2001; A/RES/57/85 of 22 November 2002; A/RES/58/46 of 8 December 2003; A/RES/59/83 of 3 December 2004; A/RES/60/76 of 8 December 2005; A/RES/61/83 of 6 December 2006; A/RES/62/39 of 5 December 2007; A/RES/63/49 of 2 December 2008; A/RES/64/55 of 2 December 2009; A/RES/65/76 of 8 December 2010; A/RES/66/46 of 2 December 2011; A/RES/67/33 of 3 December 2012; A/RES/68/42 of 5 December 2013; A/RES/69/43 of 2 December 2014; and A/RES/70/56 of 7 December 2015. These resolutions make a number of significant statements.

51. The series of aforementioned General Assembly resolutions on follow-up to the 1996 Advisory Opinion of the ICJ (1996-2015) begins by expressing the General Assembly's belief that "the continuing existence of nuclear weapons poses a threat to humanity" and that "their use would have catastrophic consequences for all life on earth", and, further, that "the only defence against a nuclear catastrophe is the total elimination of nuclear weapons and the certainty that they will never be produced again" (2nd preambular paragraph). The General Assembly resolutions reiteratedly reaffirm "the commitment of the international community to the realization of the goal of a nuclear-weapon-free world through the total elimination of nuclear weapons" (3rd preambular paragraph). They recall their request to the Conference on Disarmament to establish an *ad hoc*

<sup>31</sup> Cf., e.g., *inter alia*, General Assembly resolution A/RES/50/71E, of 12 December 1995.

Committee to commence negotiations on a phased programme of nuclear disarmament, aiming at the elimination of nuclear weapons, within a “time bound framework”; they further reaffirm the role of the Conference on Disarmament as the single multilateral disarmament negotiating forum.

52. The General Assembly then recalls, again and again, that “the solemn obligations of States parties, undertaken in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), particularly to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament” (4th preambular paragraph). They express the goal of achieving a legally binding prohibition on the development, production, testing, deployment, stockpiling, threat or use of nuclear weapons, and their destruction under “effective international control”. They significantly call upon *all States* to fulfil promptly the obligation leading to an early conclusion of a convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination<sup>32</sup>.

53. Those resolutions (from 2003 onwards) express deep concern at the lack of progress made in the implementation of the “thirteen steps” agreed to, at the 2000 Review Conference, for the implementation of Article VI of the NPT. The aforementioned series of General Assembly resolutions include, from 2010 onwards, an additional (6th) preambular paragraph, expressing “deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons”, and reaffirming, in this context, “the need for all States at all times to comply with applicable international law, including international humanitarian law”. Those follow-up General Assembly resolutions further recognize

“with satisfaction that the Antarctic Treaty, the Treaties of Tlatelolco, Rarotonga, Bangkok and Pelindaba, and the Treaty on a Nuclear-Weapon-Free Zone in Central Asia, as well as Mongolia’s nuclear-weapon-free status, are gradually freeing the entire southern hemisphere and adjacent areas covered by those treaties from nuclear weapons” (10th preambular paragraph).

54. More recent resolutions (from 2013 onwards) are significantly further expanded. They call upon all NWS to undertake concrete disarmament efforts, stressing that all States need to make special efforts to achieve and maintain a world without nuclear weapons. They also take

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<sup>32</sup> Note that in earlier resolutions, the following year is explicitly referenced, i.e., States should commence negotiations in “the following year”. This reference is removed in later resolutions.

note of the “Five-Point Proposal on Nuclear Disarmament” made by the UN Secretary-General (cf. Part XVI, *infra*), and recognize the need for a multilaterally negotiated and legally binding instrument to assure that NNWS stand against the threat or use of nuclear weapons, pending the total elimination of nuclear weapons. In their operative part, the same series of General Assembly resolutions underline the ICJ’s unanimous conclusion, in its 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons*, that “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” (para. 1).

55. Looking at this particular series of General Assembly follow-up resolutions as a whole, it should not pass unnoticed that they contain paragraphs referring to the obligation to pursue and conclude, in good faith, negotiations leading to nuclear disarmament, without any reference to the NPT or to States parties to it. They rather refer to that obligation as a general one, not grounded on any treaty provision. *All States*, and not only States parties to the NPT, are called upon to fulfil promptly that obligation, incumbent upon *all States*, to report (to the Secretary-General) on their compliance with the resolutions at issue. There are, notably, other paragraphs in those resolutions that are specifically directed at nuclear-weapon States, or make specific references to the NPT. In sum, references to *all States* are deliberate, and in the absence of any references to a treaty or other specifically-imposed international obligation, this thus points towards a customary law obligation to negotiate and achieve nuclear disarmament.

#### IV. UN SECURITY COUNCIL RESOLUTIONS AND *OPINIO JURIS*

56. Like the UN General Assembly, the UN Security Council has also often dwelt upon the matter at issue. May I refer, *inter alia*, to Security Council resolutions S/23500, of 31 January 1992; S/RES/984, of 11 April 1995; S/RES/1540, of 28 April 2004; S/RES/1673, of 27 April 2006; S/RES/1810, of 25 April 2008; S/RES/1887, of 24 September 2009; and S/RES/1997, of 11 July 2011, — to which others can be added<sup>33</sup>. May I at first recall that, at a Security Council’s meeting at the level of Heads

<sup>33</sup> Cf. also Security Council resolutions S/RES/1695 of 15 July 2006; S/RES/1718 of 14 October 2006; S/RES/1874 of 12 June 2009; S/RES/1928 of 7 June 2010; S/RES/2094 of 7 March 2013; S/RES/2141 of 5 March 2014; S/RES/2159 of 9 June 2014; S/RES/2224 of 9 June 2015; S/RES/2270 of 2 March 2016. In preambular paragraphs of all these Secu-



of State and Government, held on 31 January 1992, the President of the UN Security Council made a statement on behalf of the members of the Security Council that called upon all Member States to fulfil their obligations on matters of arms control and disarmament, and to prevent the proliferation of all weapons of mass destruction<sup>34</sup> (encompassing nuclear, chemical, and biological weapons).

57. The statement expressed the feeling prevailing at the time that the end of the Cold War “has raised hopes for a safer, more equitable and more humane world”, giving now to the world “the best chance of achieving international peace and security since the foundation of the United Nations”<sup>35</sup>. The members of the Security Council then warned against the threat to international peace and security of all weapons of mass destruction, and expressed their commitment to take appropriate action to prevent “the spread of technology related to the research for or production of such weapons”<sup>36</sup>. They further stressed the importance of “the integral role in the implementation” of the NPT of “fully effective IAEA safeguards”, and of “effective export controls”; they added that they would take “appropriate measures in the case of any violations notified to them by the IAEA”<sup>37</sup>.

58. The proliferation of all weapons of mass destruction is defined in the aforementioned Security Council statement, notably, as a threat to international peace and security, — a point which was to be referred to, in subsequent resolutions of the Security Council, to justify its action under Chapter VII of the UN Charter. In three of its subsequent resolutions, in a preambular paragraph (resolution 1540, of 28 April 2004, para. 2; resolution 1810, of 25 April 2008, para. 3; and resolution 1887, of 24 September 2009, para. 2), the Security Council reaffirms the statement of its President (adopted on 31 January 1992), and, also in other resolutions, further asserts (also in preambular paragraphs) that the proliferation of nuclear, chemical and biological weapons is a threat to international peace and security<sup>38</sup> and that all States need to take measures to prevent such proliferation.

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rity Council resolutions, the Security Council reaffirms, time and time again, that the proliferation of nuclear, chemical and biological weapons, and their means of delivery, constitutes a threat to international peace and security.

<sup>34</sup> UN doc. S/23500, of 31 January 1992, pp. 1-5.

<sup>35</sup> *Ibid.*, pp. 2 and 5.

<sup>36</sup> *Ibid.*, p. 4.

<sup>37</sup> *Ibid.*

<sup>38</sup> Cf. e.g. Security Council resolutions S/RES/1540, of 28 April 2004; S/RES/1673, of 27 April 2006; S/RES/1810, of 25 April 2008; S/RES/1977, of 20 April 2011. And cf. also resolutions S/RES/1695, of 15 July 2006; S/RES/1718, of 14 October 2006; S/RES/1874, of 12 June 2009; S/RES/1928, of 7 June 2010; S/RES/2094, of 7 March 2013; S/RES/2141, of 5 March 2014; S/RES/2159, of 9 June 2014; S/RES/2224, of 9 June 2015; and S/RES/2270, of 2 March 2016.

59. In resolution 1540/2004 of 28 April 2004, adopted by the Security Council acting under Chapter VII of the UN Charter, it sets forth legally binding obligations on all UN Member States to set up and enforce appropriate and effective measures against the proliferation of nuclear, chemical, and biological weapons, — including the adoption of controls and a reporting procedure for UN Member States to a Committee of the Security Council (sometimes referred to as the “1540 Committee”). Subsequent Security Council resolutions reaffirm resolution 1540/2004 and call upon UN Member States to implement it.

60. The UN Security Council refers, in particular, in two of its resolutions (984/1995, of 11 April 1995; and 1887/2009 of 24 September 2009), to the obligation to pursue negotiations in good faith in relation to nuclear disarmament. In its preamble, Security Council resolution 984/1995 affirms the need for all States parties to the NPT “to comply fully with all their obligations”; in its operative part, it further

“[u]rges all States, as provided for in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, to pursue negotiations in good faith on effective measures relating to nuclear disarmament and on a treaty on general and complete disarmament under strict and effective international control which remains a universal goal” (para. 8).

It should not pass unnoticed that Security Council resolution 984/1995 pre-dates the ICJ’s 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons*.

61. And Security Council resolution 1887/2009 of 24 September 2009, in its operative part, again calls upon States parties to the NPT “to comply fully with all their obligations and fulfil their commitments under the Treaty” (para. 2), and, in particular, “pursuant to Article VI of the Treaty, to undertake to pursue negotiations in good faith on effective measures relating to nuclear arms reduction and disarmament”; furthermore, it calls upon “all other States to join in this endeavour” (para. 5). It should not pass unnoticed that it is a general call, upon all UN Member States, whether or not parties to the NPT.

62. In my perception, the aforementioned resolutions of the Security Council, like those of the General Assembly (cf. *supra*), addressing all UN Member States, provide significant elements of the emergence of an *opinio juris*, in support of the gradual formation of an obligation of customary international law, corresponding to the conventional obligation under Article VI of the NPT. In particular, the fact that the Security Council calls upon *all States*, and not only States parties to the NPT, to pursue negotiations towards nuclear disarmament in good faith (or to join the NPT State parties in this endeavour) is significant. It is an indication that the obligation is incumbent on all UN Member States, irrespectively of their being or not Parties to the NPT.

## V. THE SAGA OF THE UNITED NATIONS IN THE CONDEMNATION OF NUCLEAR WEAPONS

63. The UN resolutions (of the General Assembly and the Security Council) that I have just reviewed (*supra*) portray the United Nations' longstanding saga in the condemnation of nuclear weapons. This saga goes back to the birth and earlier years of the United Nations. In fact, nuclear weapons were not in the minds of the delegates to the San Francisco Conference of June 1945, at the time when the United Nations Charter was adopted on 26 June 1945. The United States' dropping of atomic bombs over Hiroshima and Nagasaki, heralding the nuclear age, occurred on 6 and 9 August 1945, respectively, over ten weeks before the UN Charter's entry into force, on 24 October 1945.

64. As soon as the United Nations Organization came into being, it promptly sought to equip itself to face the new challenges of the nuclear age: the General Assembly's very first resolution, — resolution 1 (I) of 24 January 1946, — thus, established a Commission to deal with the matter, entrusted with submitting reports to the Security Council “in the interest of peace and security” (para. 2 (a)), as well as with making proposals for “control of atomic energy to the extent necessary to ensure its use only for peaceful purposes”, and for “the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction” (para. 5 (b) (c)).

65. One decade later, in 1956, the International Atomic Energy Agency (IAEA) was established. And half a decade later, in 1961, the General Assembly adopted a ground-breaking resolution: it would be proper here to recall the precise terms of the historical General Assembly resolution 1653 (XVI), of 24 November 1961, titled “Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons”. That *célèbre* resolution 1653 (1961) remains contemporary today, and, 55 years later, continues to require close attention; in it,

*“The General Assembly,*

*Mindful* of its responsibility under the Charter of the United Nations in the maintenance of international peace and security, as well as in the consideration of principles governing disarmament,

*Gravely concerned* that, while negotiations on disarmament have not so far achieved satisfactory results, the armaments race, particularly in the nuclear and thermo-nuclear fields, has reached a dangerous stage requiring all possible precautionary measures to protect humanity and civilization from the hazard of nuclear and thermo-nuclear catastrophe,

*Recalling* that the use of weapons of mass destruction, causing unnecessary human suffering, was in the past prohibited, as being

contrary to the laws of humanity and to the principles of international law, by international declarations and binding agreements, such as the Declaration of St. Petersburg of 1868, the Declaration of the Brussels Conference of 1874, the Conventions of the Hague Peace Conferences of 1899 and 1907, and the Geneva Protocol of 1925, to which the majority of nations are still parties,

*Considering* that the use of nuclear and thermo-nuclear weapons would bring about indiscriminate suffering and destruction to mankind and civilization to an even greater extent than the use of those weapons declared by the aforementioned international declarations and agreements to be contrary to the laws of humanity and a crime under international law,

*Believing* that the use of weapons of mass destruction, such as nuclear and thermo-nuclear weapons, is a direct negation of the high ideals and objectives which the United Nations has been established to achieve through the protection of succeeding generations from the scourge of war and through the preservation and promotion of their cultures,

1. *Declares* that:

- (a) The use of nuclear and thermo-nuclear weapons is contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations;
- (b) The use of nuclear and thermo-nuclear weapons would exceed even the scope of war and cause indiscriminate suffering and destruction to mankind and civilization and, as such, is contrary to the rules of international law and to the laws of humanity;
- (c) The use of nuclear and thermo-nuclear weapons is a war directed not against an enemy or enemies alone but also against mankind in general, since the peoples of the world not involved in such a war will be subjected to all the evils generated by the use of such weapons;
- (d) Any State using nuclear and thermo-nuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization;

2. *Requests* the Secretary-General to consult the Governments of Member States to ascertain their views on the possibility of convening a Special Conference for signing a Convention on the prohibition of the use of nuclear and thermo-nuclear weapons for war purposes and to report on the results of such consultation to the General Assembly at its seventeenth session”.

66. Over half a century later, the lucid and poignant declaration contained in General Assembly resolution 1653 (1961) appears endowed with

permanent topicality, as the whole international community remains still awaiting for the conclusion of the propounded general convention on the prohibition of nuclear and thermo-nuclear weapons: nuclear disarmament remains still a goal to be achieved by the United Nations today, as it was in 1961. The Comprehensive Nuclear Test Ban Treaty (CTBT), adopted on 24 September 1996, has not yet entered into force, although 164 States have ratified it to date.

67. It is beyond the scope of the present dissenting opinion to dwell upon the reasons why, already for two decades, one remains awaiting for the CTBT's entry into force<sup>39</sup>. Suffice it here to recall that the CTBT provides (Art. XIV) that for it to enter into force, the 44 States specified in its Annex 2 need to ratify it<sup>40</sup>; a number of these States have not yet ratified the CTBT, including some NWS, like India and Pakistan. NWS have invoked distinct reasons for their positions conditioning nuclear disarmament (cf. *infra*). The entry into force of the CTBT has thus been delayed.

68. Recently, in a panel in Vienna (on 27 April 2016) in commemoration of the twentieth anniversary of the CTBT, the UN Secretary-General (Ban Ki-moon) pondered that there have been advances in the matter, but there remains a long way to go, in the determination "to bring into force a legally binding prohibition against all nuclear tests". He recalled to have

"repeatedly pointed to the toxic legacy that some 2,000 tests left on people and the environment in parts of Central Asia, North Africa, North America and the South Pacific. Nuclear testing poisons water, causes cancers, and pollutes the area with radioactive fall-out for generations and generations to come. We are here to honour the victims. The best tribute to them is action to ban and to stop nuclear testing. Their sufferings should teach the world to end this madness."<sup>41</sup>

<sup>39</sup> For a historical account and the perspectives of the CTBT, cf., e.g., K. A. Hansen, *The Comprehensive Nuclear Test Ban Treaty*, Stanford, Stanford University Press, 2006, pp. 1-84; [Various Authors], *Nuclear Weapons after the Comprehensive Test Ban Treaty* (ed. E. Arnett), Stockholm-Solna/Oxford, SIPRI/Oxford University Press, 1996, pp. 1-141; J. Ramaker, J. Mackby, P. D. Marshall and R. Geil, *The Final Test — A History of the Comprehensive Nuclear-Test-Ban Treaty Negotiations*, Vienna, Ed. Prep. Comm. of CTBTO, 2003, pp. 1-265.

<sup>40</sup> Those 44 States, named in Annex 2, participated in the CTBT negotiations at the Conference on Disarmament, from 1994 to 1996, and possessed nuclear reactors at that time.

<sup>41</sup> UN doc. SG/SM/17709-DC/3628, of 27 April 2016, pp. 1-2.

He then called on the (eight) remaining CTBT Annex 2 States “to sign and ratify the Treaty without further delay”, so as to strengthen its goal of universality; in this way, — he concluded, — “we can leave a safer world, free of nuclear tests, to our children and to succeeding generations of this world”<sup>42</sup>.

69. To this one may add the unaccomplished endeavours of the UN General Assembly Special Sessions on Disarmament. Of the three Special Sessions held so far (in 1978, Tenth Special Session; in 1982, Twelfth Special Session; and in 1988, Fifteenth Special Session)<sup>43</sup>, the first one appears to have been the most significant one so far. The Final Document adopted unanimously (without a vote) by the First Special Session on Disarmament sets up a programme of action on disarmament and the corresponding mechanism in its current form.

70. That Final Document of the first General Assembly Special Session on Disarmament (1978) addresses nuclear disarmament in its distinct aspects. In this respect, the General Assembly begins by observing that the accumulation of nuclear weapons constitutes a threat to the future of humankind (Final Doc., para. 1)<sup>44</sup>, in effect “the greatest danger” to humankind and to “the survival of civilization” (*ibid.*, para. 47). It adds that the arms race, particularly in its nuclear aspect, is incompatible with the principles enshrined in the United Nations Charter (*ibid.*, para. 12). In its view, the most effective guarantee against the dangers of nuclear war is the complete elimination of nuclear weapons (*ibid.*, paras. 8 and 56).

71. While disarmament is the responsibility of all States, the General Assembly asserts that NWS have the primary responsibility for nuclear disarmament. There is pressing need of “urgent negotiations of agreements” to that end, and in particular to conclude “a treaty prohibiting nuclear-weapon tests” (*ibid.*, paras. 50-51). It further stresses the importance of nuclear-weapon-free zones that have been established or are the subject of negotiations in various parts of the globe (*ibid.*, paras. 60-64).

72. The Conference on Disarmament, since 1979 the sole multilateral disarmament-negotiating forum of the international community, has helped to negotiate multilateral arms-limitation and disarmament agreements<sup>45</sup>. It has focused its work on four main issues, namely: nuclear disarmament, prohibition of the production of fissile material for weapon

<sup>42</sup> UN doc. SG/SM/17709-DC/3628, of 27 April 2016, p. 2.

<sup>43</sup> Ever since, several General Assembly resolutions have called for a Fourth Special Session on Disarmament, but it has not yet taken place.

<sup>44</sup> And cf. also paras. 18 and 20.

<sup>45</sup> E.g., the aforementioned NPT, CTBT, the Biological Weapons Convention, and the Chemical Weapons Convention, in addition to the sea-bed treaties, and the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques.

use, prevention of arms race in outer space, and negative security assurances. Yet, since the adoption of the CTBT in 1996, the Conference on Disarmament has been largely deadlocked, in face of the invocation of divergent security interests, added to the understanding that nuclear weapons require mutuality; furthermore, the Rules of Procedure of the Conference provide that all decisions must be adopted by consensus. In sum, some States blame political factors for causing its long-standing stalemate, while others attribute it to outdated procedural rules.

73. After all, in historical perspective, some advances have been attained in the last decades in respect of other weapons of mass destruction, as illustrated by the adoption of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (on 10 April 1972), as well as the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (on 13 January 1993); distinctly from the CTBT (*supra*), these two Conventions have already entered into force (on 26 March 1975, and on 29 April 1997, respectively).

74. If we look at conventional international law only, weapons of mass destruction (poisonous gases, biological and chemical weapons) have been outlawed; yet, nuclear weapons, far more destructive, have not been banned yet. This juridical absurdity nourishes the positivist myopia, or blindness, in inferring therefrom that there is no customary international obligation of nuclear disarmament. Positivists only have eyes for treaty law, for individual State consent, revolving in vicious circles, unable to see the pressing needs and aspirations of the international community as a whole, and to grasp the *universality* of contemporary international law — as envisaged by its “founding fathers”, already in the sixteenth-seventeenth centuries, — with its underlying fundamental principles (cf. *infra*).

75. The truth is that, in our times, the obligation of nuclear disarmament has emerged and crystallized, in both conventional and customary international law, and the United Nations has been giving a most valuable contribution to this over the decades. The matter at issue, the United Nations saga in this domain, was brought to the attention of the ICJ, two decades ago, in the advisory proceedings that led to its Advisory Opinion of 1996 on the *Threat or Use of Nuclear Weapons*, and now again, two decades later, in the present contentious proceedings in the cases of *Obligations concerning Negotiations relating to Cessation of the*

*Nuclear Arms Race and to Nuclear Disarmament*, opposing the Marshall Islands to India, Pakistan and the United Kingdom, respectively.

76. The aforementioned UN resolutions were in effect the object of attention on the part of the Contending Parties before the Court (Marshall Islands, India, Pakistan and the United Kingdom). In the oral phase of their arguments, they were dealt with by the participating States (Marshall Islands, India and the United Kingdom), and, extensively so, in particular, by the Marshall Islands and India. The key point is the relation of those resolutions with the emergence of *opinio juris*, of relevance to the identification of a customary international law obligation in the present domain. May I turn, then, to the positions sustained by the Contending Parties, in the written phase of the proceedings in the *cas d'espèce*.

#### VI. UN RESOLUTIONS AND THE EMERGENCE OF *OPINIO JURIS*: THE POSITIONS OF THE CONTENDING PARTIES

77. In their written submissions and oral arguments before the Court in the present case(s) of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, the Marshall Islands addresses General Assembly resolutions on nuclear disarmament, in relation to the development of customary international law<sup>46</sup>; it also refers to Security Council resolutions<sup>47</sup>. Quoting the ICJ's Advisory Opinion of 1996, it contends (perhaps not as clearly as it could have done) that although General Assembly resolutions lack binding force, they may "sometimes have normative value", and thus contribute to the emergence of an *opinio juris*<sup>48</sup>.

78. In its written submissions and oral arguments before the Court, India addresses UN General Assembly resolutions on follow-up to the ICJ's Advisory Opinion of 1996, pointing out that it is the only nuclear weapon State that has co-sponsored and voted in favour of such resolutions<sup>49</sup>. India supports nuclear disarmament "in a time-bound, universal, non-discriminatory, phased and verifiable manner"<sup>50</sup>. And it criticizes the Marshall Islands for not supporting the General Assembly follow-up resolutions in its own voting pattern (having voted against one of them, in favour once, and all other times abstained)<sup>51</sup>.

79. In its preliminary objections (of 15 June 2015), the United Kingdom, after recalling the Marshall Islands' position on earlier UN Gen-

<sup>46</sup> CR 2016/1, of 7 March 2016, para. 7.

<sup>47</sup> *Ibid.*, para. 8.

<sup>48</sup> *Ibid.*, para. 7.

<sup>49</sup> CR 2016/4, of 10 March 2016, para. 1.

<sup>50</sup> Counter-Memorial of India, p. 9, para. 13.

<sup>51</sup> *Ibid.*, p. 8, para. 12.



eral Assembly resolutions, in the 1960s and 1970s (paras. 21 and 98 (*c*) and (*h*)), then refers to its own position thereon (paras. 84 and 99 (*c*)). It also refers to UN Security Council resolutions (para. 92). It then recalls the Marshall Islands' arguments — e.g., that “the United Kingdom has always voted against” General Assembly resolutions on the follow-up of the ICJ Advisory Opinion of 1996, and of the UN High Level Meetings in 2013 and 2014 (paras. 98 (*e*) and (*h*)), — in order to rebut them (paras. 99-103).

80. As for Pakistan, though it informed the Court of its decision not to participate in the oral phase of the present proceedings (letter of 2 March 2016), in the submissions in its Counter-Memorial it argues that the ICJ 1996 Advisory Opinion nowhere stated that the obligation under Article VI of the NPT was a general obligation or that it was opposable *erga omnes*; in its view, there was no prima facie evidence to this effect *erga omnes*<sup>52</sup>. As to the UN General Assembly resolutions following up the ICJ's 1996 Advisory Opinion, Pakistan notes that it has voted in favour of these resolutions from 1997 to 2015, and by contrast, it adds, the Marshall Islands abstained from voting in 2002 and 2003 and again from 2005 to 2012<sup>53</sup>.

81. After recalling that it is not a party to the NPT<sup>54</sup>, Pakistan further argues that General Assembly resolutions do not have binding force and cannot thus, in its view, give rise to obligations enforceable against a State<sup>55</sup>. Pakistan concludes that the General Assembly resolutions do not support the proposition that there exists a customary international law obligation “rooted” in Article VI of the NPT. Rather, it is the NPT that underpins the Marshall Islands' claims<sup>56</sup>.

82. In sum, the United Kingdom has voted against such resolutions, the Marshall Islands has abstained in most of them, India and Pakistan have voted in favour of them. Despite these distinct patterns of voting, in my view the UN General Assembly resolutions reviewed in the present dissenting opinion, taken altogether, are not at all deprived of their contribution to the conformation of *opinio juris* as to the formation of a customary international law obligation of nuclear denuclearization. After all, they are resolutions of the UN General Assembly itself (and not only of the large majority of UN Member States which voted in their favour); they are resolutions of the United Nations Organization itself, addressing a matter of common concern of humankind as a whole (cf. Part XIX, *infra*).

<sup>52</sup> Counter-Memorial of Pakistan, p. 8, para. 2.3.

<sup>53</sup> *Ibid.*, p. 8, para. 2.4.

<sup>54</sup> *Ibid.*, p. 14, para. 4.4; p. 30, para. 7.55.

<sup>55</sup> *Ibid.*, p. 38, paras. 7.95-7.97.

<sup>56</sup> *Ibid.*, para. 7.97.

VII. HUMAN WICKEDNESS: FROM THE TWENTY-FIRST CENTURY  
BACK TO THE BOOK OF GENESIS

83. Since the beginning of the nuclear age in August 1945, some of the great thinkers of the twentieth century started inquiring whether humankind has a future. Indeed, this is a question which cannot be eluded. Thus, already in 1946, for example, deeply shocked by the United States' atomic bombings of Hiroshima and Nagasaki (on 6 and 9 August 1945, respectively)<sup>57</sup>, Mahatma Gandhi, in promptly expressing his worry about the future of human society, wrote, in the Journal *Harijan*, on 7 July 1946, that

“So far as I can see, the atomic bomb has deadened the finest feeling that has sustained mankind for ages. There used to be the so-called laws of war which made it tolerable. Now we know the naked truth. War knows no law except that of might.”<sup>58</sup>

84. And Gandhi, denouncing its brutality, added that the “atom bomb is the weapon of ultimate force and destruction”, evidencing the “futility” of such violence; the development of the atom bomb “represents the most sinful and diabolical use of science”<sup>59</sup>. In the same Journal *Harijan*, M. Gandhi further wrote, on 29 September 1946, that non-violence is “the only thing the atom bomb cannot destroy”; and he further warned that “unless now the world adopts non-violence, it will spell certain suicide for mankind”<sup>60</sup>.

85. Over a decade later, in the late 1950s, Karl Jaspers, in his book *La bombe atomique et l'avenir de l'homme* (1958), regretted that the existence of nuclear weapons seemed to have been taken for granted, despite their capacity to destroy humankind and all life on the surface of earth<sup>61</sup>. One has thus to admit, he added, that “this Earth, which was born of an atomic explosion, may well also be destroyed by atomic bombs”<sup>62</sup>. Jaspers further regretted that progress had occurred in technological

<sup>57</sup> Preceded by a nuclear test undertaken by the United States at Alamogordo, New Mexico, on 16 July 1945.

<sup>58</sup> M. Gandhi, “Atom Bomb and Ahimsa”, *Harijan* (7 July 1946), reproduced in: *Journalist Gandhi — Selected Writings of Gandhi* (org. S. Sharma), 1st ed., Mumbai, Ed. Gandhi Book Centre, 1994, p. 104; also cited in: P. F. Power, *Gandhi on World Affairs*, London, Allen & Unwin, 1961, pp. 63-64.

<sup>59</sup> Cited in: *What Mahatma Gandhi Said about the Atom Bomb* (org. Y. P. Anand), New Delhi, National Gandhi Museum, 1998, p. 5.

<sup>60</sup> From the Journal *Harijan* (29 September 1946), cited in: Faisal Devji, *The Impossible Indian — Gandhi and the Temptation of Violence*, London, Hurst & Co., 2012, p. 150.

<sup>61</sup> K. Jaspers, *La bombe atomique et l'avenir de l'homme* [1958], Paris, Buchet-Chastel, 1963, pp. 22 and 336.

<sup>62</sup> *Ibid.*, p. 576 [translation by the Registry].

knowledge, but there had been “no progress of ethics nor of reason”. Human nature has not changed: “man must change or die”<sup>63</sup>.

86. In the early 1960s, for his part, Bertrand Russell, in his book *Has Man a Future?* (1961), likewise regretted that people seemed to have got used to the existence of nuclear weapons, in a world dominated by a “will towards death”, prevailing over sanity<sup>64</sup>. Unfortunately, he proceeded, “love for power” has enticed States “to pursue irrational policies”; and he added: “Those who regard Genesis as authentic history, may take Cain as the first example: he may well have thought that, with Abel out of the way, he could rule over coming generations”<sup>65</sup>. To Russell, it is “in the hearts of men that the evil lies”, it is in their minds that “the cure must be sought”<sup>66</sup>. He further regretted the discouraging results of disarmament conferences, and even wrote that ICJ pronouncements on the issue should be authoritative, and it was not “optional” for States “to respect or not international law”<sup>67</sup>.

87. For his part, Karl Popper, at the end of his life, in his book (in the form of an interview) *The Lesson of This Century* (1997), in assembling his recollections of the twentieth century, expressed the anguish, for example, at the time of the 1962 Cuban Missile crisis, with the finding that each of the 38 warheads at issue had three thousand times more power than the atomic bomb dropped over Hiroshima<sup>68</sup>. Once again, the constatation: human nature has not changed. Popper, like other great thinkers of the twentieth century, regretted that no lessons seemed to have been learned from the past; this increased the concern they shared, in successive decades, with the future of humankind, in the presence of arsenals of nuclear weapons.

88. A contemporary writer, Max Gallo, in his recent novel *Cain et Abel — Le premier crime*, has written that the presence of evil is within everyone; “evil lies at the heart of good, and this ambiguous reality is peculiar to the affairs of humankind”<sup>69</sup>. Writers of the past, he went on, “they too — you, Dante, you, Dostoyevsky, and those who inspired you, Aeschylus, Sophocles — fan the flames of punishment and guilt”<sup>70</sup>. And he added:

“Everywhere, Cain stabs or strangles Abel. (. . .) And no one seems to see (. . .) the imminent death of all humankind. It holds in its hands

<sup>63</sup> *Op. cit. supra* note 61, pp. 621 and 640 [translation by the Registry].

<sup>64</sup> B. Russell, *Has Man a Future?*, [London], Penguin Books, 1962 [reprint], pp. 27 and 37.

<sup>65</sup> *Ibid.*, p. 45.

<sup>66</sup> *Ibid.*, pp. 45-46, and cf. p. 69.

<sup>67</sup> *Ibid.*, pp. 97 and 79.

<sup>68</sup> K. Popper, *The Lesson of This Century* (interview with G. Bosetti), London/N.Y., Routledge, 1997, pp. 24 and 28. And cf. also, earlier on, K. Popper, *La Responsabilidad de Vivir — Escritos sobre Política, Historia y Conocimiento* [1994], Barcelona, Paidós, 2012 (reed.), p. 242, and cf. p. 274.

<sup>69</sup> M. Gallo, *Cain et Abel — Le premier crime*, [Paris], Fayard, 2011, pp. 112 and 141.

<sup>70</sup> *Ibid.*, p. 174 [translation by the Registry].

the weapon of its destruction. Now it is not only entire cities that will be burnt down, razed to the ground: all life will be consumed, and the earth vitrified.

Two cities have already suffered that fate, and the shadows of their inhabitants' bodies are forever embedded in the stone by a heat as hot as the sun's lava.

.....  
Cain will pursue Abel everywhere. (. . .) Vulnerable cities will be soaked in blood. The highest towers will be destroyed, their inhabitants buried beneath the rubble."<sup>71</sup>

89. As well captured by those and other thinkers, in the Book of Genesis, the episode of the brothers Cain and Abel portraying the first murder ever, came to be seen, over the centuries, as disclosing the presence of evil and guilt in the world where everyone lives. This called for care, prudence and reflection, as it became possible to realize that human beings were gradually distancing themselves from their Creator. The fragility of civilizations soon became visible. That distancing became manifest in the subsequent episode of the Tower of Babel (Genesis, Chap. 11: 9). As they were built, civilizations could be destroyed. History was to provide many examples of that (as singled out, in the twentieth century, by Arnold Toynbee). Over the centuries, with the growth of scientific-technological knowledge, the human capacity of self-destruction increased considerably, having become limitless in the present nuclear age.

90. Turning back to the aforementioned book by Bertrand Russell, also in its French edition (*L'homme survivra-t-il?*, 1963), he further warned therein that

“[I]l faut que nous nous rendions compte que la haine, la perte de temps, d'argent et d'habilité intellectuelle en vue de la création d'engins de destruction, la crainte du mal que nous pouvons nous faire mutuellement, le risque quotidien et permanent de voir la fin de tout ce que l'homme a réalisé, sont le produit de la folie humaine. (. . .) C'est dans nos cœurs que réside le mal, c'est de nos cœurs qu'il doit être extirpé.”<sup>72</sup> “[W]e must become aware that the hatred, the expenditure of time and money and intellectual ability upon weapons of destruction, the fear of what we may do to each other, and the imminent daily and continued risk of an end to all that man has achieved, (. . .) all this is a product of human folly. (. . .) It is in our hearts that the evil lies, and it is from our hearts that it must be plucked out.”<sup>73</sup>

<sup>71</sup> *Op. cit. supra* note 69, pp. 236-237 [translation by the Registry].

<sup>72</sup> B. Russell, *L'homme survivra-t-il?*, Paris, Ed. J. Didier, 1963, pp. 162-163.

<sup>73</sup> B. Russell, *Has Man a Future?*, *op. cit. supra* note 64, pp. 109-110. Towards the end of his life, Bertrand Russell again warned against the extreme danger of atomic and hydrogen bombs, and expressed his concern that people seemed to get used to their existence; cf. B. Russell, *Autobiography* [1967], London, Unwin, 1985 (reed.), pp. 554-555.

91. Some other great thinkers of the twentieth century (from distinct branches of knowledge), expressed their grave common concern with the increased human capacity of destruction coupled with the development of scientific-technological knowledge. Thus, the historian Arnold Toynbee (*A Study in History*, 1934-1954; and *Civilization on Trial*, 1948), regretted precisely the modern tragedy that human iniquity was not eliminated with the development of scientific-technological knowledge, but widely enlarged, without a concomitant advance at spiritual level<sup>74</sup>. And the increase in armaments and in the capacity of destruction, he added, became a symptom of the fall of civilizations<sup>75</sup>.

92. For his part, the writer Hermann Hesse, in a posthumous book of essays (*Guerre et Paix*, 1946), originally published shortly after the Second World War, warned that with the mass killings, not only do we keep on killing ourselves, but also our present and perhaps also our future<sup>76</sup>. The worst destruction, he added, was the one organized by the State itself, with its corollary, “the philosophy of the State”, accompanied by capital and industry<sup>77</sup>. The philosopher and theologian Jacques Maritain (*Œuvres complètes*, 1961-1967), in turn, wrote that the atrocities perpetrated in the twentieth century had “a more tragic significance for human conscience”<sup>78</sup>. In calling for an “integral humanism”, he warned that the human person transcends the State, and the realization of the common good is to be pursued keeping in mind human dignity<sup>79</sup>. In his criticism of the “realists”, he stressed the imperatives of ethics and justice, and the importance of general principles of law, in the line of jusnaturalist thinking<sup>80</sup>.

<sup>74</sup> Cf. A. J. Toynbee, *A Study in History*, Oxford University Press, 1970 [3rd reprint], pp. 48-718 and 826-850; A. J. Toynbee, *Civilization on Trial*, Oxford/N.Y., Oxford University Press, 1948, pp. 3-263.

<sup>75</sup> A. J. Toynbee, *Guerra e Civilização [War and Civilization]*, Lisbon, Edit. Presença, 1963, pp. 29, 129 and 178.

<sup>76</sup> H. Hesse, *Sobre la Guerra y la Paz* [1946], 5th ed., Barcelona, Edit. Noguer, 1986, pp. 119 and 122.

<sup>77</sup> H. Hesse, *Guerre et Paix*, Paris, L'Arche Ed., 2003 (reed.), pp. 127 and 133.

<sup>78</sup> J. Maritain, “Dieu et la permission du mal”, *Œuvres de Jacques Maritain — 1961-1967 (Jacques et Raïssa Maritain — Œuvres complètes)*, Vol. XII, Fribourg/Paris, Ed. Universitaires/Ed. Saint-Paul, 1992, p. 17, and cf. p. 41 [translation by the Registry].

<sup>79</sup> Cf. J. Maritain, *Humanisme intégral*, Paris, Aubier, 2000 (reed.), pp. 18, 37, 137 and 230-232; J. Maritain, *The Person and the Common Good*, Notre Dame, University of Notre Dame Press, 2002 (reed.), pp. 29, 49-50, 92-93 and 104; J. Maritain, *O Homem e o Estado*, 4th ed., Rio de Janeiro, Livr. Agir Ed., 1966, pp. 96-102; J. Maritain, *Los Derechos del Hombre y la Ley Natural*, Buenos Aires, Ed. Leviatan, 1982, pp. 38, 44, 50, 69 and 94-95, and cf. pp. 79-82; J. Maritain, *Para una Filosofía de la Persona Humana*, Buenos Aires, Ed. Club de Lectores, 1984, pp. 164, 176-178, 196-197, 221 and 231.

<sup>80</sup> J. Maritain, *De la justice politique — Notes sur la présente guerre*, Paris, Libr. Plon, 1940, pp. 88, 90-91, 106-107 and 112-114.

93. Another writer, the humanist Stefan Zweig, remained always concerned with the fate of humankind. He was impressed with the Scripture's legend of the Tower of Babel, having written an essay on it in 1916, and kept it in mind over the years, as shown in successive essays written in more than the two following decades<sup>81</sup>, taking it as a symbol of the perennial yearning for a unified humanity. In his own words,

“The history of tomorrow must be a history of all humanity and the conflicts between individual conflicts must be seen as redundant alongside the common good of the community. History must then be transformed from the current woeful State to a completely new position; (. . .) it must clearly contrast the old ideal of victory with the new one of unity and the old glorification of war with a new contempt for it. (. . .) [T]he only important thing is to push forward under the banner of a community of nations, the mentality of mankind (. . .)”<sup>82</sup>

94. Yet, in his dense and thoughtful intellectual autobiography (*Le monde d'hier*, 1944), written shortly before putting an end to his own life, Stefan Zweig expressed his deep concern with the fading away of conscience, disclosed by the fact that the world got used to the “dehumanization, injustice and brutality, as never before in hundreds of centuries”<sup>83</sup>; persons had been transformed into simple objects<sup>84</sup>. Earlier on — before the nuclear age — his friend the psychologist Sigmund Freud, in a well-known essay (*Civilization and Its Discontents*, 1930), expressed his deep preoccupation with what he perceived as an impulse to barbarism and destruction, which could not be expelled from the human psyche<sup>85</sup>. In face of human hostility and the threat of self-disintegration, he added, there is a consequent loss of happiness<sup>86</sup>.

95. Another psychologist, Carl Jung, referring, in his book *Aspects du drame contemporain* (1948), to events of contemporary history of his epoch, warned against subsuming individuals under the State; in his view, collective evil and culpability contaminate everyone everywhere<sup>87</sup>. He fur-

<sup>81</sup> As shown in his posthumous book of essays: S. Zweig, *Messages from a Lost World*, London, Pushkin Press, 2016, pp. 55, 88-90, 97, 107 and 176.

<sup>82</sup> *Ibid.*, pp. 170 and 175.

<sup>83</sup> S. Zweig, *O Mundo que Eu Vi* [1944, *Die Welt von Gestern*], Rio de Janeiro, Edit. Record, 1999, p. 483, and cf. pp. 272-274, 278, 462, 467, 474, 490 and 503-505.

<sup>84</sup> *Ibid.*, p. 490.

<sup>85</sup> Sigmund Freud, *Civilization and Its Discontents* [1930], N.Y., Norton & Cia., 1962 (reed.), pp. 7-9, 26, 36-37 and 59-63.

<sup>86</sup> Cf. *ibid.*, pp. 23 and 67-92.

<sup>87</sup> C. G. Jung, *Aspects du drame contemporain*, Geneva/Paris, Libr. de l'Univ. Georg/Ed. de la Colonne Vendôme, 1948, pp. 99 and 145.

ther warned against the tragic dehumanization of others<sup>88</sup> and the psychic exteriorizations of mass movements (of the collective unconscious) conducive to destruction<sup>89</sup>.

96. To the writer and theologian Albert Schweitzer (who wrote his *Kulturphilosophie* in 1923), the essence of civilization lies in the respect for life, to the benefit of each person and of humankind<sup>90</sup>. He rejected the “illness” of *Realpolitik*, having stated that good consists in the preservation and exaltation of life, and evil lies in its destruction; nowadays more than ever, he added, we need an “ethics of reverence for life”, what requires responsibility<sup>91</sup>. He insisted, in his book *La civilisation et l'éthique* (1923), that respect for life started as from awareness of one's responsibility vis-à-vis the life of others<sup>92</sup>.

97. Later on in his life, then in the nuclear age, in his series of lectures *Paix ou guerre atomique* (1958), Schweitzer called for an end to nuclear weapons, with their “unimaginable destruction and annihilation”<sup>93</sup>. In his own words,

“There are no victors in a nuclear war, only the vanquished. Each belligerent suffers the same damage from the adversary's atomic bombs and missiles as it inflicts with its own. The result is continuous annihilation (. . .). It can only say: are we both going to commit suicide by mutual extermination?”<sup>94</sup>

98. Well before them, by the turn of the nineteenth to the twentieth century, the writer Leo Tolstoy warned (*The Slavery of Our Times*, 1900) against the undue use of the State monopoly of “organized violence”, conforming a new form of slavery of the vulnerable ones<sup>95</sup>; he criticized the recruitment of personnel to be sent to war to kill defenseless persons, perpetrating acts of extreme violence<sup>96</sup>. On his turn, the physician Georges Duhamel warned (in his account *Civilization, 1914-1917*) against the fact that war had become an industry of killing, with a “barbaric ideology”, destroying civilization with its “lack of humanity”; yet,

<sup>88</sup> *Op. cit. supra* note 87, pp. 173 and 179.

<sup>89</sup> *Ibid.*, pp. 198-200, 208, 218-219 and 223.

<sup>90</sup> A. Schweitzer, *Filosofia da Civilização* [1923], São Paulo, Edit. Unesp, 2011 (reed.), pp. 80, 304, 311 and 315.

<sup>91</sup> A. Schweitzer, *Pilgrimage to Humanity [Weg zur Humanität]*, N.Y., Philosophical Library, 1961, pp. 87-88, 99 and 101.

<sup>92</sup> M. Arnold, *Albert Schweitzer — La compassion et la raison*, Lyon, Ed. Olivétan, 2015, pp. 74-75 and 77 [translation by the Registry].

<sup>93</sup> Cited in *ibid.*, p. 111 [translation by the Registry].

<sup>94</sup> Extract from his book *Paix ou guerre atomique* (1958), reproduced in his posthumous book of essays: A. Schweitzer, *Respect de la vie* (org. B. Kaempf), Paris, Ed. Arfuyen/CIAL, 1990, p. 98 [translation by the Registry].

<sup>95</sup> L. Tolstoy, *La Esclavitud de Nuestro Tiempo* [1900], Barcelona, Littera, 2000 (reed.), pp. 86-87, 89, 91 and 97.

<sup>96</sup> *Ibid.*, pp. 101, 103-104 and 121.

he still cherished the hope that the spirit of humanism could flourish from the ashes<sup>97</sup>.

99. The historian of ideas, Isaiah Berlin, for his part, warned (*The Proper Study of Mankind*) against the dangers of the *raison d'Etat*, and stressed the relevance of *values*, in the search of knowledge, of cultures, and of the *recta ratio*<sup>98</sup>. On his turn, the writer Erich Fromm upheld human life in insisting that there could only exist a truly “civilized” society if based on humanist values<sup>99</sup>. Towards the end of his life, in his book *The Anatomy of Human Destructivity* (1974), he warned against destruction and propounded the prevalence of love for life<sup>100</sup>.

100. Fromm further warned that the devastation of wars (including the contemporary ones) has led to the loss of hope and to brutalization, amidst the tension of the co-existence or ambivalence between civilization and barbarism, which requires all our endeavours towards the revival of humanism<sup>101</sup>. Likewise, in our days, the philosopher Edgar Morin has also warned that the advances of scientific knowledge disclosed an ambivalence, in that they provided, on the one hand, the means to improve the knowledge of the world, and, on the other hand, with the production (and proliferation) of nuclear weapons, in addition to other weapons (biological and chemical) of mass destruction, the means to destroy the world<sup>102</sup>.

101. The future has thus become unpredictable, and unknown, in face of the confrontation between the forces of life and the forces of death. Yet, he added, human beings are endowed with conscience, and are aware that civilizations, as well as the whole of humankind, are mortal<sup>103</sup>. Morin further contended the tragic experiences lived in recent times should lead to the repentance of barbarism and the return to humanism; in effect, to think about, and resist to, barbarism, amounts to contributing to recreate humanism<sup>104</sup>.

102. For his part, in the late 1980s, in his book of essays *Silences et mémoires d'hommes* (1989), Elie Wiesel stressed the need of memory and

<sup>97</sup> G. Duhamel, *Civilisation — 1914-1917*, Paris, Mercure de France, 1944, pp. 53 and 274-275; G. Duhamel, *Memorial de la guerre blanche — 1938*, Paris, Mercure de France, 1945, pp. 41, 95, 100, 102 and 170.

<sup>98</sup> I. Berlin, *The Proper Study of Mankind*, N.Y., Farrar & Straus & Giroux, 2000 (reed.), pp. 78, 135, 155, 217, 235-236, 242, 247, 311 and 334; I. Berlin, “Return of the *Volksgeist*: Nationalism, Good and Bad”, *At Century's End* (ed. N. P. Gardels), San Diego/Cal., Alti Publ., 1995, p. 94.

<sup>99</sup> Cf. E. Fromm, *Las Cadenas de la Ilusión — Una Autobiografía Intelectual* [1962], Barcelona, Paidós, 2008 (reed.), pp. 78 and 234-239.

<sup>100</sup> Cf. E. Fromm, *Anatomía de la Destructividad Humana* [1974], Mexico/Madrid/Buenos Aires, 2009 (reed.), pp. 16-468; and cf. also E. Fromm, *El Amor a la Vida* [1983 — *Über die Liebe zum Leben*], Barcelona, Paidós, 2016 (4th reprint), pp. 15-250.

<sup>101</sup> E. Fromm, *Las Cadenas de la Ilusión . . .*, *op. cit. supra* note 99, pp. 240 and 250-251.

<sup>102</sup> E. Morin, *Vers l'abîme?*, Paris, L'Herne, 2012, pp. 9, 24-25 and 40-41.

<sup>103</sup> *Ibid.*, pp. 27, 30, 59, 85, 89, 126 and 181.

<sup>104</sup> E. Morin, *Breve Historia de la Barbarie en Occidente*, Barcelona, Paidós, 2009, p. 94, and cf. pp. 60 and 92-93.



attention to the world wherein we live, so as to combat the indifference to violence and evil<sup>105</sup>. Looking back to the Book of Genesis, he saw it fit to recall that

“Cain and Abel — the first children on earth — discovered they were enemies. Although they were brothers, one became the murderer and the other the victim. What lesson should we learn from this? Two men may be brothers and nonetheless want to kill each other. And also: whoever does the killing, kills his brother. But it is only later that we learn this.”<sup>106</sup>

103. Turning attention to the threat of nuclear weapons, Wiesel sharply criticized the already prevailing attitude of indifference to it: the world, today, seems astonishingly indifferent to the nuclear question — an attitude which he found not understandable<sup>107</sup>. And he added that

“Indifference (. . .) can also become contagious. (. . .) Indifference can, moreover, serve as a measure of the progress of the evil that is undermining society. (. . .) Here again, memory alone can awaken us. If we remember what happened forty years ago, there is a chance we can prevent further disasters. Otherwise, we are at risk of being the victims of our own indifference. For if we are indifferent to the lessons of our past, we will be indifferent to the hopes inherent in our future. (. . .) My fear is this: if we forget, we will be forgotten. (. . .) If we remain indifferent to our fate, (. . .) there will be no one left to tell our story.”<sup>108</sup>

104. In effect, already in the early twentieth century, Henri Bergson, in his monograph *La conscience et la vie* (1911), devoted attention to the search for meaning in life: to him, to live with consciousness is to remember the past (memory) in the present, and to anticipate the future<sup>109</sup>. In his own words, “To remember what is no longer, to anticipate what does not yet exist, that is the first function of consciousness. (. . .) Consciousness is a link between what was and what will be, a bridge between the past and the future.”<sup>110</sup>

105. Also in international legal doctrine, there have been those who have felt the need to move away from State voluntarism and acknowledge the prevalence of conscience over the “will”. It is not my intention to

<sup>105</sup> E. Wiesel, *Silences et mémoires d'hommes*, Paris, Ed. Seuil, 1989, pp. 166, 173 and 175.

<sup>106</sup> *Ibid.*, pp. 167-168.

<sup>107</sup> *Ibid.*, p. 174, and cf. p. 170 [translation by the Registry].

<sup>108</sup> *Ibid.*, pp. 175-176 [translation by the Registry].

<sup>109</sup> H. Bergson, *La conscience et la vie* [1911], Paris, PUF, 2012 [reprint], pp. 10-11, 13 and 26.

<sup>110</sup> *Ibid.*, pp. 5-6 [translation by the Registry].

dwell upon this point here, as I have dealt with it elsewhere<sup>111</sup>. For the purposes of the present dissenting opinion, suffice it to recall a couple of examples. The jurist Gustav Radbruch, at the end of his life, forcefully discarded legal positivism, always subservient to power and the established order, and formulated his moving conversion and profession of faith in jusnaturalism<sup>112</sup>. His lucid message was preserved and has been projected in time<sup>113</sup>, thanks to the devotion of his students and disciples of the School of Heidelberg.

106. There are further examples of doctrinal endeavours to put limits to State voluntarism, such as the jusnaturalist construction of, e.g., Alfred Verdross, — as from the *idée du droit*, — of an objective law finding expression in the general principles of law, preceding positive international law<sup>114</sup>; or else the conception of the *droit spontané*, of Roberto Ago, upholding the spontaneous formation (emanating from human conscience, well beyond the “will” of individual States) of new rules of international law<sup>115</sup>.

107. In the view of Albert de La Pradelle, the conception of the formation of international law on the strict basis of reciprocal rights and duties only of States is “extremely grave and dangerous”<sup>116</sup>. International law is a “law of the human community”, encompassing, besides States, also peoples and human beings; it is the “law of all mankind”, on the foundations of which are the general principles of law<sup>117</sup>. To de La Pradelle, this “*droit de l’humanité*” is not static, but rather dynamic, attentive to human values, in the line of jusnaturalist thinking<sup>118</sup>.

108. “Juridical conscience” is invoked in lucid criticisms of legal positivism<sup>119</sup>. Thus, in his monograph-plea (of 1964) against nuclear weap-

<sup>111</sup> Cf. A. A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, 2nd rev. ed., Leiden/The Hague, Nijhoff/The Hague Academy of International Law, 2013, pp. 141-147 and 153-161.

<sup>112</sup> Cf. G. Radbruch, *Introducción a la Filosofía del Derecho*, 3rd ed., Mexico/Buenos Aires, Fondo de Cultura Económica, 1965, pp. 9-180.

<sup>113</sup> Cf., e.g., R. Alexy, *The Argument from Injustice — A Reply to Legal Positivism*, Oxford University Press, 2010, pp. 3-130.

<sup>114</sup> A. Verdross, *Derecho Internacional Público*, 5th ed., Madrid, Aguilar, 1969 [reprint], pp. 15-19.

<sup>115</sup> R. Ago, “Nouvelles réflexions sur la codification du droit international”, 92 *Revue générale de droit international public* (1988), p. 540, and cf. p. 541 on “la nature non volontaire de l’origine du droit coutumier”.

<sup>116</sup> A. de La Pradelle, *Droit international public* (cours sténographié), Paris, Institut des Hautes Etudes Internationales/Centre Européen de la Dotation Carnegie, November 1932/May 1933, p. 33, and cf. pp. 36-37.

<sup>117</sup> *Ibid.*, pp. 49-59, 149, 222 and 264.

<sup>118</sup> Cf. *ibid.*, pp. 412-413.

<sup>119</sup> Such as, e.g., those of Antonio Gómez Robledo, *Meditación sobre la Justicia* [1963], Mexico/Buenos Aires, Fondo de Cultura Económica, 1963, pp. 179 and 185; R. Quadri, “Cours général de droit international public”, 113 *Recueil des cours de l’Académie de droit international de La Haye* (1964), pp. 326, 332, 336-337, 339 and 350-351.

ons, for example, Stefan Glaser sustained that customary international norms are those that, “according to universal conscience”, ought to regulate the international community, for fulfilling common interest and responding to the demands of justice; and he added that “It is on this universal conscience that the main characteristic of international law is based: the belief that its norms are essential for the common good explains why they are recognized as binding rules.”<sup>120</sup>

109. This is the position that I also uphold; in my own understanding, it is the universal juridical conscience that is the ultimate material source of international law<sup>121</sup>. In my view, one cannot face the new challenges confronting the whole international community keeping in mind only State susceptibilities; such is the case with the obligation to render the world free of nuclear weapons, an imperative of *recta ratio* and not a derivative of the “will” of States. In effect, to keep hope alive it is necessary to bear always in mind humankind as a whole.

110. For my part, within the ICJ, I have deemed it fit to ponder, in my dissenting opinion in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, *Judgment, I.C.J. Reports 2015 (I)*, pp. 365-366, paras. 488-489), that, from Homer’s *Iliad* (late eighth or early seventh century BC) to date, individuals, indoctrinated and conditioned for war and destruction, have become objects of the struggle for domination. I recalled that this has been lucidly warned by Simone Weil, in a penetrating essay (of 1934), in which war victimizes everyone, there occurring “the substitution of the ends by the means”, transforming human life into a simple means, which can be sacrificed; individuals become unable to think, in face of the “social machine” of destruction of the spirit<sup>122</sup>.

111. The presence of evil has accompanied and marked human existence over the centuries. In the same aforementioned dissenting opinion in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (2015), after drawing attention

<sup>120</sup> S. Glaser, *L’arme nucléaire à la lumière du droit international*, Paris, Pedone, 1964, p. 18 [translation by the Registry].

<sup>121</sup> Cf. A. A. Cançado Trindade, *op. cit. supra* note 111, Chap. VI, pp. 139-161.

<sup>122</sup> S. Weil, *Reflexiones sobre las Causas de la Libertad y de la Opresión Social*, Barcelona, Ed. Paidós/Universidad Autónoma de Barcelona, 1995, pp. 81-82, 84 and 130-131; S. Weil, *Réflexions sur les causes de la liberté et de l’oppression sociale*, Paris, Gallimard, 1955, pp. 124-125, and cf. pp. 114-115 and 144.

to “the ever-lasting presence of evil, which appears proper to the human condition, in all times”, I added:

“It is thus understandable that it has attracted the concern of, and has presented challenges to, legal thinking, in our times and previous centuries, as well as other branches of knowledge (such as, e.g., history, psychology, anthropology, sociology, philosophy and theology, among others). It has marked presence in literature as well. This long-standing concern, over centuries, has not, however, succeeded to provide an explanation for evil.

Despite the endeavours of human thinking, through history, we have not been able to rid humankind of it. Like the passing of time, the ever-lasting presence of evil is yet another mystery surrounding human beings, wherever and while they live. Whenever individuals purport to subject their fellow human beings to their ‘will’, placing this latter above conscience, evil is bound to manifest itself. In one of the most learned writings on the problem of evil, R. P. Sertillanges ponders that the awareness of evil and the anguish emanated therefrom have marked presence in all civilizations. The ensuing threat to the future of humankind has accounted for the continuous presence of that concern throughout the history of human thinking.<sup>123</sup>

Religions were the first to dwell upon the problem of evil, which came also to be considered by philosophy, history, psychology, social sciences and literature. Over the centuries, human thinking has always acknowledged the need to examine the problem of evil, its incidence in human relations, in the world wherein we live, without losing faith in human values<sup>124</sup>. Despite the perennial quest of human thinking to find answers to the problem of evil, going as far back as the *Book of Job*, or even further back, to the Genesis itself<sup>125</sup>, — not even theology has found an explanation for it, that is satisfactory to all.” (*I.C.J. Reports 2015 (I)*, pp. 361-362, paras. 472-474.)

112. The Scripture’s account of Cain and Abel (Genesis, Chap. 4: 8-10) through the centuries came to be regarded as the aetiology of the fragmentation of humankind, as from the indifference of an individual to the fate of another. The increasing disregard for human life was fostered by

<sup>123</sup> R. P. Sertillanges, *Le problème du mal — l’histoire*, Paris, Aubier, 1948, pp. 5-412.

<sup>124</sup> *Ibid.*, pp. 5-412.

<sup>125</sup> Cf., *inter alia*, e.g., M. Neusch, *L’énigme du mal*, Paris, Bayard, 2007, pp. 7-193; J. Maritain, *Dio e la Permissione del Male*, 6th ed., Brescia, Edit. Morcelliana, 2000, pp. 9-100; E. Fromm, *Anatomia de la Destructividad Humana*, Mexico/Madrid/Buenos Aires, Siglo XXI Edit., 2009 [reprint.], pp. 11-468; P. Ricœur, *Evil — A Challenge to Philosophy and Theology*, London, Continuum, 2007, pp. 33-72; P. Ricœur, *Le mal — Un défi à la philosophie et à la théologie*, Geneva, Ed. Labor et Fides, 2004, pp. 19-65; C. S. Nino, *Juicio al Mal Absoluto*, Buenos Aires, Emecé Edit., 1997, pp. 7-292; A. Morton, *On Evil*, N.Y./London, Routledge, 2004, pp. 1-148; T. Eagleton, *On Evil*, New Haven/London, Yale University Press, 2010, pp. 1-163; P. Dews, *The Idea of Evil*, Oxford, Wiley-Blackwell, 2013, pp. 1-234.

growing, generalized and uncontrolled violence in search of domination. This was further aggravated by ideological manipulations, and even the dehumanization of the others, the ones to be victimized. The problem of evil continues to be studied, in face of the human capacity for extreme violence and self-destruction on a large scale<sup>126</sup>. The tragic message of the Book of Genesis, in my perception, seems perennial, as contemporary as ever, in the current nuclear age.

### VIII. THE ATTENTION OF THE UNITED NATIONS CHARTER TO PEOPLES

113. It should be kept in mind that the United Nations Charter was adopted on 26 June 1945 on behalf of “we, the peoples of the United Nations”. In several provisions it expresses its concern with the living conditions of all peoples (preamble, Arts. 55, 73 (a), 76, 80), and calls for the promotion of, and universal respect for, human rights (Arts. 55 (c), 62 (2), 68, 76 (c)). It invokes the “principles of justice and international law” (Art. 1 (1), and refers to “justice and respect for the obligations arising from treaties and other sources of international law” (preamble). It further states that the Statute of the ICJ, “the principal judicial organ of the United Nations”, forms “an integral part” of the UN Charter itself (Art. 92).

114. In the mid-1950s, Max Huber, a former judge of the PCIJ, wrote that international law has to protect also values common to humankind, attentive to respect for life and human dignity, in the line of the jusnaturalist conception of the *jus gentium*; the UN Charter, in incorporating human rights into this *droit de l'humanité*, initiated a new era in the development of international law, in a way rescuing the idea of the *civitas maxima*, which marked presence already in the historical origins of the law of nations. The UN Charter's attention to peoples, its principled position for the protection of the human person, much transcends positive domestic law and politics<sup>127</sup>.

<sup>126</sup> Cf., moreover, *inter alia*, e.g., [Various Authors], *Le Mal* (ed. C. Crignon), Paris, Flammarion, 2000, pp. 11-232; J. Waller, *Becoming Evil*, 2nd ed., Oxford University Press, 2007, pp. 3-330; S. Baron-Cohen, *The Science of Evil — On Empathy and the Origins of Cruelty*, N.Y., Basic Books, 2012, pp. 1-243; L. Svendsen, *A Philosophy of Evil*, Champaign/London, Dalkey Archive Press, 2011 [reprint], pp. 9-282; M. Salvioli, *Bene e Male — Variazioni sul Tema*, Bologna, Ed. Studio Domenicano (ESD), 2012, pp. 11-185; D. Livingstone Smith, *Less than Human*, N.Y., St. Martin's Press, 2011, pp. 1-316; R. Safranski, *El Mal, o el Drama de la Libertad*, 4th ed., Barcelona, Tusquets Edit., 2014, pp. 15-281; S. Neiman, *Evil in Modern Thought*, 2nd ed., Princeton/Oxford, Princeton University Press, 2015, pp. 1-359; J.-C. Guillebaud, *Le tourment de la guerre*, Paris, Ed. de l'Iconoclaste, 2016, pp. 9-390.

<sup>127</sup> Max Huber, *La pensée et l'action de la Croix-Rouge*, Geneva, CICR, 1954, pp. 26, 247, 270, 286 and 291.

115. The new vision advanced by the UN Charter, and espoused by the law of the United Nations, has, in my perception, an incidence upon judicial settlement of international disputes. Thus, the fact that the ICJ's mechanism for the handling of contentious cases is an inter-State one, does not mean that its reasoning should also pursue a strictly inter-State dimension; that will depend on the nature and substance of the cases lodged with it. And there have been several cases lodged with the Court that required a reasoning going well beyond the inter-State dimension<sup>128</sup>. Such reasoning beyond the inter-State dimension is faithful to the UN Charter, the ICJ being "the principal judicial organ of the United Nations" (Art. 92).

116. Recently, in one of such cases, that of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, in my extensive dissenting opinion appended thereto, I have deemed it fit, *inter alia*, to warn that

"The present case concerning the *Application of the Convention against Genocide* provides yet another illustration of the pressing need to overcome and move away from the dogmatic and strict inter-State outlook, even more cogently. In effect, the 1948 Convention against

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<sup>128</sup> Cf., e.g., the case of *Nottebohm (Liechtenstein v. Guatemala)* (1955, pertaining to double nationality); the cases of the *Trial of Pakistani Prisoners of War (Pakistan v. India)* (1973), of the *Hostages (United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran))* case (1980); of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* case (1996 and 2007); of the *Frontier Dispute (Burkina Faso/Republic of Mali)* (1986); the triad of cases concerning consular assistance — namely, the cases *Vienna Convention on Consular Relations (Paraguay v. United States of America)* (1998), the case *LaGrand (Germany v. United States of America)* (2001), the case *Avena and Other Mexican Nationals (Mexico v. United States of America)* (2004); the case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (2000), concerning grave violations of human rights and of international humanitarian law; of the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)* (1996); of *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (2009 and 2012), pertaining to the principle of universal jurisdiction under the UN Convention against Torture; of *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (2010) (on detention and expulsion of a foreigner), of the *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)* (2010 and 2012); of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* (2011); of the *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)* (provisional measures, 2011); of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (2015). To those cases one can add the two most recent Advisory Opinions of the ICJ, on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (2010); and on a *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development* (2012).

Genocide, adopted on the eve of the Universal Declaration of Human Rights, is not State-centred, but rather *people-centred*. The Convention against Genocide cannot be properly interpreted and applied with a strict State-centred outlook, with attention turned to inter-State susceptibilities. Attention is to be kept on the *justiciables*, on the victims — real and potential victims — so as to impart justice under the Genocide Convention.” (*I.C.J. Reports 2015 (I)*, p. 368, para. 496.)

117. In a report in the early 1990s, a former UN Secretary-General, calling for a “concerted effort” towards complete disarmament, rightly pondered that “[i]n today’s world, societies can no longer afford to solve problems by the use of force. (. . .) [O]ne of the most important means of reducing violence in inter-State relations is disarmament”<sup>129</sup>. There followed the cycle of World Conferences of the United Nations during the 1990s, in a commendable endeavour of the United Nations *to go beyond and transcend the purely inter-State dimension*, imbued of a spirit of solidarity, so as to consider the challenges for the future of humankind.

118. Those UN World Conferences disclosed a growing awareness of the international community as a whole, and entered into a continuing universal dialogue between UN Member States and entities of the civil societies, — which I well remember, having participated in it<sup>130</sup>, — so as to devise the new international agenda in the search of common solutions for the new challenges affecting humankind as a whole. In focusing attention on vulnerable segments of the populations, the immediate concern has been with meeting basic human needs, that memorable cycle of world conferences disclosed a common concern with the deterioration of living conditions, dramatically affecting increasingly greater segments of the population in many parts of the world nowadays<sup>131</sup>.

119. The common denominator in those UN World Conferences — as I have pointed out on distinct occasions over the last two decades<sup>132</sup> —

<sup>129</sup> B. Boutros-Ghali, *New dimensions of arms regulation and disarmament in the post-Cold War era — Report of the Secretary-General*, N.Y., United Nations, 1993, para. 46.

<sup>130</sup> E.g., in the UN Conference on Environment and Development (Rio de Janeiro, 1992, in its World NGO Forum) and in the II World Conference on Human Rights (Vienna, 1993, in the same Forum and in its Drafting Committee).

<sup>131</sup> A growing call was formed for the pursuance of social justice *among* and *within* nations.

<sup>132</sup> A. A. Cançado Trindade, *A Proteção dos Vulneráveis como Legado da II Conferência Mundial de Direitos Humanos (1993-2013)*, Fortaleza/Brazil, IBDH/IIDH/SLADI, 2014, pp. 13-356; A. A. Cançado Trindade, “Sustainable Human Development and Conditions

can be found in the recognition of the legitimacy of the concern of the international community as a whole with the conditions of living of all human beings everywhere. The placing of the well-being of peoples and human beings, of the improvement of their conditions of living, at the centre of the concerns of the international community, is remindful of the historical origins of the *droit des gens*<sup>133</sup>.

120. At the end of the decade and the dawn of the new millennium, the United Nations Millennium Declaration (adopted by General Assembly's resolution 55/2, of 8 September 2000) stated the determination "to eliminate the dangers posed by weapons of mass destruction" (para. II (8)), and, noticeably,

"To strive for the elimination of weapons of mass destruction, particularly nuclear weapons, and to keep all options open for achieving this aim, including the possibility of convening an international conference to identify ways of eliminating nuclear dangers." (Para. II (9).)

121. In addition to our responsibilities to our individual societies, — the UN Millennium Declaration added,

"we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level. (. . .) [W]e have a duty therefore to all the world's people, especially the most vulnerable and, in particular, the children of the world, to whom the future belongs.

We reaffirm our commitment to the purposes and principles of the Charter of the United Nations, which have proved timeless and universal. Indeed, their relevance and capacity to inspire have increased, as nations and peoples have become increasingly

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of Life as a Matter of Legitimate International Concern: The Legacy of the UN World Conferences", *Japan and International Law — Past, Present and Future* (International Symposium to Mark the Centennial of the Japanese Association of International Law), The Hague, Kluwer, 1999, pp. 285-309; A. A. Cançado Trindade, "The Contribution of Recent World Conferences of the United Nations to the Relations between Sustainable Development and Economic, Social and Cultural Rights", *Les hommes et l'environnement: Quels droits pour le vingt-et-unième siècle? — Etudes en hommage à Alexandre Kiss* (eds. M. Prieur and C. Lambrechts), Paris, Ed. Frison-Roche, 1998, pp. 119-146; A. A. Cançado Trindade, "Memória da Conferência Mundial de Direitos Humanos (Vienna, 1993)", 87/90 *Boletim da Sociedade Brasileira de Direito Internacional* (1993-1994), pp. 9-57.

<sup>133</sup> Those Conferences acknowledged that human rights do in fact permeate all areas of human activity, and contributed decisively to the reestablishment of the central position of human beings in the conceptual universe of the law of nations (*droit des gens*). Cf., on the matter, A. A. Cançado Trindade, *Evolution du droit international au droit des gens — L'accès des particuliers à la justice internationale: le regard d'un juge*, Paris, Pedone, 2008, pp. 1-187.



interconnected and interdependent” (A/RES/55/2, of 8 September 2000, paras. I (2-3)).

#### IX. IMPERTINENCE OF THE SO-CALLED *MONETARY GOLD* “PRINCIPLE”

122. The distortions generated by the obsession with the strict inter-State paradigm are not hard to detect. An example is afforded, in this connection, by the ICJ’s handling of the *East Timor* case (1995): the East Timorese people had no *locus standi* to request intervention in the proceedings, not even to present an *amicus curiae*, although the crucial point under consideration was that of sovereignty over their own territory. Worse still, the interests of a third State (which had not even accepted the Court’s jurisdiction) were taken for granted and promptly safeguarded by the Court, by means of the application of the so-called *Monetary Gold* “principle” — an assumed “principle” also invoked now, two decades later, in the present case concerning the obligation of elimination of nuclear weapons!

123. Attention has to be turned to the *nature* of the case at issue, which may well require a reasoning— as the *cas d’espèce* does — moving away from “a strict State-centred voluntarist perspective” and from the “exaltation of State consent”, and seeking guidance in fundamental principles (*prima principia*), such as the principle of humanity. This is what I pointed out in my extensive dissenting opinion in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, where I pondered *inter alia* that such *prima principia* confer to the international legal order “its ineluctable axiological dimension”; they “conform its *substratum*, and convey the idea of an *objective* justice, in the line of jusnaturalist thinking” (*I.C.J. Reports 2015 (I)*, p. 373, para. 517).

124. That was not the first time I made such ponderation: I had done the same, in another extensive dissenting opinion, in the *Application of the CERD Convention*. In my subsequent aforementioned dissenting opinion in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, I expressed my dissatisfaction that in a case pertaining to the interpretation and application of the Convention against Genocide, the ICJ even made recourse to the so-called *Monetary Gold* “principle”<sup>134</sup>, which had no place in a case like that, and “which does not belong to the realm of the *prima principia*, being nothing more than a concession to State consent, within an outdated State voluntarist framework” (*I.C.J. Reports 2015 (I)*, p. 374, para. 519).

125. May I, in the present dissenting opinion, this time in the case of *Obligations concerning Negotiations relating to Cessation of the Nuclear*

<sup>134</sup> Even if only to dismiss it (para. 116).

*Arms Race and to Nuclear Disarmament*, again leave on the records my dissatisfaction for the same reason. Once again, may I stress that the adjudication of a case like the present one shows the need to go beyond the strict inter-State outlook. The fact that the mechanism for the adjudication of contentious cases before the ICJ is an inter-State one, does not at all imply that the Court's reasoning should likewise be strictly inter State. In the present case concerning nuclear weapons and the obligation of nuclear disarmament, it is necessary to focus attention on peoples, rather than on inter-State susceptibilities. It is imperative to keep in mind the world population, in pursuance of a humanist outlook, in the light of the *principle of humanity*.

#### X. THE FUNDAMENTAL PRINCIPLE OF THE JURIDICAL EQUALITY OF STATES

126. The present case of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* stresses the utmost importance of the principle of the juridical equality of States. The importance attributed to fundamental principles, the idea of an objective justice, and its incidence upon the laws, go back in time, being deeply-rooted in jusnaturalist thinking. If laws are deprived of justice, they no longer oblige in conscience. Ethics cannot be dissociated from law; in the international scenario, each one is responsible for all the others. To the “founding fathers” of the law of nations (*droit des gens*), like Francisco de Vitoria and Francisco Suárez, the principle of equality was fundamental, in the relations among individuals, as well as among nations. Their teachings have survived the erosion of time: today, four and a half centuries later, the basic principle of equality and non-discrimination is in the foundations of the law of the United Nations itself.

127. The present case is surely not the first one before the ICJ that brings to the fore the relevance of the principle of the juridical equality of States. In the ICJ's Order (of Provisional Measures of Protection) of 3 March 2014, I have deemed it fit to point out, in my separate opinion appended thereto, that the case concerning *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*

“bears witness of the relevance of the principle of the juridical equality of States. The prevalence of this fundamental principle has marked a longstanding presence in the realm of international law, ever since the times of the II Hague Peace Conference of 1907, and then of the drafting of the Statute of the Permanent Court of International Justice by the Advisory Committee of Jurists, in June-July 1920. Recourse was then made, by that Committee, *inter alia*, to general principles of law, as these latter embodied the objective idea of justice. A general princi-

ple such as that of the juridical equality of States, enshrined a quarter of a century later in the United Nations Charter (Art. 2 (1)), is ineluctably intermingled with the quest for justice.

Subsequently, throughout the drafting of the 1970 UN Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (1964-1970), the need was felt to make it clear that stronger States cannot impose their will upon the weak, and that *de facto* inequalities among States cannot affect the weaker in the vindication of their rights. The principle of the juridical equality of States gave expression to this concern, embodying the *idée de justice*, emanated from the universal juridical conscience.” (*I.C.J. Reports 2014*, p. 184, paras. 44-45.)

128. And one decade earlier, in my General Course on public international law delivered at the Hague Academy of International Law (2005), I pondered that

“On successive occasions the principles of international law have proved to be of fundamental importance to humankind’s quest for justice. This is clearly illustrated by the role played, *inter alia*, by the principle of juridical equality of States. This fundamental principle, — the historical roots of which go back to the II Hague Peace Conference of 1907, — proclaimed in the UN Charter and enunciated also in the 1970 Declaration of Principles, means ultimately that all States, — factually strong and weak, great and small, — are equal before international law, are entitled to the same protection under the law and before the organs of international justice, and to equality in the exercise of international rights and duties.

Despite successive attempts to undermine it, the principle of juridical equality of States has remained, from the II Hague Peace Conference of 1907 to date, one of the basic pillars of international law. It has withstood the onslaught of time, and shown itself salutary for the peaceful conducting of international relations, being ineluctably associated — as it stands — with the foundations of international law. It has been very important for the international legal system itself, and has proven to be a cornerstone of international law in the United Nations era. In fact, the UN Charter gave it a new dimension, and the principle developments such as that of the system of collective security, within the ambit of the law of the United Nations.”<sup>135</sup>

<sup>135</sup> A. A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, *op. cit. supra* note 111, pp. 84-85, and cf. pp. 62-63, 65 and 73.

129. By the turn of the century, the General Assembly's resolution 55/2, of 8 September 2000, adopted the United Nations Millennium Declaration, which *inter alia* upheld the "sovereign equality of all States", in conformity with "the principles of justice and international law" (para. I (4)). Half a decade later, the General Assembly's resolution 60/1, of 16 September 2005, adopted the World Summit Outcome, which *inter alia* expressed the determination "to establish a just and lasting peace all over the world in accordance with the purposes and principles of the [UN] Charter", as well as "to uphold the sovereign equality of all States" (para. I (5)). In stressing therein the "vital importance of an effective multilateral system" to face current challenges to international peace and security (paras. 6-7), the international community reiterated its profession of faith in the general principles of international law.

#### XI. UNFOUNDEDNESS OF THE STRATEGY OF "DETERRENCE"

130. In effect, the strategy of "deterrence", pursued by NWS in the present context of nuclear disarmament in order to attempt to justify their own position, makes abstraction of the fundamental principle of the juridical equality of States, enshrined into the UN Charter. Factual inequalities cannot be made to prevail over the juridical equality of States. All UN Member States are juridically equal. The strategy of a few States pursuing their own "national security interests" cannot be made to prevail over a fundamental principle of international law set forth in the UN Charter: factual inequalities between States cannot, and do not prevail over the juridical equality of States.

131. In its 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons*, permeated with ambiguity, the ICJ gave undue weight to "the still strong adherence to the practice of deterrence" (*I.C.J. Reports 1996 (I)*, pp. 254 and 255, paras. 67 and 73) by a few NWS, to the point of beholding in it an obstacle to the formation and consolidation of *opinio juris* and a customary rule as to the illegality of nuclear weapons, leading to "a specific and express prohibition" of their use (*ibid.*, p. 255, para. 73). Here the Court assumed its usual positivist posture: in its view, the prohibition must be express, stated in positive law, even if those weapons are capable of destroying all life on earth, the whole of humankind . . .

132. The ICJ, in its Advisory Opinion of 1996, gave too much weight to the opposition of NWS as to the existence of an *opinio juris* on the unlawfulness of nuclear weapons. And this, despite the fact that, in their overwhelming majority, Member States of the United Nations stand

clearly against nuclear weapons, and in favour of nuclear disarmament. The 1996 Advisory Opinion, notwithstanding, appears unduly influenced by the lack of logic of “deterrence”<sup>136</sup>. One cannot conceive, as the 1996 Advisory Opinion did, of recourse to nuclear weapons by a hypothetical State in “self-defence” at the unbearable cost of the devastating effects and sufferings inflicted upon humankind as a whole, in an “escalation to apocalypse”<sup>137</sup>.

133. The infliction of such devastation and suffering is in flagrant breach of international law, — of the ILHR, IHL and the law of the United Nations (cf. Part XII, *infra*). It is, furthermore, in flagrant breach of norms of *jus cogens*<sup>138</sup>. The strategy of “deterrence” seems to make abstraction of all that. The ICJ, as the International Court of Justice, should have given, on all occasions when it has been called upon to pronounce on nuclear weapons (in the exercise of its jurisdiction on contentious and advisory matters), far greater weight to the *raison d’humanité*<sup>139</sup>, rather than to the *raison d’Etat* nourishing “deterrence”. We have to keep in mind the human person and the peoples, for which States were created, instead of relying only on what one assumes to be the *raison d’Etat*. The *raison d’humanité*, in my understanding, prevails surely over considerations of *Realpolitik*.

134. In its 1996 Advisory Opinion, the ICJ, however, at the same time, rightly acknowledged the importance of complete nuclear disarmament, asserted in the series of General Assembly resolutions, and the relevance of the corresponding obligation under Article VI of the NPT to the international community as a whole (*I.C.J. Reports 1996 (I)*, pp. 263-264, paras. 99 and 102). To the Court, this is an obligation of result, and not of mere conduct (*ibid.*, p. 264, para. 99). Yet, it did not extract the consequences of that. Had it done so, it would have reached the conclusion that nuclear disarmament cannot be hampered by the conduct of a few States — the NWS — which maintain and modernize their own arsenals of nuclear weapons, pursuant to their strategy of “deterrence”.

<sup>136</sup> Cf. criticisms of such posture in, e.g., A. Sayed, *Quand le droit est face à son néant — Le droit à l’épreuve de l’emploi de l’arme nucléaire*, Brussels, Bruylant, 1998, pp. 79-80, 84, 88-89, 96 and 113.

<sup>137</sup> Cf. *ibid.*, p. 147, and cf. pp. 129, 133, 151, 160, 174-175, 197 and 199-200.

<sup>138</sup> On the expansion of the material content of this latter, cf. A. A. Cançado Trindade, “*Jus Cogens*: The Determination and the Gradual Expansion of Its Material Content in Contemporary International Case Law”, *XXXV Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano — 2008*, Washington D.C., OAS General Secretariat, 2009, pp. 3-29.

<sup>139</sup> A. A. Cançado Trindade, “La Humanización del Derecho Internacional y los Límites de la Razón de Estado”, 40 *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais* — Belo Horizonte/Brazil (2001), pp. 11-23.

135. The strategy of “deterrence” has a suicidal component. Nowadays, in 2016, twenty years after the 1996 ICJ Advisory Opinion, and with the subsequent reiteration of the conventional and customary international legal obligation of nuclear disarmament, there is no longer any room for ambiguity. There is an *opinio juris communis* as to the illegality of nuclear weapons, and as to the well-established obligation of nuclear disarmament, which is an obligation of result and not of mere conduct. Such *opinio juris* cannot be erased by the dogmatic positivist insistence on an express prohibition of nuclear weapons; on the contrary, that *opinio juris* discloses that the invocation of the absence of an express prohibition is nonsensical, in relying upon the destructive and suicidal strategy of “deterrence”.

136. Such strategy is incompatible with jusnaturalist thinking, always attentive to ethical considerations (cf. Part XIV, *infra*). Over half a century ago (precisely 55 years ago), the UN General Assembly had already stated, in its seminal resolution 1653 (XVI) of 1961, that the use of nuclear weapons was “contrary to the spirit, letter and aims of the United Nations”, a “direct violation” of the UN Charter, a breach of international law and of “the laws of humanity”, and “a crime against mankind and civilization” (operative para. 1). Several subsequent General Assembly resolutions upheld the same understanding of resolution 1653 (XVI) of 1961 (cf. Part III, *supra*), leaving thus no room at all for ambiguity or hesitation, or to any concession.

137. Two decades ago, in the advisory proceedings of late 1995 before the ICJ, conducive to its 1996 Advisory Opinion on *Threat or Use of Nuclear Weapons*, fierce criticisms were voiced of the strategy of “deterrence”, keeping in mind the inhumane sufferings of victims of nuclear detonation, radiation and contamination<sup>140</sup>. Attention was drawn, on the occasion, to the “distortion of logic” in “deterrence”, in trying to rely on so immensely destructive weapons to keep peace, and in further trying to persuade others “to accept that for the last 50 or so years this new and more dangerous and potentially genocidal level of armaments should be credited with keeping peace”<sup>141</sup>.

138. In the aforementioned advisory proceedings, “nuclear deterrence” was dismissed as being “simply the maintenance of a balance of fear”<sup>142</sup>; it was criticized as seeking to ground itself on a “highly questionable” premise, whereby a handful of NWS feel free to “arrogate to themselves”

<sup>140</sup> Cf., e.g., the testimonies of the Mayors of Hiroshima and Nagasaki, in Part XII, *infra*.

<sup>141</sup> CR 1995/35, of 15 November 1995, p. 32 (statement of Zimbabwe).

<sup>142</sup> CR 1995/27, of 7 November 1995, p. 37 (statement of the Mayor of Nagasaki).

the faculty “to determine what is world peace and security, exclusive in the context of their own” national strategies and interests<sup>143</sup>. It was contended that nuclear weapons are in breach of international law by their own nature, as weapons of catastrophic mass destruction; “nuclear deterrence” wrongfully assumes that States and individuals act rationally, leaving the world “under the nuclear sword of Damocles”, stimulating “the nuclear ambitions of their countries, thereby increasing overall instability”, and also increasing the danger of their being used “intentionally or accidentally”<sup>144</sup>.

139. The NWS, in persisting to rely on the strategy of “deterrence”, seem to overlook the above-reviewed distinct series of UN General Assembly resolutions (cf. Part III, *supra*) condemning nuclear weapons and calling for their elimination. The strategy of “deterrence” has come under strong criticism over the years, for the serious risks it carries, and for its indifference to the goal — supported by the United Nations, — of achieving a world free of nuclear weapons. Very recently, participants in the series of Conferences on Humanitarian Impact of Nuclear Weapons (2013-2014) strongly criticized the strategy of nuclear “deterrence”. In a statement sent to the 2014 Vienna Conference, the UN Secretary-General warned against the dangers of nuclear “deterrence”, undermining world stability (cf. Part XVIII, *infra*).

140. There is here, in effect, clearly formed, an *opinio juris communis* as to the illegality and prohibition of nuclear weapons. The use or threat of use of nuclear weapons being a clear breach of international law, of international humanitarian law and of the international law of human rights, and of the UN Charter, renders unsustainable and unfounded any invocation of the strategy of “deterrence”. In my view, a few States cannot keep on insisting on “national security interests” to arrogate to themselves indefinitely the prerogative to determine by themselves the conditions of world peace, and to impose them upon all others, the overwhelming majority of the international community. The survival of humankind cannot be made to depend on the “will” of a handful of privileged States. The universal juridical conscience stands well above the “will” of individual States.

<sup>143</sup> CR 1995/27, of 7 November 1995, p. 45, para. 14 (statement of Malaysia).

<sup>144</sup> *Ibid.*, p. 55, para. 8; and cf. pp. 60-61 and 63, paras. 17-20 (statement of Malaysia).

XII. THE ILLEGALITY OF NUCLEAR WEAPONS AND  
THE OBLIGATION OF NUCLEAR DISARMAMENT

*1. The Condemnation of All Weapons of Mass Destruction*

141. Since the beginning of the nuclear age, it became clear that the effects of nuclear weapons (such as heat and radiation) cannot be limited to military targets only, being thus by nature indiscriminate and disproportionate in their long-term devastation, disclosing the utmost cruelty. The *opinio juris communis* as to the prohibition of nuclear weapons, and of all weapons of mass destruction, has gradually been formed, over the last decades<sup>145</sup>. If weapons less destructive than nuclear weapons have already been expressly prohibited (as is the case of biological and chemical weapons), it would be nonsensical to argue that, those which have not, by positive conventional international law, like nuclear weapons, would not likewise be illicit; after all, they have far greater and long-lasting devastating effects, threatening the existence of the international community as a whole.

142. It may be recalled that, already in 1969, *all* weapons of mass destruction were condemned by the Institut de droit international (I.D.I.). In the debates of its Edinburgh session on the matter, emphasis was placed on the need to respect the principle of distinction (between military and non-military objectives), and the terrifying effects of the use of nuclear weapons were pointed out, — the example of the atomic bombing of Hiroshima and Nagasaki having been expressly recalled<sup>146</sup>. In its resolution of September 1969 on the matter, the Institut began by restating, in the preamble, the *prohibition of recourse to force* in international law, and the duty of protection of civilian populations in any armed conflict; it further recalled the general principles of international law, customary rules and conventions, — supported by international case law and practice, — which “clearly restrict” the extent to which the parties engaged in a conflict may harm the adversary, and warned against “the consequences which the indiscriminate conduct of hostilities and particularly the use of nuclear, chemical and bacteriological weapons, may involve for civilian populations and for mankind as a whole”<sup>147</sup>.

<sup>145</sup> Cf., e.g., G. E. do Nascimento e Silva, “A Proliferação Nuclear e o Direito Internacional”, *Pensamiento Jurídico y Sociedad Internacional — Libro-Homenaje al Prof. A. Truyol y Serra*, Vol. II, Madrid, Universidad Complutense, 1986, pp. 877-886; C. A. Dunshee de Abranches, *Proscrição das Armas Nucleares*, Rio de Janeiro, Livr. Freitas Bastos, 1964, pp. 114-179.

<sup>146</sup> Cf. *Annuaire de l'Institut de droit international — Session d'Edimbourg (1969)-II*, pp. 49-50, 53, 55, 60, 62-63, 66, 88-90 and 99.

<sup>147</sup> *Ibid.*, pp. 375-376.



143. In its operative part, the aforementioned resolution of the Institut stressed the importance of the principle of distinction (between military and non-military objectives) as a “fundamental principle of international law” and the pressing need to protect civilian populations in armed conflicts<sup>148</sup> and added, in paragraphs 4 and 7, that:

“Existing international law prohibits all armed attacks on the civilian population as such, as well as on non-military objects, notably dwellings or other buildings sheltering the civilian population, so long as these are not used for military purposes

.....  
 Existing international law prohibits the use of all weapons which, by their nature, affect indiscriminately both military objectives and non-military objects, or both armed forces and civilian populations. In particular, it prohibits the use of weapons the destructive effect of which is so great that it cannot be limited to specific military objectives or is otherwise uncontrollable (self-generating weapons), as well as of ‘blind’ weapons.”<sup>149</sup>

144. For its part, the International Law Association (ILA), in its more recent work (in 2014) on nuclear disarmament, after referring to Article VI of the NPT, was of the view that it was not only conventional, but also an evolving customary international obligation with an *erga omnes* character, affecting “the international community as a whole”, and not only the States parties to the NPT<sup>150</sup>. It also referred to the “world-wide public opinion” pointing to “the catastrophic consequences for humankind of any use or detonation of nuclear weapons”, and added that reliance on nuclear weapons for “deterrence” was thus unsustainable<sup>151</sup>.

145. In its view, “nuclear” deterrence is not a global “umbrella”, but rather a threat to international peace and security, and NWS are still far from implementing Article VI of the NPT<sup>152</sup>. To the International Law Association, the provisions of Article VI are not limited to States parties to the NPT, “they are part of customary international law or at least evolving custom”; they are valid *erga omnes*, as they affect “the international community as a whole”, and not only a group of States or a par-

<sup>148</sup> *Op. cit. supra* note 146, pp. 376-377, paras. 1-3, 5-6 and 8.

<sup>149</sup> *Ibid.*, pp. 376-377.

<sup>150</sup> International Law Association (ILA), Committee: *Nuclear Weapons, Non-Proliferation and Contemporary International Law* (Second Report: *Legal Aspects of Nuclear Disarmament*), ILA, Washington Conference, 2014, pp. 2-4.

<sup>151</sup> *Ibid.*, pp. 5-6.

<sup>152</sup> *Ibid.*, pp. 8-9.

ticular State<sup>153</sup>. Thus, as just seen, learned institutions in international law, such as the IDI and the ILA, have also sustained the prohibition in international law of all weapons of mass destruction, starting with nuclear weapons, the most devastating of all.

146. A single use of nuclear weapons, irrespective of the circumstances, may today ultimately mean the end of humankind itself<sup>154</sup>. All weapons of mass destruction are illegal, and are prohibited: this is what ineluctably ensues from an international legal order of which the ultimate material source is the *universal juridical conscience*<sup>155</sup>. This is the position I have consistently sustained over the years, including in a lecture I delivered at the University of Hiroshima, Japan, on 20 December 2004<sup>156</sup>. I have done so in the line of jusnaturalist thinking, faithful to the lessons of the “founding fathers” of the law of nations, keeping in mind not only States, but also peoples and individuals, and humankind as a whole.

## 2. *The Prohibition of Nuclear Weapons: The Need of a People-Centred Approach*

147. In effect, the nuclear age itself, from its very beginning (the atomic blasts of Hiroshima and Nagasaki in August 1945) can be properly studied from a people-centred approach. There are moving testimonies and historical accounts of the devastating effects of nuclear weapons, from surviving victims and witnesses<sup>157</sup>. Yet, even with the eruption of the nuclear age, attention remained focused largely on State strategies: it

<sup>153</sup> *Op. cit. supra* note 150, p. 18.

<sup>154</sup> Nagendra Singh, *Nuclear Weapons and International Law*, London, Stevens, 1959, p. 242.

<sup>155</sup> A. A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, *op. cit. supra* note 111, Chap. VI (“The Material Source of International Law: Manifestations of the Universal Juridical Conscience”), pp. 139-161.

<sup>156</sup> Text of my lecture reproduced in: A. A. Cançado Trindade, *Le droit international pour la personne humaine*, Paris, Pedone, 2012, Chap. I (“L’illicéité de toutes les armes de destruction massive au regard du droit international contemporain”), pp. 61-90; A. A. Cançado Trindade, *A Humanização do Direito Internacional*, 2nd ed., Belo Horizonte/Brazil, Edit. Del Rey, 2015, Chap. XVII (“The Illegality under Contemporary International Law of All Weapons of Mass Destruction”), pp. 361-390.

<sup>157</sup> Michihiko Hachiya, *Journal d’Hiroshima — 6 août-30 septembre 1945* [1955], Paris, Ed. Tallandier, 2015 (reed.), pp. 25-281; Toyofumi Ogura, *Letters from the End of the World — A First-Hand Account of the Bombing of Hiroshima* [1948], Tokyo/N.Y./London, Kodansha International, 2001 (reed.), pp. 15-173; Naomi Shohno, *The Legacy of Hiroshima — Its Past, Our Future*, Tokyo, Kösei Publ. Co., 1987 (reed.), pp. 13-140; Kenzaburo Oe, *Notes de Hiroshima* [1965], [Paris,] Gallimard, 1996 (reed.), pp. 17-230; J. Hersey, *Hiroshima* [1946], London, Penguin, 2015 [reprint], pp. 1-98.

took some time for them gradually to shift to the devastating effects of nuclear weapons on peoples.

148. As recalled in one of the historical accounts, only at the First Conference against Atomic and Hydrogen Bombs (1955), “the victims had their first opportunity, after ten years of silence, to make themselves heard”, in that forum<sup>158</sup>. Over the last decades, there have been endeavours to shift attention from State strategies to the numerous victims and enormous damages caused by nuclear weapons, focusing on “human misery and human dignity”<sup>159</sup>. Recently, one significant initiative to this effect has been the series of Conferences on the Humanitarian Impact of Nuclear Weapons (2013-2014), which I shall survey later on in this dissenting opinion (cf. Part XVIII, *infra*).

149. There has been a chorus of voices of those who have been personally victimized by nuclear weapons in distinct circumstances, — either in the atomic bombings of Hiroshima and Nagasaki (1945), or in nuclear testing (during the Cold-War era) in regions such as Central Asia and the Pacific. Focusing on their intensive suffering (e.g., ensuing from radioactive contamination and forced displacement)<sup>160</sup>, affecting successive generations, they have drawn attention to the humanitarian consequences of nuclear weapon detonations.

150. In addressing the issue of nuclear weapons, on four successive occasions (cf. *infra*), the ICJ appears, however, to have always suffered from inter-State myopia. Despite the clarity of the formidable threat that nuclear weapons represent, the treatment of the issue of their prohibition under international law has most regrettably remained permeated by ambiguities. The present case of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* is the third time that attempts were made, by means of the lodging of contentious cases with the ICJ, to obtain its pronouncement thereon. On two prior occasions — in the *Nuclear Tests* cases (1974 and 1995)<sup>161</sup>, the Court assumed, in both of them, a rather evasive posture, avoiding to pronounce clearly on the substance of a matter pertaining to the very survival of humankind.

151. May I here briefly single out one aspect of those earlier contentious proceedings, given its significance in historical perspective. It should not pass unnoticed that, in the first *Nuclear Tests* case (*Australia v.*

<sup>158</sup> Kenzaburo Oe, *Hiroshima Notes* [1965], N.Y./London, Marion Boyars, 1997 (reed.), pp. 72 and 159.

<sup>159</sup> *Ibid.*, pp. 149 and 162.

<sup>160</sup> Cf. J. Borrie, “Humanitarian Reframing of Nuclear Weapons and the Logic of a Ban”, 90 *International Affairs* (2014), p. 633, and cf. pp. 637, 643-644 and 646.

<sup>161</sup> Cf. *I.C.J. Reports 1974*, pp. 63-455; and cf. *I.C.J. Reports 1995*, pp. 4-23, and the position of three dissenting judges in *ibid.*, pp. 317-421.

*France; New Zealand v. France*), one of the applicant States contended, *inter alia*, that the nuclear testing undertaken by the French Government in the South Pacific region violated not only the right of New Zealand that no radioactive material enter its territory, air space and territorial waters *and* those of other Pacific territories but *also* “the rights of all members of the international community, including New Zealand, that no nuclear tests that give rise to radioactive fall-out be conducted”<sup>162</sup>.

152. For its part, the other applicant State contended that it was seeking protection to the life, health and well-being of Australia’s population, in common with the populations of other States, against atmospheric nuclear tests by any State<sup>163</sup>. Thus, over three decades ago, the perspective of the Applications instituting proceedings of both New Zealand and Australia (of 1973) went clearly — and correctly so — beyond the purely inter-State dimension, as the problem at issue concerned the international community as a whole.

153. Both Australia and New Zealand insisted on the people-centred approach throughout the legal proceedings (written and oral phases). New Zealand, for example, in its Memorial, invoked the obligation *erga omnes* not to undertake nuclear testing “owed to the international community as a whole” (paras. 207-208), adding that non-compliance with it aroused “the keenest sense of alarm and antagonism among the peoples” and States of the region wherein the tests were conducted (para. 212). In its oral arguments in the public sitting of 10 July 1974 in the same *Nuclear Tests* case, New Zealand again invoked “the rights of all members of the international community”, and the obligations *erga omnes* owed to the international community as a whole<sup>164</sup>. And Australia, for example, in its oral arguments in the public sitting of 8 July 1974, referring to the 1963 Partial Test Ban Treaty, underlined the concern of “the whole international community” for “the future of mankind” and the responsibility imposed by “the principles of international law” upon “all States to refrain from testing nuclear weapons in the atmosphere”<sup>165</sup>.

154. The outcome of the *Nuclear Test* cases, however, was rather disappointing: even though the ICJ issued orders of provisional measures of protection in the cases in June 1973 (requiring the respondent State to cease testing), subsequently, in its Judgments of 1974<sup>166</sup>, in view of the

<sup>162</sup> Application instituting proceedings (of 9 May 1973), *Nuclear Tests* case (*New Zealand v. France*), pp. 8 and 15-16, cf. pp. 4-16.

<sup>163</sup> *Ibid.*, *Nuclear Tests* case (*Australia v. France*), pp. 12 and 14, paras. 40, 47 and 49 (1).

<sup>164</sup> *I.C.J. Pleadings, Nuclear Tests (New Zealand v. France)*, Vol. II: 1973-1974, pp. 256-257 and 264-266.

<sup>165</sup> *I.C.J. Pleadings, Nuclear Tests (Australia v. France)*, Vol. I, p. 503.

<sup>166</sup> For a critical parallel between the 1973 Orders and the 1974 Judgments, cf. P. Lellouche, “The *Nuclear Tests* Cases: Judicial Silence *versus* Atomic Blasts”, 16 *Harvard*

announcement of France's voluntary discontinuance of its atmospheric tests, the ICJ found, yielding to State voluntarism, that the claims of Australia and New Zealand no longer had "any object" and that it was thus not called upon to give a decision thereon<sup>167</sup>. The dissenting judges in the case rightly pointed out that the legal dispute between the Contending Parties, far from having ceased, still persisted, since what Australia and New Zealand sought was a declaratory judgment of the ICJ stating that atmospheric nuclear tests were contrary to international law<sup>168</sup>.

155. The reticent position of the ICJ in that case was even more regrettable if one recalls that the applicants, in referring to the "psychological injury" caused to the peoples of the South Pacific region through their "anxiety as to the possible effects of radioactive fall-out on the well-being of themselves and their descendants", as a result of the atmospheric nuclear tests, ironically invoked the notion of *erga omnes* obligations (as propounded by the ICJ itself in its *obiter dicta* in the *Barcelona Traction* case only four years earlier)<sup>169</sup>. As the ICJ reserved itself the right, in certain circumstances, to reopen the case decided in 1974, it did so two decades later, upon an Application instituted by New Zealand *versus* France. But in its Order of 22 September 1995, the ICJ dismissed the complaint, as it did not fit into the *caveat* of the 1974 Judgment, which concerned atmospheric nuclear tests; here, the complaint was directed against the underground nuclear tests conducted by France since 1974<sup>170</sup>.

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*International Law Journal* (1975), pp. 615-627 and 635; and, for further criticisms, cf. *ibid.*, pp. 614-637.

<sup>167</sup> *I.C.J. Reports 1974*, pp. 272 and 478, respectively.

<sup>168</sup> *Nuclear Tests* case, joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock, *ibid.*, pp. 319-322, 367-369, 496, 500, 502-504, 514 and 520-521; and cf. dissenting opinion of Judge De Castro, *ibid.*, pp. 386-390; and dissenting opinion of Judge Barwick, *ibid.*, pp. 392-394, 404-405, 436-437 and 525-528. It was further pointed out that the ICJ should thus have dwelt upon the question of the existence of rules of *customary* international law prohibiting States from causing, through atmospheric nuclear tests, the deposit of radio-active fall-out on the territory of other States; *Nuclear Tests* case, separate opinion of Judge Petrán, *ibid.*, pp. 303-306 and 488-489. It was the existence or otherwise of such customary rules that had to be determined, — a question which unfortunately was left largely unanswered by the Court in that case.

<sup>169</sup> As recalled in the joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock, *ibid.*, pp. 362, 368-369 and 520-521; as well as in the dissenting opinion of Judge Barwick, *ibid.*, pp. 436-437.

<sup>170</sup> Cf. *I.C.J. Reports 1995*, pp. 288-308; once again, there were dissenting opinions (cf. *ibid.*, pp. 317-421). Furthermore, petitions against the French nuclear tests in the atoll of Mururoa and in that of Fangataufa, in French Polynesia, were lodged with the European

156. The ICJ thus lost two historical opportunities, in both contentious cases (1974 and 1995), to clarify the key point at issue (nuclear tests). And now, with the decision it has just rendered today, 5 October 2016, it has lost a third occasion, this time to pronounce on the *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, at the request of the Marshall Islands. This time the Court has found that the existence of a legal dispute has not been established before it and that it has no jurisdiction to consider the Application lodged with it by the Marshall Islands on 24 April 2014.

157. Furthermore, in the mid-1990s, the Court was called upon to exercise its advisory function, in respect of a directly related issue, that of nuclear weapons: both the UN General Assembly and the World Health Organization (WHO) opened those proceedings before the ICJ, by means of requests for an Advisory Opinion. Such requests no longer referred to nuclear tests, but rather to the question of the threat or use of nuclear weapons in the light of international law, for the determination of their illegality or otherwise.

158. In response to only one of the applications, that of the UN General Assembly<sup>171</sup>, the Court, in the Advisory Opinion of 8 July 1996 on the *Threat or Use of Nuclear Weapons*, affirmed that neither customary international law nor conventional international law authorizes specifically the threat or use of nuclear weapons; neither one, nor the other, contains a complete and universal prohibition of the threat or use of nuclear weapons as such; it added that such threat or use which is contrary to Article 2 (4) of the UN Charter and does not fulfil the requisites of its Article 51, is illicit; moreover, the conduct in armed conflicts should be compatible with the norms applicable in them, including those of international humanitarian law; it also affirmed the obligation to undertake in good will negotiations conducive to nuclear disarmament in all its aspects<sup>172</sup>.

159. In the most controversial part of its Advisory Opinion (resolatory point 2E), the ICJ stated that the threat or use of nuclear weapons “would be generally contrary to the rules of international law applicable in armed conflict”, mainly those of international humanitarian law; however, the Court added that, at the present stage of international law “it cannot

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Commission of Human Rights (ECHR); cf. ECHR, case *N. N. Tauira and 18 Others v. France* (Appl. No. 28204/95), decision of 4 December 1995, 83-A *Decisions and Reports* (1995), p. 130.

<sup>171</sup> As the ICJ understood, as to the other application, that the WHO was not competent to deal with the question at issue, despite the purposes of that UN specialized agency at issue and the devastating effects of nuclear weapons over human health and the environment.

<sup>172</sup> *I.C.J. Reports 1996 (I)*, pp. 266-267.

conclude definitively if 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”<sup>173</sup>. The Court therein limited itself to record the existence of a legal uncertainty.

160. In fact, it did not go further than that, and the Advisory Opinion was permeated with evasive ambiguities, not avoiding the shadow of the *non liquet*, in relation to a question which affects, more than each State individually, the whole of humankind. The Advisory Opinion made abstraction of the fact that international humanitarian law applies likewise in case of self-defence, always safeguarding the principles of distinction and proportionality (which nuclear weapons simply ignore)<sup>174</sup>, and upholding the prohibition of infliction of unnecessary suffering.

161. The Advisory Opinion could and should have given greater weight to a point made before the ICJ in the oral arguments of November 1995, namely, that of the need of a people-centred approach in the present domain. Thus, it was stated, for example, that the “experience of the Marshallese people confirms that unnecessary suffering is an unavoidable consequence of the detonation of nuclear weapons”<sup>175</sup>; the effects of nuclear weapons, by their nature, are widespread, adverse and indiscriminate, affecting also future generations<sup>176</sup>. It was further stated that the “horrifying evidence” of the use of atomic bombs in Hiroshima and Nagasaki, followed by the experience and the aftermath of the nuclear tests carried out in the region of the Pacific Island States in the 1950s and the 1960s, have alerted to “the much graver risks to which mankind is exposed by the use of nuclear weapons”<sup>177</sup>.

<sup>173</sup> *I.C.J. Reports 1996 (I)*, p. 266.

<sup>174</sup> L. Doswald-Beck, “International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons”, 316 *International Review of the Red Cross* (1997), pp. 35-55; H. Fujita, “The Advisory Opinion of the International Court of Justice on the Legality of Nuclear Weapons”, *ibid.*, pp. 56-64. International Humanitarian Law prevails also over self-defence; cf. M.-P. Lanfranchi and Th. Christakis, *La licéité de l’emploi d’armes nucléaires devant la Cour Internationale de Justice*, Aix-Marseille/Paris, Université d’Aix-Marseille III/Economica, 1997, pp. 111, 121 and 123; S. Mahmoudi, “The International Court of Justice and Nuclear Weapons”, 66 *Nordic Journal of International Law* (1997), pp. 77-100; E. David, “The Opinion of the International Court of Justice on the Legality of the Use of Nuclear Weapons”, 316 *International Review of the Red Cross* (1997), pp. 21-34.

<sup>175</sup> CR 1995/32, of 14 November 1995, p. 22 (statement of the Marshall Islands).

<sup>176</sup> *Ibid.*, p. 23.

<sup>177</sup> *Ibid.*, p. 31 (statement of Solomon Islands). Customary international law and general principles of international law have an incidence in this domain; *ibid.*, pp. 36 and 39-40.

162. The 1996 Opinion, on the one hand, recognized that nuclear weapons cause indiscriminate and durable suffering, and have an enormous destructive effect (para. 35), and that the principles of humanitarian law (encompassing customary law) are “intransgressible” (para. 79); nevertheless, these considerations did not appear sufficient to the Court to discard the use of such weapons also in self-defence, thus eluding to tell what the law is in all circumstances. It is clear to me that States are bound to respect, and to ensure respect, for international humanitarian law (IHL) and the international law of human rights (ILHR) in *any circumstances*; their fundamental principles belong to the domain of *jus cogens*, in prohibition of nuclear weapons.

163. Again, in the 1996 Opinion, it was the dissenting judges, and not the Court’s split majority, who drew attention to this<sup>178</sup>, and to the relevance of the Martens clause in the present context<sup>179</sup> (cf. Part XIII, *infra*). Moreover, the 1996 Opinion also minimized (para. 71) the resolutions of the UN General Assembly which affirm the illegality of nuclear weapons<sup>180</sup> and condemn their use as a violation of the UN Charter and as a crime against humanity. Instead, it took note of the “policy of deterrence”, which led it to find that the members of the international community continued “profoundly divided” on the matter, rendering it impossible to determine the existence of an *opinio juris* in this respect (para. 67).

164. It was not incumbent upon the Court to resort to the unfounded strategy of “deterrence” (cf. Part XI, *supra*), devoid of any legal value for the determination of the formation of a customary international law obligation of prohibition of the use of nuclear weapons. The Court did not contribute on this matter. In unduly relying on “deterrence” (para. 73), it singled out a division, in its view “profound”, between an extremely reduced group of nuclear powers on the one hand, and the vast majority of the countries of the world on the other; it ended up by favouring the former, by means of an inadmissible *non liquet*<sup>181</sup>.

<sup>178</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, dissenting opinion of Judge Koroma, pp. 573-574 and 578.

<sup>179</sup> Cf. *ibid.*, dissenting opinions of Judge Shahabuddeen, pp. 386-387, 406, 408, 410-411 and 425; and of Judge Weeramantry, pp. 477-478, 481, 483, 486-487, 490-491, 494, 508 and 553-554.

<sup>180</sup> Notably, the ground-breaking General Assembly resolution A/RES/1653 (XVI), of 24 November 1961.

<sup>181</sup> A. A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, *op. cit. supra* note 111, pp. 415-418; L. Condorelli, “Nuclear Weapons: A Weighty Matter for the International Court of Justice — *Jura Novit Curia?*”, 316 *International Review of the Red Cross* (1997), pp. 9-20; M. Mohr, “Advisory Opinion of the



165. The Court, thus, lost yet another opportunity — in the exercise of its advisory function as well — to contribute to the consolidation of the *opinio juris communis* in condemnation of nuclear weapons. Its 1996 Advisory Opinion considered the survival of a hypothetical State (in its resolutive point 2E), rather than that of peoples and individuals, and ultimately of humankind as a whole. It seemed to have overlooked that the survival of a State cannot have primacy over the right to survival of humankind as a whole.

### 3. *The Prohibition of Nuclear Weapons: The Fundamental Right to Life*

166. There is yet another related point to keep in mind. The ICJ's 1996 Advisory Opinion erroneously took IHL as *lex specialis* (para. 25), overstepping the ILHR, oblivious that the maxim *lex specialis derogat generalis*, thus understood, has no application in the present context: in face of the immense threat of nuclear weapons to human life on earth, both IHL and the ILHR apply in a converging way<sup>182</sup>, so as to enhance the much-needed protection of human life. In any circumstances, the norms which best protect are the ones which apply, be they of IHL or of the ILHR, or any other branch of international protection of the human person (such as the international law of refugees). They are all equally important. Regrettably, the 1996 Advisory Opinion unduly minimized the international case law and the whole doctrinal construction on the right to life in the ambit of the ILHR.

167. It should not pass unnoticed, in this connection, that contemporary international human rights tribunals, such as the European (ECHR) and the Inter-American (IACtHR) Courts of Human Rights, in the adjudication of successive cases in recent years, have taken into account the relevant principles and norms of both the ILHR and IHL (conventional and customary). For its part, the African Commission of Human and Peoples' Rights (ACHPR), in its longstanding practice, has likewise acknowledged the approximations and convergences between the ILHR

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International Court of Justice on the Legality of the Use of Nuclear Weapons under International Law — A Few Thoughts on Its Strengths and Weaknesses”, 316 *International Review of the Red Cross* (1997), pp. 92-102. The Opinion is not conclusive and provides no guidance; J.-P. Queneudec, “E.T. à la C.I.J. : méditations d'un extra-terrestre sur deux avis consultatifs”, 100 *Revue générale de droit international public* (1996), pp. 907-914, esp. p. 912.

<sup>182</sup> Cf. A. A. Cançado Trindade, *Derecho Internacional de los Derechos Humanos, Derecho Internacional de los Refugiados y Derecho Internacional Humanitario — Aproximaciones y Convergencias*, Geneva, ICRC, [2000], pp. 1-66.

and IHL, and drawn attention to the principles underlying both branches of protection (such as, e.g., the principle of humanity).

168. This has been done, in distinct continents, so as to seek to secure the most effective safeguard of the protected rights, in all circumstances (including in times of armed conflict). Contrary to what was held in the ICJ's 1996 Advisory Opinion, there is no *lex specialis* here, but rather a concerted endeavour to apply the relevant norms (be they of the ILHR or of IHL) that best protect human beings. This is particularly important when they find themselves in a situation of utmost vulnerability, — such as in the present context of threat or use of nuclear weapons. In their case law, international human rights tribunals (like the ECHR and the IACtHR) have focused attention on the imperative of securing protection, e.g., to the fundamental right to life, of persons in great vulnerability (potential victims)<sup>183</sup>.

169. In the course of the proceedings before the ICJ in the present cases of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, the applicant State draws attention reiteratedly to the devastating effects upon human life of nuclear weapons detonations. Thus, in the case opposing the Marshall Islands to the United Kingdom, the applicant State draws attention, in its Memorial, to the destructive effects of nuclear weapons (testing) in space and time (pp. 12-14). In its oral arguments of 11 March 2016, the Marshall Islands addresses the “tragic losses to the Marshallese”, the “dire health consequences suffered by the Marshallese following nuclear contamination, including extreme birth defects and cancers”<sup>184</sup>.

170. In the case opposing the Marshall Islands to India, the applicant State, in its Memorial, refers to the grave “health and environmental consequences of nuclear testing” upon the Marshallese (pp. 5-6). In its oral arguments of 7 March 2016, the Marshall Islands stated:

“The Marshall Islands has a unique and devastating history with nuclear weapons. While it was designated as a Trust Territory by the United Nations, no fewer than 67 atomic and thermonuclear weapons were deliberately exploded as ‘tests’ in the Marshall Islands, by the United States. (. . .) Several islands in my country were vaporized and others are estimated to remain uninhabitable for thousands of years.

<sup>183</sup> Cf. A. A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford University Press, 2012 [reprint], Chaps. II-III and VII, pp. 17-62 and 125-131.

<sup>184</sup> CR 2016/5, of 11 March 2016, p. 9, para. 10.

Many, many Marshallese died, suffered birth defects never before seen and battled cancers resulting from the contamination. Tragically the Marshall Islands thus bears *eyewitness* to the horrific and indiscriminate lethal capacity of these weapons, and the intergenerational and continuing effects that they perpetuate even 60 years later.

One ‘test’ in particular, called the ‘Bravo’ test [in March 1954], was one thousand times stronger than the bombs dropped on Hiroshima and Nagasaki.”<sup>185</sup>

171. And in the case opposing the Marshall Islands to Pakistan, the applicant State, in its Memorial, likewise addresses the serious “health and environmental consequences of nuclear testing” upon the Marshallese (pp. 5-6). In its oral arguments of 8 March 2016, the Marshall Islands recalls the 67 atomic and thermonuclear weapons “tests” that it had to endure (since it became a UN Trust Territory); it further recalls the reference, in the UN Charter, to nations “large and small” having “equal rights” (preamble), and to the assertion in its Article 2 that the United Nations is “based on the principle of the sovereign equality of all its Members”<sup>186</sup>.

172. Two decades earlier, in the course of the advisory proceedings before the ICJ of late 1995 preceding the 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons*, the devastating effects upon human life of nuclear weapons detonations were likewise brought to the Court’s attention. It is beyond the purposes of the present dissenting opinion to review all statements to this effect; suffice it here to recall two of the most moving statements, from the Mayors of Hiroshima and Nagasaki, who appeared before the Court as members of the delegation of Japan. The Mayor of Hiroshima (Mr. Takashi Hiraoka) thus began his statement of 7 November 1995 before the ICJ:

“I am here today representing Hiroshima citizens, who desire the abolition of nuclear weapons. More particularly, I represent the hundreds of thousands of victims whose lives were cut short, and survivors who are still suffering the effects of radiation, 50 years later. On their behalf, I am here to testify to the cruel, inhuman nature of nuclear weapons.

.....  
 The development of the atomic bomb was the product of co-

<sup>185</sup> CR 2016/1, of 7 March 2016, p. 16, paras. 4-5.

<sup>186</sup> CR 2016/2, of 8 March 2016, p. 10, paras. 5-7.

operation among politicians, military and scientists. The nuclear age began the moment the bombs were dropped on human beings.

Their enormous destructive power reduced utterly innocent civilian populations to ashes. Women, the elderly, and the newborn were bathed in deadly radiation and slaughtered.”<sup>187</sup>

173. After stressing that the mass killing was “utterly indiscriminate”, he added that, even today, “thousands of people struggle daily with the curse of illness caused by that radiation”, there being until then “no truly accurate casualty figures”<sup>188</sup>. The exposure in Hiroshima to high-levels of radiation, he proceeded, “was the first in human history”, generating leukaemia, distinct kinds of cancer (of breast, lung, stomach, thyroid, and other), extending for “years or decades”, with all the fear generated by such continuing killing “across years or decades”<sup>189</sup>.

174. Even half a century later, added the Mayor of Hiroshima, “the effects of radiation on human bodies are not thoroughly understood. Medically, we do know that radiation destroys cells in the human body, which can lead to many forms of pathology”<sup>190</sup>. The victimized segments of the population have continued suffering “psychologically, physically, and socially from the atomic bomb’s after-effects”<sup>191</sup>. He further stated that

“The horror of nuclear weapons (. . .) derives (. . .) from the tremendous destructive power, but equally from radiation, the effects of which reach across generations. (. . .) What could be more cruel? Nuclear weapons are more cruel and inhumane than any weapon banned thus far by international law.”<sup>192</sup>

175. After singling out the significance of UN General Assembly resolution A/RES/1653 (XVI) of 1961, the Mayor of Hiroshima warned that “[t]he stockpiles of nuclear weapons on earth today are enough to annihilate the entire human race several times over. These weapons are possessed on the assumption that they can be used.”<sup>193</sup> He con-

<sup>187</sup> CR 1995/27, of 7 November 1995, pp. 22-23.

<sup>188</sup> *Ibid.*, pp. 24-25.

<sup>189</sup> *Ibid.*, pp. 25-27.

<sup>190</sup> *Ibid.*, p. 25.

<sup>191</sup> *Ibid.*, pp. 27-28.

<sup>192</sup> *Ibid.*, p. 30.

<sup>193</sup> *Ibid.*, pp. 30-31.

cluded with a strong criticism of the strategy of “deterrence”; in his own words,

“As long as nuclear weapons exist, the human race faces a real and present danger of self-extermination. The idea based on nuclear deterrence that nuclear war can be controlled and won exhibits a failure of human intelligence to comprehend the human tragedy and global environmental destruction brought about by nuclear war.

[O]nly through a treaty that clearly stipulates the abolition of nuclear weapons can the world step toward the future. (. . .)”<sup>194</sup>

176. For his part, the Mayor of Nagasaki (Mr. Iccho Itoh), in his statement before the ICJ, also of 7 November 1995, likewise warned that “nuclear weapons bring enormous, indiscriminate devastation to civilian populations”; thus, five decades ago, in Hiroshima and Nagasaki, “a single aircraft dropped a single bomb and snuffed out the lives of 140,000 and 74,000 people, respectively. And that is not all. Even the people who were lucky enough to survive continue to this day to suffer from the late effects unique to nuclear weapons. In this way, nuclear weapons bring enormous, indiscriminate devastation to civilian populations”<sup>195</sup>.

177. He added that “the most fundamental difference between nuclear and conventional weapons is that the former release radioactive rays at the time of explosion”, and the exposure to large doses of radiation generates a “high incidence of disease” and mortality (such as leukaemia and cancer). Descendants of atomic bomb survivors will have, amidst anxiety, “to be monitored for several generations to clarify the genetic impact”; “nuclear weapons are inhuman tools for mass slaughter and destruction”, their use “violates international law”<sup>196</sup>. The Mayor of Nagasaki concluded with a strong criticism of “nuclear deterrence”, characterizing it as “simply the maintenance of a balance of fear” (CR 1995/27, p. 37), always threatening peace, with its “psychology of suspicion and intimidation”; the Nagasaki survivors of the atomic bombing of 50 years ago, “continue to live in fear of late effects”<sup>197</sup>.

178. Those testimonies before the ICJ, in the course of contentious proceedings (in 2016) as well as advisory proceedings (two decades ear-

<sup>194</sup> CR 1995/27, of 7 November 1995, p. 31.

<sup>195</sup> *Ibid.*, p. 33.

<sup>196</sup> *Ibid.*, pp. 36-37.

<sup>197</sup> *Ibid.*, pp. 39.

lier, in 1995), leave it quite clear that the threat or use (including “testing”) of nuclear weapons entails an arbitrary deprivation of human life, and is in flagrant breach of the fundamental right to life. It is in manifest breach of the ILHR, of IHL, as well as the law of the United Nations, and has an incidence also on the ILR. There are, furthermore, in such grave breach, aggravating circumstances: the harm caused by radiation from nuclear weapons cannot be contained in space, nor can it be contained in time, it is a true inter-generational harm.

179. As pointed out in the pleadings before the ICJ of late 1995, the use of nuclear weapons thus violates the right to life (and the right to health) of “not only people currently living, but also of the unborn, of those to be born, of subsequent generations”<sup>198</sup>. Is there anything quint-essentially more cruel? To use nuclear weapons appears like condemning innocent persons to hell on earth, even *before* they are born. That seems to go even further than the Book of Genesis’s story of the original sin. In reaction to such extreme cruelty, the consciousness of the rights inherent to the human person has always marked a central presence in endeavours towards complete nuclear disarmament.

#### 4. *The Absolute Prohibitions of Jus Cogens and the Humanization of International Law*

180. The absolute prohibition of arbitrary deprivation of human life (*supra*) is one of *jus cogens*, originating in the ILHR, and with an incidence also on IHL and the ILR, and marking presence also in the law of the United Nations. The absolute prohibition of inflicting cruel, inhuman or degrading treatment is one of *jus cogens*, originating likewise in the ILHR, and with an incidence also on IHL and the ILR. The absolute prohibition of inflicting unnecessary suffering is one of *jus cogens*, originating in IHL, and with an incidence also on the ILHR and the ILR.

181. In addition to those converging trends (ILHR, IHL, ILR) of international protection of the rights of the human person, those prohibitions of *jus cogens* mark presence also in contemporary international criminal law (ICL), as well as in the *corpus juris gentium* of condemnation of all weapons of mass destruction. The absolute prohibitions of *jus cogens* nowadays encompass the threat or use of nuclear weapons, for all

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<sup>198</sup> CR 1995/35, of 15 November 1995, p. 28 (statement of Zimbabwe).

the human suffering they entail: in the case of their use, a suffering without limits in space or in time, and extending to succeeding generations.

182. I have been characterizing, over the years, the doctrinal and jurisprudential construction of international *jus cogens* as proper of the new *jus gentium* of our times, the international law for humankind. I have been sustaining, moreover, that, by definition, international *jus cogens* goes beyond the law of treaties, extending itself to the law of the international responsibility of the State, and to the whole *corpus juris* of contemporary international law, and reaching, ultimately, any juridical act<sup>199</sup>.

183. In my lectures in an OAS Course of international law delivered in Rio de Janeiro almost a decade ago, e.g., I have deemed it fit to ponder that

“The fact that the concepts both of the *jus cogens*, and of the obligations (and rights) *erga omnes* ensuing therefrom, already integrate the conceptual universe of contemporary international law, the new *jus gentium* of our days, discloses the reassuring and necessary opening of this latter, in the last decades, to certain superior and fundamental values. This significant evolution of the recognition and assertion of norms of *jus cogens* and obligations *erga omnes* of protection is to be fostered, seeking to secure its full practical application, to the benefit of all human beings. In this way the universalist vision of the founding fathers of the *droit des gens* is being duly rescued. New conceptions of the kind impose themselves in our days, and, of their faithful observance, will depend to a large extent on the future evolution of contemporary international law.

This latter does not emanate from the inscrutable ‘will’ of the States, but rather, in my view, from human conscience. General or customary international law emanates not so much from the practice of States (not devoid of ambiguities and contradictions), but rather from the *opinio juris communis* of all the subjects of international law (States, international organizations, human beings, and humankind as a whole). Above the will stands the conscience. (. . .)

The current process of the necessary *humanization* of international law stands in reaction to that state of affairs. It bears in mind the universality and unity of the human kind, which inspired, more than four and a half centuries ago, the historical process of formation of the *droit des gens*. In rescuing the universalist vision which marked the origins of the most lucid doctrine of international law, the aforementioned process of humanization contributes to the construction of the new *jus gentium* of the twenty-first century, oriented by the

<sup>199</sup> A. A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, *op. cit. supra* note 111, Chap. XII, pp. 291-326.

general principles of law. This process is enhanced by its own conceptual achievements, such as, to start with, the acknowledgement and recognition of *jus cogens* and the consequent obligations *erga omnes* of protection, followed by other concepts disclosing likewise a universalist perspective of the law of nations.

.....  
 The emergence and assertion of *jus cogens* in contemporary international law fulfil the necessity of a minimum of verticalization in the international legal order, erected upon pillars in which the juridical and the ethical are merged. The evolution of the concept of *jus cogens* transcends nowadays the ambit of both the law of treaties and the law of the international responsibility of the States, so as to reach general international law and the very foundations of the international legal order.”<sup>200</sup>

#### 5. Pitfalls of Legal Positivism: A Rebuttal of the So-Called Lotus “Principle”

184. A matter which concerns the whole of humankind, such as that of the existence of nuclear weapons, can no longer be appropriately dealt with from a purely inter-State outlook of international law, which is wholly surpassed in our days. After all, without humankind there is no State whatsoever; one cannot simply have in mind States, apparently overlooking humankind. In its 1996 Advisory Opinion, the ICJ took note of the treaties which nowadays prohibit, e.g., biological and chemical weapons<sup>201</sup>, and weapons which cause excessive damages or have indiscriminate effects (*I.C.J. Reports 1996 (I)*, p. 256, para. 76<sup>202</sup>).

185. But the fact that nowadays, in 2016, there does not yet exist a similar general treaty, of specific prohibition of nuclear weapons, does not mean that these latter are permissible (in certain circumstances, even in self-defence)<sup>203</sup>. In my understanding, it cannot be sustained, in a matter which concerns the future of humankind, that which is not expressly prohibited is thereby permitted (a classic postulate of positivism). This

<sup>200</sup> A. A. Cançado Trindade, “*Jus Cogens: The Determination and the Gradual Expansion of Its Material Content in Contemporary International Case Law*”, *XXXV Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano — 2008*, Washington D.C., OAS General Secretariat, 2009, pp. 3-29.

<sup>201</sup> The Geneva Protocol of 1925, and the Conventions of 1972 and 1993 against Biological and Chemical Weapons, respectively.

<sup>202</sup> E.g., the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects.

<sup>203</sup> The Roman-privatist influence — with its emphasis on the autonomy of the will had harmful consequences in traditional international law; in the public domain, quite to the contrary, conscience stands above the “will”, also in the determination of competences.



posture would amount to the traditional — and surpassed — attitude of the *laissez-faire*, *laissez-passer*, proper of an international legal order fragmented by State voluntarist subjectivism, which in the history of international law has invariably favoured the most powerful ones. *Ubi societas, ibi jus* . . .

186. Legal positivists, together with the so-called “realists” of *Realpolitik*, have always been sensitive to the established power, rather than to values. They overlook the time dimension, and are incapable to behold a universalist perspective. They are static, in time and space. Nowadays, in the second decade of the twenty-first century, in an international legal order which purports to assert common superior values, amidst considerations of international *ordre public*, and basic considerations of humanity, it is precisely the reverse logic which is to prevail: *that which is not permitted, is prohibited*<sup>204</sup>.

187. Even in the days of the “*Lotus*” case (1927), the view endorsed by the old PCIJ whereby under international law everything that was not expressly prohibited would thereby be permitted, was object of severe criticisms, not only of a compelling dissenting opinion in the case itself<sup>205</sup> but also on the part of expert writing of the time<sup>206</sup>. Such conception could only have flourished in an epoch “politically secure” in global terms, certainly quite different from that of the current nuclear age, in face of the recurrent threat of nuclear weapons and other weapons of mass destruction, the growing vulnerability of territorial States and indeed of the world population, and the increasing complexity in the conducting of international relations. In our days, in face of such a terrifying threat, it is the logical opposite to that of the “*Lotus*” case which imposes itself: all that is not expressly permitted is surely prohibited<sup>207</sup>. All weapons of mass destruction, including nuclear weapons, are illegal and prohibited under contemporary international law.

188. The case of *Shimoda and Others* (District Court of Tokyo, decision of 7 December 1963), with the dismissed claims of five injured survi-

<sup>204</sup> A. A. Cançado Trindade, *O Direito Internacional em um Mundo em Transformação*, Rio de Janeiro, Edit. Renovar, 2002, p. 1099.

<sup>205</sup> Cf. dissenting opinion of Judge Loder, “*Lotus*” case [*France v. Turkey*], *Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 34 (such conception was not in accordance with the “spirit of international law”).

<sup>206</sup> Cf. J. L. Briery, *The Basis of Obligation in International Law and Other Papers*, Oxford, Clarendon Press, 1958, p. 144; H. Lauterpacht, *The Function of Law in the International Community*, Oxford, Clarendon Press, 1933, pp. 409-412 and 94-96; and cf., subsequently, e.g., G. Herczegh, “Sociology of International Relations and International Law”, *Questions of International Law* (ed. G. Haraszti), Budapest, Progresprint, 1971, pp. 69-71 and 77.

<sup>207</sup> A. A. Cançado Trindade, *O Direito Internacional em um Mundo em Transformação*, *op. cit. supra* note 204, p. 1099.

vors of the atomic bombings of Hiroshima and Nagasaki, stands as a grave illustration of the veracity of the *maxim summum jus, summa injuria*, when one proceeds on the basis of an allegedly absolute submission of the human person to a degenerated international legal order built on an exclusively inter-State basis. May I here reiterate what I wrote in 1981, regarding the *Shimoda and Others* case, namely,

“The whole arguments in the case reflect the insufficiencies of an international legal order being conceived and erected on the basis of an exclusive inter-State system, leaving individual human beings impotent in the absence of express treaty provisions granting them procedural status at international level. Even in such a matter directly affecting fundamental human rights, the arguments were conducted in the case in the classical lines of the conceptual apparatus of the so-called law on diplomatic protection, in a further illustration of international legal reasoning still being haunted by the old Vattelian fiction.”<sup>208</sup>

189. There exists nowadays an *opinio juris communis* as to the illegality of all weapons of mass destruction, including nuclear weapons, and the obligation of nuclear disarmament, under contemporary international law. There is no “gap” concerning nuclear weapons; given the indiscriminate, lasting and indescribable suffering they inflict, they are outlawed, as much as other weapons of mass destruction (biological and chemical weapons) are. The positivist outlook purporting to challenge this prohibition of contemporary general international law has long been surpassed. Nor can this matter be approached from a strictly inter-State outlook, without taking into account the condition of peoples and human beings as subjects of international law.

190. All weapons of mass destruction are illegal under contemporary international law. The threat or use of such weapons is condemned in any circumstances by the universal juridical conscience, which in my view constitutes the ultimate material source of international law, as of all law. This is in keeping with the conception of the formation and evolution of international law which I have been sustaining for many years; it transcends the limitations of legal positivism, seeking to respond effectively to

<sup>208</sup> A. A. Cançado Trindade, “The Voluntarist Conception of International Law: A Re-Assessment”, 59 *Revue de droit international de sciences diplomatiques et politiques*, Geneva (1981), p. 214, and cf. pp. 212-213. On the need of a universalist perspective, cf. also K. Tanaka, “The Character of World Law in the International Court of Justice” [translated from Japanese into English by S. Murase], 15 *Japanese Annual of International Law* (1971), pp. 1-22.

the needs and aspirations of the international community as a whole, and, ultimately, of all humankind.

### XIII. RECOURSE TO THE “MARTENS CLAUSE” AS AN EXPRESSION OF THE *RAISON D’HUMANITÉ*

191. Even if there was a “gap” in the law of nations in relation to nuclear weapons, which there is not, it is possible to fill it by resorting to general principles of law. In its 1996 Advisory Opinion, the ICJ preferred to focus on self-defence of a hypothetical individual State, instead of developing the rationale of the Martens clause, the purpose of which is precisely that of filling gaps<sup>209</sup> in the light of the principles of the law of nations, the “laws of humanity” and the “dictates of public conscience” (terms of the wise premonition of Fyodor Fyodorovich von Martens<sup>210</sup>, originally formulated at the I Hague Peace Conference of 1899).

192. Yet, continuing recourse to the Martens clause, from 1899 to our days, consolidates it as an expression of the strength of human conscience. Its historical trajectory of more than one century has sought to extend protection juridically to human beings in all circumstances (even if not contemplated by conventional norms). Its reiteration for over a century in successive international instruments, besides showing that conventional and customary international law in the domain of protection of the human person go together, reveals the Martens clause as an emanation of the *material source par excellence* of the whole law of nations (the universal juridical conscience), giving expression to the *raison d’humanité* and imposing limits to the *raison d’Etat*<sup>211</sup>.

193. It cannot be denied that nuclear weapons are intrinsically indiscriminate, incontrollable, that they cause severe and durable damage and in a wide scale in space and time, that they are prohibited by international humanitarian law (Articles 35, 48 and 51 of the Additional Protocol I

<sup>209</sup> J. Salmon, “Le problème des lacunes à la lumière de l’avis ‘Licéité de la menace ou de l’emploi d’armes nucléaires’ rendu le 8 juillet 1996 par la Cour internationale de Justice”, *Mélanges en l’honneur de N. Valticos — Droit et justice* (ed. R.-J. Dupuy), Paris, Pedone, 1999, pp. 197-214, esp. pp. 208-209; R. Ticehurst, “The Martens Clause and the Laws of Armed Conflict”, 317 *International Review of the Red Cross* (1997), pp. 125-134, esp. pp. 133-134; A. Azar, *Les opinions des juges dans l’avis consultatif sur la licéité de la menace ou de l’emploi d’armes nucléaires*, Brussels, Bruylant, 1998, p. 61.

<sup>210</sup> Which was intended to extend juridically the protection to the civilians and combatants in all situations, even if not contemplated by the conventional norms.

<sup>211</sup> A. A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, Vol. II, Porto Alegre/Brazil, S.A. Fabris Ed., 1999, pp. 497-509.

of 1977 to the 1949 Geneva Conventions on international humanitarian law), and are inhuman as weapons of mass destruction<sup>212</sup>. Early in the present nuclear age, the four Geneva Conventions established the *grave violations* of international law (Convention I, Article 49 (3); Convention II, Article 50 (3); Convention III, Article 129 (3); and Convention IV, Article 146 (3)). Such *grave violations*, when involving nuclear weapons, victimize not only States, but all other subjects of international law as well, individuals and groups of individuals, peoples, and humankind as a whole.

194. The absence of conventional norms stating specifically that nuclear weapons are prohibited in all circumstances does not mean that they would be allowed in a given circumstance. Two decades ago, in the course of the advisory proceedings of late 1995 before the ICJ leading to its 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons*, some of the participating States drew attention to the incidence of the Martens clause in the present domain<sup>213</sup>. It was pointed out, on the occasion, that the argument that international instruments do not specifically contain an express prohibition of use of nuclear weapons seems to overlook the Martens clause<sup>214</sup>.

195. Also in rebuttal of that argument, — typical of legal positivism, in its futile search for an express prohibition, — it was further observed that the “principles of humanity” and the “dictates of public conscience”, evoked by the Martens clause, permeate not only the law of armed conflict, but “the whole of international law”; they are essentially dynamic, pointing to conduct which may nowadays be condemned as inhumane by the international community<sup>215</sup>, such as recourse to the threat or use of nuclear weapons. It was further stated, in the light of the Martens clause, that the “threat and use of nuclear weapons violate both customary international law and the dictates of public conscience”<sup>216</sup>.

196. The Martens clause safeguards the integrity of law (against the undue permissiveness of a *non liquet*) by invoking the principles of the law of nations, the “laws of humanity” and the “dictates of the public conscience”. Thus, that absence of a conventional norm is not conclusive, and is by no means the end of the matter, — bearing in mind also cus-

<sup>212</sup> Cf. comments in *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (eds. Y. Sandoz, C. Swinarski and B. Zimmermann), Geneva, ICRC/Nijhoff, 1987, pp. 389-420 and 597-600.

<sup>213</sup> Cf. CR 1995/31, of 13 November 1995, pp. 45-46 (statement of Samoa); CR 1995/25, of 3 November 1995, p. 55 (statement of Mexico); CR 1995/27, of 7 November 1995, p. 60 (statement of Malaysia).

<sup>214</sup> CR 1995/26, of 6 November 1995, p. 32 (statement of Iran).

<sup>215</sup> CR 1995/22, of 30 October 1995, p. 39 (statement of Australia).

<sup>216</sup> CR 1995/35, of 15 November 1995, p. 33 (statement of Zimbabwe).

tomy international law. Such absence of a conventional provision expressly prohibiting nuclear weapons does not at all mean that they are legal or legitimate<sup>217</sup>. The evolution of international law<sup>218</sup> points, in our days, in my understanding, towards the construction of the international law for humankind<sup>219</sup> and, within the framework of this latter, to the outlawing by general international law of all weapons of mass destruction.

197. Had the ICJ, in its 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons*, made decidedly recourse in great depth to the Martens clause, it would not have lost itself in a sterile exercise, proper of a legal positivism *déjà vu*, of a hopeless search of conventional norms, frustrated by the finding of what it understood to be a lack of these latter as to nuclear weapons specifically, for the purposes of its analysis. The existing arsenals of nuclear weapons, and of other weapons of mass destruction, are to be characterized by what they really are: a scorn and the ultimate insult to human reason, and an affront to the juridical conscience of humankind.

198. The aforementioned evolution of international law, — of which the Martens clause is a significant manifestation, — has gradually moved from an international into a universal dimension, on the basis of fundamental values, and in the sense of an *objective justice*<sup>220</sup>, which has always been present in jusnaturalist thinking. Human conscience stands above the “will” of individual States. This evolution has, in my perception, significantly contributed to the formation of an *opinio juris communis* in recent decades, in condemnation of nuclear weapons.

199. This *opinio juris communis* is clearly conformed in our days: the overwhelming majority of Member States of the United Nations, the NNWS, have been sustaining for years the series of General Assembly resolutions in condemnation of the use of nuclear weapons as illegal under general international law. To this we can add other developments,

<sup>217</sup> Stefan Glaser, *L'arme nucléaire à la lumière du droit international*, Paris, Pedone, 1964, pp. 15, 21, 24-27, 32, 36-37, 41, 43-44 and 62-63, and cf. pp. 18 and 53.

<sup>218</sup> If, in other epochs, the ICJ had likewise limited itself to verify a situation of “legal uncertainty” (which, anyway, does not apply in the present context), most likely it would not have issued its *célèbres* Advisory Opinions on *Reparation for Injuries Suffered in the Service of the United Nations* (1949), on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (1951), and on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (1971), which have so much contributed to the evolution of international law.

<sup>219</sup> Cf. A. A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, *op. cit. supra* note 111, pp. 1-726.

<sup>220</sup> A. A. Cançado Trindade, *Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, Buenos Aires, Ed. Ad-Hoc, 2013, pp. 166-167; and cf. C. Husson-Rochongar, *Droit international des droits de l'homme et valeurs — Le recours aux valeurs dans la jurisprudence des organes spécialisés*, Brussels, Bruylant, 2012, pp. 309-311, 451-452, 578-580, 744-745 and 771-772.

reviewed in the present dissenting opinion, such as, e.g., the NPT Review Conferences, the establishment of regional nuclear-weapon-free zones, and the Conferences on Humanitarian Impact of Nuclear Weapons (cf. Parts XVI-XVIII, *infra*).

#### XIV. NUCLEAR DISARMAMENT: JUSNATURALISM, THE HUMANIST CONCEPTION AND THE UNIVERSALITY OF INTERNATIONAL LAW

200. The existence of nuclear weapons, — maintained by the strategy of “deterrence” and “mutually assured destruction” (“MAD”, as it became adequately called, since it was devised in the Cold-War era), is the contemporary global tragedy of the nuclear age. Death, or self-destruction, haunts everyone everywhere, propelled by human madness. Human beings need protection from themselves, today more than ever<sup>221</sup>, — and this brings our minds to other domains of human knowledge. Law by itself cannot provide answers to this challenge to humankind as a whole.

201. In the domain of nuclear disarmament, we are faced today, within the conceptual universe of international law, with unexplainable insufficiencies, or anomalies, if not absurdities. For example, there are fortunately in our times conventions prohibiting biological and chemical weapons (of 1972 and 1993), but there is to date no such comprehensive conventional prohibition of nuclear weapons, which are far more destructive. There is no such prohibition despite the fact that they are in clear breach of international law, of IHL and the ILHR, as well as of the law of the United Nations.

202. Does this make any sense? Can international law prescind from ethics? In my understanding, not at all. Just as law and ethics go together (in the line of jusnaturalist thinking), scientific knowledge itself cannot be dissociated from ethics. The production of nuclear weapons is an illustration of the divorce between ethical considerations and scientific and technological progress. Otherwise, weapons which can destroy millions of innocent civilians, and the whole of humankind, would not have been conceived and produced.

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<sup>221</sup> In another international jurisdiction, in my separate opinion in the IACtHR’s case of the *Massacres of Ituango v. Colombia* (judgment of 1 July 2006), I devoted part of my reflections to “human cruelty in its distinct manifestations in the execution of State policies” (Part II, paras. 9-13).

203. The principles of *recta ratio*, orienting the *lex praeceptiva*, emanate from human conscience, affirming the ineluctable relationship between law and ethics. Ethical considerations are to guide the debates on nuclear disarmament. Nuclear weapons, capable of destroying humankind as a whole, carry evil in themselves. They ignore civilian populations, they make abstraction of the principles of necessity, of distinction and of proportionality. They overlook the principle of humanity. They have no respect for the fundamental right to life. They are wholly illegal and illegitimate, rejected by the *recta ratio*, which endowed *jus gentium*, in its historical evolution, with ethical foundations, and its character of universality.

204. Already in 1984, in its General Comment No. 14 (on the right to life), the UN Human Rights Committee (HRC — under the Covenant on Civil and Political Rights), for example, began by warning that war and mass violence continue to be “a scourge of humanity”, taking the lives of thousands of innocent human beings every year (para. 2). In successive sessions of the General Assembly, it added, representatives of States from all geographical regions have expressed their growing concern at the development and proliferation of “increasingly awesome weapons of mass destruction” (para. 3). Associating itself with this concern, the HRC stated that

“It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. This threat is compounded by the danger that the actual use of such weapons may be brought about, not only in the event of war, but even through human or mechanical error or failure.

Furthermore, the very existence and gravity of this threat generates a climate of suspicion and fear between States, which is in itself antagonistic to the promotion of universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations and the International Covenants on Human Rights.

The production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity.

The Committee, accordingly, in the interest of mankind, calls upon all States (. . .) to take urgent steps (. . .) to rid the world of this menace.” (Paras. 4-7.)<sup>222</sup>

<sup>222</sup> ‘General Comment No.14 (of 1984) of the HRC, text in: United Nations, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, doc. HRI/GEN/1/Rev.3, of 15 August 1997, pp. 18-19. The HRC, further stressing that the right to life is a fundamental right which does not admit any derogation not even in time of public emergency, related the current proliferation of weapons of mass destruc-

205. The absence in contemporary international law of a comprehensive conventional prohibition of nuclear weapons is incomprehensible. Contrary to what legal positivists think, law is not self-sufficient, it needs inputs from other branches of human knowledge for the realization of justice. Contrary to what legal positivists think, norms and values go together, the former cannot prescind from the latter. Contrary to legal positivism, may I add, jusnaturalism, taking into account ethical considerations, pursues a universalist outlook (which legal positivists are incapable of doing), and beholds humankind as entitled to protection<sup>223</sup>.

206. Humankind is subject of rights, in the realm of the new *jus gentium*<sup>224</sup>. As this cannot be visualized from the optics of the State, contemporary international law has reckoned the limits of the State as from the optics of humankind. Natural law thinking has always been attentive to justice, which much transcends positive law. The present case of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* has been lodged with the International Court of Justice, and not with an International Court of Positive Law. The contemporary tragedy of nuclear weapons cannot be addressed from the myopic outlook of positive law alone.

207. Nuclear weapons, and other weapons of mass destruction, have no ethics, have no ground on the law of nations (*le droit des gens*): they are in flagrant breach of its fundamental principles, and those of IHL, the ILHR, as well as the law of the United Nations. They are a contemporary manifestation of evil, in its perennial trajectory going back to the Book of Genesis (see Part VII, *supra*). Jusnaturalist thinking, always open to ethical considerations, identifies and discards the disrupting effects of the strategy of “deterrence” of fear creation and infliction<sup>225</sup> (see Part XI, *supra*). Humankind is victimized by this.

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tion to “the supreme duty of States to prevent wars”. Cf. also *UN Report of the Human Rights Committee, G.A.O.R.* — Fortieth Session (1985), suppl. No. 40 (A/40/40), p. 162.

<sup>223</sup> A. A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, *op. cit. supra* note 111, pp. 1-726. *Recta ratio* and universalism, present in the jusnaturalist thinking of the “founding fathers” of international law (F. de Vitoria, F. Suárez, H. Grotius, among others), go far back in time to the legacies of Cicero, in his characterization of *recta ratio* in the foundations of *jus gentium* itself, and of Thomas Aquinas, in his conception of *synderesis*, as predisposition of human reason to be guided by principles in the search of the common good; *ibid.*, pp. 10-14.

<sup>224</sup> *Ibid.*, Chap. XI, pp. 275-288; A. A. Cançado Trindade, “Quelques réflexions sur l’humanité comme sujet du droit international”, *Unité et diversité du droit international — Ecrits en l’honneur du professeur Pierre-Marie Dupuy* (eds. D. Alland, V. Chetail, O. de Frouville and J. E. Viñuales), Leiden, Nijhoff, 2014, pp. 157-173.

<sup>225</sup> Cf., to this effect, C. A. J. Coady, “Natural Law and Weapons of Mass Destruc-



208. In effect, humankind has been, already for a long time, a *potential victim* of nuclear weapons. To establish such condition of potential victim, one does not need to wait for the actual destruction of life on earth. Humankind has, for the last decades, been suffering psychological harm caused by the existence itself of arsenals of nuclear weapons. And there are peoples, and segments of populations, who have been *actual victims* of the vast and harmful effects of nuclear tests. The existence of *actual and potential victims* is acknowledged in international case law in the domain of the international law of human rights<sup>226</sup>. To address this danger from a strict inter-State outlook is to miss the point, to blind oneself. States were created and exist for human beings, and not vice versa.

209. The NPT has a universalist vocation, and counts on everyone, as shown by its three basic principled pillars together. In effect, as soon as it was adopted, the 1968 NPT came to be seen as having been devised and concluded on the basis of those principled pillars, namely: non-proliferation of nuclear weapons (preamble and Articles I-III), peaceful use of nuclear energy (preamble and Articles IV-V), and nuclear disarmament (preamble and Article VI)<sup>227</sup>. The antecedents of the NPT go back to the work of the UN General Assembly in 1953<sup>228</sup>. The NPT's three-pillar framework came to be reckoned as the "grand bargain" between its parties, NWS and NNWS. But soon it became a constant point of debate between NWS and NNWS parties to the NPT. In effect, the "grand bargain" came to be seen as "asym-

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tion", *Ethics and Weapons of Mass Destruction — Religious and Secular Perspectives* (eds. S. H. Hashmi and S. P. Lee), Cambridge University Press, 2004, p. 122, and cf. p. 113; and cf. also J. Finnis, J. M. Boyle Jr. and G. Grisez, *Nuclear Deterrence, Morality and Realism*, Oxford, Clarendon Press, 1987, pp. 77-103, 207-237, 275-319 and 367-390. In effect, contemporary expert writing has become, at last, very critical of the "failed strategy" of "deterrence"; cf., *inter alia*, e.g., [Various Authors], *At the Nuclear Precipice — Catastrophe or Transformation?* (eds. R. Falk and D. Krieger), London, Palgrave/MacMillan, 2008, pp. 162, 209, 218 and 229; A. C. Alves Pereira, *Os Impérios Nucleares e Seus Reféns: Relações Internacionais Contemporâneas*, Rio de Janeiro, Ed. Graal, 1984, pp. 87-88, and cf. pp. 154, 209 and 217.

<sup>226</sup> For an early study on this issue, cf. A. A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des cours de l'Académie de droit international de La Haye* (1987), Chap. XI, pp. 271-283. And for subsequent developments on the notion of *potential victims*, cf. A. A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford University Press, 2012 [reprint], Chap. VII, pp. 125-131.

<sup>227</sup> Articles VIII-XI, in turn, are procedural in nature.

<sup>228</sup> In particular the speech of President D. D. Eisenhower (US) to the UN General Assembly in 1953, as part of his plan "Atoms for Peace"; cf., e.g., I. Chernus, *Eisenhower's Atoms for Peace*, [Austin], Texas A & M University Press, 2002, pp. 3-154.

metrical”<sup>229</sup>, and NNWS began to criticize the very slow pace of achieving nuclear disarmament as one of the three basic principled pillars of the NPT (Art. VI)<sup>230</sup>.

210. Under the NPT, each State is required to do its due. NWS are no exception to that, if the NPT is not to become dead letter. To achieve the three interrelated goals (non-proliferation of nuclear weapons, peaceful use of nuclear energy, and nuclear disarmament) is a duty of each and every State towards humankind as a whole. It is a universal duty of conventional and customary international law in the nuclear age. There is an *opinio juris communis* to this effect, sedimented during recent decades, and evidenced in the successive establishment, in distinct continents, of nuclear-weapon-free zones, and nowadays in the Conferences on the Humanitarian Impact of Nuclear Weapons (cf. Parts XVII-XVIII, *infra*).

XV. THE PRINCIPLE OF HUMANITY AND THE UNIVERSALIST APPROACH:  
*JUS NECESSARIUM* TRANSCENDING THE LIMITATIONS OF  
*JUS VOLUNTARIUM*

211. In my understanding, there is no point in remaining attached to an outdated and reductionist inter-State outlook, particularly in view of the revival of the conception of the law of nations (*droit des gens*) encompassing humankind as a whole, as foreseen and propounded by the “founding fathers” of international law<sup>231</sup> (in the sixteenth-seventeenth centuries). It would be nonsensical to try to cling to the unduly reductionist inter-State outlook in the international adjudication of a case concerning the Contending Parties and affecting all States, all peoples and humankind as a whole.

212. An artificial, if not fossilized, strictly inter-State mechanism of dispute-settlement cannot pretend to entail or require a (likewise) entirely

<sup>229</sup> J. Burroughs, *The Legal Framework for Non-Use and Elimination of Nuclear Weapons*, [N.Y.], Greenpeace International, 2006, p. 13.

<sup>230</sup> H. Williams, P. Lewis and S. Aghlani, *The Humanitarian Impacts of Nuclear Weapons Initiative: The “Big Tent” in Disarmament*, London, Chatham House, 2015, p. 7; D. H. Joyner, “The Legal Meaning and Implications of Article VI of the Non-Proliferation Treaty”, *Nuclear Weapons and International Law* (eds. G. Nystuen, S. Casey-Maslen and A. G. Bersagel), Cambridge University Press, 2014, pp. 397, 404 and 417, and cf. pp. 398-399 and 408; and cf. D. H. Joyner, *Interpreting the Nuclear Non-Proliferation Treaty*, Oxford University Press, 2013 [reprint], pp. 2, 104 and 126, and cf. pp. 20, 26-29, 31, 97 and 124.

<sup>231</sup> A. A. Cançado Trindade, *Evolution du droit international au droit des gens — L'accès des particuliers à la justice internationale: le regard d'un juge*, Paris, Pedone, 2008, pp. 1-187.

inadequate and groundless inter-State reasoning. The law of nations cannot be interpreted and applied in a mechanical way, as from an exclusively inter-State paradigm. To start with, the humane ends of States cannot be overlooked. In relation to nuclear weapons, the *potential victims* are the human beings and peoples, beyond their respective States, for whom these latter were created and exist.

213. As I had the occasion to point out in another international jurisdiction, the law of nations (*droit des gens*), since its historical origins in the sixteenth century, was seen as comprising not only States (emerging as they were), but also peoples, the human person (individually and in groups), and humankind as a whole<sup>232</sup>. The strictly inter-State outlook was devised much later on, as from the Vattelien reductionism of the mid-seventeenth century, which became *en vogue* by the end of the sixteenth century and beginning of the twentieth century, with the well-known disastrous consequences — the successive atrocities victimizing human beings and peoples in distinct regions of world, — during the whole twentieth century<sup>233</sup>. In the present nuclear age, extending for the last seven decades, humankind as a whole is threatened.

214. Within the ICJ as well, I have had also the occasion to stress the need to go beyond the inter-State outlook. Thus, in my dissenting opinion in the recent case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, I have pointed out, *inter alia*, that the 1948 Convention against Genocide is not State-centric, but is rather oriented towards groups of persons, towards the victims, whom it seeks to protect (*Judgment, I.C.J. Reports 2015 (I)*, pp. 226 and 376, paras. 59 and 529). The humanist vision of the international legal order pursues an outlook centred on the peoples, keeping in mind the humane ends of States.

215. I have further underlined that the *principle of humanity* is deeply-rooted in the long-standing thinking of natural law (*ibid.*, p. 229, para. 69).

“Humaneness came to the fore even more forcefully in the treatment of persons in *situation of vulnerability, or even defencelessness*, such as those deprived of their personal freedom, for whatever reason. The *jus gentium*, when it emerged as amounting to the law of nations, came then to be conceived by its ‘founding fathers’ (F. de Vitoria, A. Gentili, F. Suárez, H. Grotius, S. Pufendorf, C. Wolff) as regulat-

<sup>232</sup> IACTHR, case of the *Moiwana Community v. Suriname* (judgment of 15 June 2005), separate opinion of Judge Cançado Trindade, paras. 6-7.

<sup>233</sup> *Ibid.*

ing the international community constituted by human beings socially organized in the (emerging) States and co-extensive with humankind, thus conforming the *necessary* law of the *societas gentium*.

The *jus gentium*, thus conceived, was inspired by the principle of humanity *lato sensu*. Human conscience prevails over the will of individual States. Respect for the human person is to the benefit of the common good. This humanist vision of the international legal order pursued — as it does nowadays — a *people-centred outlook*, keeping in mind the *humane ends of the State*. The precious legacy of natural law thinking, evoking the right human reason (*recta ratio*), has never faded away . . .” (*I.C.J. Reports 2015 (I)*, p. 231, paras. 73-74).

The precious legacy of natural law thinking has never vanished; despite the indifference and pragmatism of the “strategic” *droit d’étatistes* (so numerous in the legal profession nowadays), the *principle of humanity* emerged and remained in international legal thinking as an expression of the *raison d’humanité* imposing limits to the *raison d’Etat* (*ibid.*, para. 74).

216. This is the position I have always taken, within the ICJ and, earlier on, the IACtHR. For example, in the ICJ’s Advisory Opinion on *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development* (of 1 February 2012), I devoted one entire part (Part XI) of my separate opinion to the erosion — as I perceive it — of the inter-State outlook of adjudication by the ICJ (*I.C.J. Reports 2012 (I)*, pp. 79-81, paras. 76-81). I warned likewise in my separate opinion in the case of *Whaling in the Antarctic (Australia v. Japan)*, Order of 6 February 2013, on New Zealand’s intervention) (*I.C.J. Reports 2013*, pp. 21-23, paras. 21-23), as well as in my recent separate opinion in the case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, *Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)* (pp. 49-51, paras. 16-21 and pp. 54-58, paras. 28-41).

217. Earlier on, within the IACtHR, I took the same position: for example, *inter alia*, in my concurring opinions in both the Advisory Opinion No. 16, on the *Right to Information on Consular Assistance in the Framework of the Due Process of Law* (of 1 October 1999), and the Advisory Opinion No. 18, on the *Juridical Condition and Rights of Undocumented Migrants* (of 17 September 2003), of the IACtHR, I deemed it fit to point out, — going beyond the strict inter-State dimension, — that, if non-compliance with Article 36 (1) (b) of the 1963 Vienna Convention on Consular Relations takes place, it occurs to the detriment not only of a State party but also of the human beings at issue. Such pioneering jur-

isprudential construction, in the line of jusnaturalist thinking, rested upon the evolving concepts of *jus cogens* and obligations *erga omnes* of protection<sup>234</sup>.

218. *Recta ratio* stands firmly above the “will”. Human conscience, — the *recta ratio* so cultivated in jusnaturalism, — clearly prevails over the “will” and the strategies of individual States. It points to a universalist conception of the *droit des gens* (the *lex praeceptiva* for the *totus orbis*), applicable to all (States as well as peoples and individuals), given the unity of the human kind. Legal positivism, centred on State power and “will”, has never been able to develop such universalist outlook, so essential and necessary to address issues of concern to humankind as a whole, such as that of the obligation of nuclear disarmament. The universal juridical conscience prevails over the “will” of individual States.

219. The “founding fathers” of the law of nations (such as, *inter alia*, F. de Vitoria, F. Suárez and H. Grotius) had in mind humankind as a whole. They conceived a universal *jus gentium* for the *totus orbis*, securing the unity of the *societas gentium*; based on a *lex praeceptiva*, the *jus gentium* was apprehended by the *recta ratio*, and conformed a true *jus necessarium*, much transcending the limitations of the *jus voluntarium*. Law ultimately emanates from the common conscience of what is juridically necessary (*opinio juris communis necessitatis*)<sup>235</sup>. The contribution of the “founding fathers” of *jus gentium* found inspiration largely in the scholastic philosophy of natural law (in particular in the stoic and Thomist conception of *recta ratio* and justice), which recognized the human being as endowed with intrinsic dignity).

220. Moreover, in face of the unity of the humankind, they conceived a truly *universal* law of nations, applicable to all — States as well as peoples and individuals — everywhere (*totus orbis*). In thus contributing to the emergence of the *jus humanae societatis*, thinkers like Francisco de Vitoria and Domingo de Soto, among others, permeated their lessons with the humanist thinking that preceded them. Four and a half centuries later, their lessons remain contemporary, endowed with perennial validity and aptitude to face, e.g., the contemporary and dangerous problem of the existing arsenals of nuclear weapons. Those thinkers went well beyond

<sup>234</sup> Cf. comments of A. A. Cançado Trindade, *Os Tribunais Internacionais e a Realização da Justiça*, Rio de Janeiro, Edit. Renovar, 2015, pp. 463-468.

<sup>235</sup> A. A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, *op. cit. supra* note 111, pp. 137-138.

the “will” of States, and rested upon the much safer foundation of human conscience (*recta ratio* and justice).

221. The conventional and customary obligation of nuclear disarmament brings to the fore another aspect: the issue of the *validity* of international legal norms is, after all, metajuridical. International law cannot simply remain indifferent to values, general principles of law and ethical considerations; it has, to start with, to identify what is *necessary*, — such as a world free of nuclear weapons, — in order to secure the survival of humankind. This *idée du droit* precedes positive international law, and is in line with jusnaturalist thinking.

222. *Opinio juris communis necessitatis* upholds a customary international law obligation to secure the survival of humankind. Conventional and customary obligations go here together. Just as customary rules may eventually be incorporated into a convention, treaty provisions may likewise eventually enter into the *corpus* of general international law. Customary obligations can either precede, or come after, conventional obligations. They evolve *pari passu*. This being so, the search for an express legal prohibition of nuclear weapons (such as the one undertaken in the ICJ’s Advisory Opinion of 1996 on the *Threat or Use of Nuclear Weapons*) becomes a futile, if not senseless, exercise of legal positivism.

223. It is clear to human conscience that those weapons, which can destroy the whole of humankind, are unlawful and prohibited. They are in clear breach of *jus cogens*. And *jus cogens* was reckoned by human conscience well before it was incorporated into the two Vienna Conventions on the Law of Treaties (of 1969 and 1986). As I had the occasion to warn, three decades ago, at the 1986 UN Conference on the Law of Treaties between States and International Organizations or between International Organizations, *jus cogens* is “incompatible with the voluntarist conception of international law, because that conception failed to explain the formation of rules of general international law”<sup>236</sup>.

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<sup>236</sup> UN, *United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations — Official Records*, Vol. I (statement by the Representative of Brazil, A. A. Cançado Trindade, of 12 March 1986), pp. 187-188, para. 18.

## XVI. NPT REVIEW CONFERENCES

224. In fact, in the course of the written phase of the proceedings before the Court in the present case of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, both the Marshall Islands<sup>237</sup> and the United Kingdom<sup>238</sup> addressed, in their distinct arguments, the series of NPT Review Conferences. For its part, India also addressed the Review Conferences<sup>239</sup>, in particular to leave on the records its position on the matter, as explained in a statement made on 9 May 2000.

225. Likewise, in the course of the oral phase of the present proceedings before the Court in *cas d'espèce*, the applicant State, the Marshall Islands, referred to the NPT Review Conferences in its oral arguments in two of the three cases it lodged with the Court against India<sup>240</sup>, and the United Kingdom<sup>241</sup>; references to the Review Conferences were also made, for their part, in their oral arguments, by the two respondent States which participated in the public sittings before the Court, namely, India<sup>242</sup> and the United Kingdom<sup>243</sup>. Those Review Conferences conform the factual context of the *cas d'espèce*, and cannot pass unnoticed. May I thus proceed to a brief review of them.

226. The NPT Review Conferences, held every five years, started in 1975. The following three Conferences of the kind were held, respectively, in 1980, 1985 and 1990, respectively<sup>244</sup>. The fifth of such Conferences took place in 1995, the same year that the Marshall Islands became a party to the NPT (on 30 January 1995). In one of its decisions, the 1995 NPT Conference singled out the vital role of the NPT in preventing the proliferation of nuclear weapons, and warned that the proliferation of nuclear weapons would seriously increase the danger of nuclear war<sup>245</sup>. For their part, NWS reaffirmed their commitment, under Article VI of the NPT, to pursue in good faith negotiations on effective measures relating to nuclear disarmament.

<sup>237</sup> Application instituting proceedings, p. 40, para. 66; and Memorial, pp. 29, 56-60, 61, 63, 68-69, 71 and 73, paras. 50, 123-128, 130, 136, 150, 153, 154, 161-162 and 168; and Statement of Observations on Preliminary Objections [United Kingdom's], pp. 15 and 47, paras. 32 and 126.

<sup>238</sup> Preliminary Objections, pp. 1-2, 10 and 23, paras. 2-3, 21 and 50.

<sup>239</sup> Counter-Memorial, p. 15, para. 23, note 49, and Annex 23.

<sup>240</sup> CR 2016/1, of 7 March 2016, pp. 26-27 and 50, paras. 9 and 17 (Marshall Islands); CR 2016/6, of 14 March 2016, p. 32, para. 10 (Marshall Islands).

<sup>241</sup> CR 2016/5, of 11 March 2016, p. 47, para. 8 (Marshall Islands).

<sup>242</sup> CR 2016/4, of 10 March 2016, p. 14, para. 3 (India).

<sup>243</sup> CR 2016/7, of 9 March 2016, pp. 14-16 and 18-19, paras. 20, 22, 24, 32 and 37 (United Kingdom).

<sup>244</sup> For an assessment of these earlier NPT Review Conferences, cf. H. Müller, D. Fischer and W. Kötter, *Nuclear Non-Proliferation and Global Order*, Stockholm-Solna Oxford, SIPRI/Oxford University Press, 1994, pp. 31-108.

<sup>245</sup> Decision 2, NPT/CONF.1995/32 (Part I), Annex, p. 2.

227. The 1995 Review Conference prolonged indefinitely the NPT, and adopted its decision on “Principles and Objectives for Nuclear Non-Proliferation and Disarmament”. Yet, in its report, the Main Committee I (charged with the implementation of the provisions of the NPT) observed with regret that Article VI and preambular paragraphs 8-12 of the NPT had not been wholly fulfilled<sup>246</sup>, with the number of nuclear weapons then existing being greater than the one existing when the NPT entered into force; it further regretted “the continuing lack of progress” on relevant items of the Conference on Disarmament, and urged a commitment on the part of NWS on “no-first use and non-use of nuclear weapons with immediate effect”<sup>247</sup>.

228. Between the fifth and the sixth Review Conferences, India and Pakistan carried out nuclear tests in 1998. For its part, on several occasions, the Movement of Non-Aligned Countries called for “urgent” measures of nuclear disarmament<sup>248</sup>. To this effect, the 2000 Review Conference agreed to a document containing the “13 Practical Steps” in order to meet the commitments of States parties under Article VI of the NPT<sup>249</sup>. The “13 Practical Steps” stress the relevance and urgency of ratifications of the CTBT so as to achieve its entry into force, and of setting up a moratorium on nuclear-weapon tests pending such entry into force. Furthermore, they call for the commencement of negotiations on a treaty banning the production of fissile material for nuclear weapons and also call upon NWS to accomplish the total elimination of nuclear arsenals<sup>250</sup>.

229. At the 2005 Review Conference, no substantive decision was adopted, amidst continuing disappointment at the lack of progress on implementation of Article VI of the NPT, particularly in view of the “13 Practical Steps” agreed to at the 2000 Review Conference. Concerns were expressed that new nuclear weapon systems were being developed, and strategic doctrines were being adopted lowering the threshold for the

<sup>246</sup> Final Document, Part II, p. 257, paras. 3-3ter., and cf. pp. 258 and 260, paras. 4 and 9.

<sup>247</sup> *Ibid.*, pp. 271-273, paras. 36-39.

<sup>248</sup> NPT/CONF.2000/4, paras. 12-13.

<sup>249</sup> Final Document, Vol. 1, Part I, pp. 14-15.

<sup>250</sup> The “13 practical steps”, moreover, affirm that the principle of irreversibility should apply to all nuclear disarmament and reduction measures. At last, the 13 practical steps reaffirm the objective of general and complete disarmament under effective international control, and stress the importance of both regular reports on the implementation of NPT’s Article VI obligations, and the further development of verification capabilities.



use of nuclear weapons; moreover, regret was also expressed that States whose ratification was needed for the CTBT's entry into force had not yet ratified the CTBT<sup>251</sup>.

230. Between the 2005 and the 2010 Review Conferences, there were warnings that the NPT was “now in danger” and “under strain”, as the process of disarmament had “stagnated” and needed to be “revived” in order to prevent the spread of weapons of mass destruction. The concerns addressed what was regarded as the unsatisfactory stalemate in the Conference on Disarmament in Geneva, which had been “unable to adopt an agenda for almost a decade” to identify substantive issues to be discussed and negotiated in the Conference<sup>252</sup>.

231. The “Five-Point Proposal on Nuclear Disarmament”, announced by the Secretary-General in an address of 24 October 2008<sup>253</sup>, began by urging all NPT States parties, in particular the NWS, to fulfil their obligations under the Treaty “to undertake negotiations on effective measures leading to nuclear disarmament” (para. 1)<sup>254</sup>. It called upon the permanent members of the Security Council to commence discussions on security issues in the nuclear disarmament process, including by giving NNWS assurances against the use or threat of use of nuclear weapons (para. 5). It stressed the need of “new efforts to bring the CTBT into force”, and encouraged NWS to ratify all the protocols to the treaties which established nuclear-weapon-free zones (para. 6). Moreover, it also stressed “the need for greater transparency” in relation to arsenals of nuclear weapons and disarmament achievements (para. 7). And it further called for the elimination also of other types of weapons of mass destruction (para. 8).

<sup>251</sup> NPT/CONF.2005/57, Part I, and cf. report on the 2005 Review Conference: 30 *UN Disarmament Yearbook* (2005), Chap. I, p. 23.

<sup>252</sup> Hans Blix, *Why Disarmament Matters*, Cambridge, Mass./London, Boston Review/MIT, 2008, pp. 6 and 63.

<sup>253</sup> Cf. UN Secretary-General (Ban Ki-moon), Address (at a conference at the East-West Institute): “The United Nations and Security in a Nuclear-Weapon-Free World”, *UN News Centre*, of 24 October 2008, pp. 1-3.

<sup>254</sup> It added that this could be pursued either by an agreement on “a framework of separate, mutually reinforcing instruments”, or else by negotiating “a nuclear-weapons convention, backed by a strong system of verification, as has long been proposed at the United Nations” (para. 2).

232. The “Five-Point Proposal on Nuclear Disarmament” was reiterated by the UN Secretary-General in two subsequent addresses in the following three years<sup>255</sup>. In one of them, before the Security Council on 24 September 2009, he stressed the need of an “early entry into force” of the CTBT, and pondered that “disarmament and non-proliferation must proceed together”; he urged “a divided international community” to start moving ahead towards achieving “a nuclear-weapon-free world”, and, at last, he expressed his hope in the forthcoming 2010 NPT Review Conference<sup>256</sup>.

233. Both the 2000 and the 2010 Review Conferences made an interpretation of nuclear disarmament under Article VI of the NPT as a “positive disarmament obligation”, in line with the dictum in the ICJ’s 1996 Advisory Opinion of nuclear disarmament in good faith as an obligation of result<sup>257</sup>. The 2010 Review Conference expressed its deep concern that there remained the continued risk for humankind put by the possibility that nuclear weapons could be used, and the catastrophic humanitarian consequences that would result therefrom.

234. The 2010 Review Conference, keeping in mind the 1995 decision on “Principles and Objectives for Nuclear Non-Proliferation and Disarmament” as well as the 2000 agreement on the “13 Practical Steps”, affirmed the vital importance of the universality of the NPT<sup>258</sup>, and, furthermore, took note of the “Five-Point Proposal on Nuclear Disarmament” of the UN Secretary-General, of 2008. For the first time in the present series of Review Conferences, the Final Document of the 2010 Review Conference recognized “the catastrophic humanitarian consequences that would result from the use of nuclear weapons”<sup>259</sup>.

235. The Final Document welcomed the creation of successive nuclear-weapon-free zones<sup>260</sup>, and, in its conclusions, it endorsed the “legitimate interest” of NNWS to receive “unequivocal and legally binding security assurances” from NWS on the matter at issue; it asserted and recognized that “the total elimination of nuclear weapons is the only

<sup>255</sup> On two other occasions, namely, during a Security Council Summit on Nuclear Non-Proliferation on 24 September 2009, and at a Conference organized by the East-West Institute on 24 October 2011.

<sup>256</sup> UN Secretary-General (Ban Ki-moon), “Opening Remarks to the Security Council Summit on Nuclear Non-Proliferation and Nuclear Disarmament”, *UN News Centre*, of 24 September 2009, pp. 1-2.

<sup>257</sup> D. H. Joyner, “The Legal Meaning and Implications of Article VI of the Non-Proliferation Treaty”, *Nuclear Weapons and International Law* (eds. G. Nystuen, S. Casey-Maslen and A. G. Bersagel), Cambridge University Press, 2014, pp. 413 and 417.

<sup>258</sup> Cf. 2010 Review Conference — Final Document, NPT/CONF.2010/50, Vol. I, pp. 12-14 and 19-20.

<sup>259</sup> *Ibid.*, p. 12, para. 80.

<sup>260</sup> Cf. *ibid.*, p. 15, para. 99.

absolute guarantee against the use or threat of use of nuclear weapons”<sup>261</sup>. The aforementioned Final Document reiterated the 2010 Review Conference’s “deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons”, and “the need for all States at all times to comply with applicable international law, including international humanitarian law”<sup>262</sup>. This key message of the 2010 Review Conference triggered the initiative, three years later, of the new series of Conferences on Humanitarian Impact of Nuclear Weapons (cf. *infra*).

236. The “historic acknowledgement” of “the catastrophic humanitarian consequences of any use of nuclear weapons” was duly singled out by the ICRC, in its statement in the more recent 2015 Review Conference<sup>263</sup>; the ICRC pointed out that that new series of Conferences (2013-2014, in Oslo, Nayarit and Vienna) have given the international community “a much clearer grasp” of the effects of nuclear detonations on peoples around the world. It then warned that, 45 years after the NPT’s entry into force, “there has been little or no concrete progress” in fulfilling the goal of elimination of nuclear weapons. As nuclear weapons remain the only weapons of mass destruction not prohibited by a treaty, “filling this gap is a humanitarian imperative”, as the “immediate risks of intentional or accidental nuclear detonations” are “too high and the dangers too real”<sup>264</sup>.

237. The 2015 Review Conference displayed frustration over the very slow pace of action on nuclear disarmament, in addition to current nuclear modernization programs and reiteration of dangerous nuclear strategies, apparently oblivious of the catastrophic humanitarian consequences of nuclear weapons. At the 2015 Review Conference, the Main Committee I, charged with addressing Article VI of the NPT, stressed the importance of “the ultimate goal” of elimination of nuclear weapons, so as to achieve “general and complete disarmament under effective international control”<sup>265</sup>.

238. The 2015 Review Conference reaffirmed that “the total elimination of nuclear weapons is the only absolute guarantee against the use or threat of use of nuclear weapons, including the risk of their unauthorized,

<sup>261</sup> *Op. cit. supra* note 258, p. 21, point (i).

<sup>262</sup> *Ibid.*, p. 19, point (v).

<sup>263</sup> ICRC, “Eliminating Nuclear Weapons”, *Statement — 2015 Review Conference of the Parties to the NPT*, of 1 May 2015, p. 1.

<sup>264</sup> *Ibid.*, pp. 2-3.

<sup>265</sup> *2015 Review Conference — Working Paper of the Chair of Main Committee I*, doc. NPT/CONF.2015/MC.I/WP.1, of 18 May 2015, p. 3, para. 17.

unintentional or accidental detonation”<sup>266</sup>. It expressed its “deep concern” that, during the period 2010-2015, the Conference on Disarmament did not commence negotiations of an instrument on such nuclear disarmament<sup>267</sup>, and then stressed the “urgency for the Conference on Disarmament” to achieve “an internationally legally binding instrument to that effect”, so as “to assure” NNWS against the use or threat of use of nuclear weapons by all NWS<sup>268</sup>.

239. After welcoming “the increased and positive interaction with civil society” during the cycle of Review Conferences, the most recent 2015 Review Conference stated that

“understandings and concerns pertaining to the catastrophic humanitarian consequences of any nuclear weapon detonation underpin and should compel urgent efforts by all States leading to a world without nuclear weapons. The Conference affirms that, pending the realization of this objective, it is in the interest of the very survival of humanity that nuclear weapons never be used again”<sup>269</sup>.

#### XVII. THE ESTABLISHMENT OF NUCLEAR-WEAPON-FREE ZONES

240. In addition to the aforementioned NPT Review Conferences, the *opinio juris communis* on the illegality of nuclear weapons finds expression also in the establishment, over the last half century, of nuclear-weapon-free zones, which has responded to the needs and aspirations of humankind, so as to rid the world of the threat of nuclear weapons. The establishment of those zones has, in effect, given expression to the growing disapproval of nuclear weapons by the international community as a whole. There are, in effect, references to nuclear-weapon-free zones in the arguments, in the written phase of the present proceedings, of the Marshall Islands<sup>270</sup> and of the United Kingdom<sup>271</sup> in the present case of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*.

241. I originally come from the part of the world, Latin America, which, together with the Caribbean, form the first region of the world to have prohibited nuclear weapons, and to have proclaimed itself as a

<sup>266</sup> *Op. cit. supra* note 265, p. 5, para. 27.

<sup>267</sup> *Ibid.*, p. 6, par. 35.

<sup>268</sup> *Ibid.*, p. 7, para. 43.

<sup>269</sup> *Ibid.*, p. 7, paras. 45-46 (1).

<sup>270</sup> Application instituting proceedings, p. 42, para. 73; and Memorial of the Marshall Islands, pp. 40, 53 and 56, paras. 84, 117 and 122.

<sup>271</sup> Preliminary Objections of the United Kingdom, p. 2, para. 4.

nuclear-weapon-free zone. The pioneering initiative in this domain, of Latin America and the Caribbean<sup>272</sup>, resulted in the adoption of the 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean and its two Additional Protocols. Its reach transcended Latin America and the Caribbean, as evidenced by its two Additional Protocols<sup>273</sup>, and the obligations set forth in its legal regime were wide in scope:

“The régime established in the Treaty is not merely one of non-proliferation: it is a régime of total absence of nuclear weapons, which means that such weapons will be prohibited in perpetuity in the territories to which the Treaty applies, regardless of the State under whose control these terrible instruments of mass destruction might be.”<sup>274</sup>

242. By the time of the creation of that first nuclear-weapon-free zone by the 1967 Treaty of Tlatelolco, it was pointed out that it came as a response to humanity’s concern with its own future (given the threat of nuclear weapons), and in particular with “the survival of the humankind”<sup>275</sup>. That initiative<sup>276</sup> was followed by four others of the kind, in distinct regions of the world, conducive to the adoption of the 1985 South Pacific (Rarotonga) Nuclear-Free Zone Treaty, the 1995 Southeast Asia (Bangkok) Nuclear-Weapon-Free Zone Treaty, the 1996 African (Pelindaba) Nuclear Weapon-Free Zone Treaty<sup>277</sup>, as well as the 2006 Central Asian (Semipalatinsk) Nuclear-Weapon-Free Zone Treaty. Basic considerations of humanity have surely been taken into account for the establishment of those nuclear-weapon-free zones.

243. In fact, besides the Treaty of Tlatelolco, also the Rarotonga, Bangkok, Pelindaba, and Semipalatinsk Treaties purport to extend the obligations enshrined therein, by means of their respective Protocols, not only to the States of the regions at issue, but also to nuclear States<sup>278</sup>, as well as States which are internationally responsible, *de jure* or *de facto*, for territories located in the respective regions. The verification of compli-

<sup>272</sup> On the initial moves in the UN to this effect, by Brazil (in 1962) and Mexico (taking up the leading role from 1963 onwards), cf. United Nations, *Las Zonas Libres de Armas Nucleares en el Siglo XXI*, *op. cit. infra* note 277, pp. 20, 116 and 139.

<sup>273</sup> The first one concerning the States internationally responsible for territories located within the limits of the zone of application of the Treaty, and the second one pertaining to the nuclear-weapon States.

<sup>274</sup> A. García Robles, “Mesures de désarmement dans des zones particulières: le traité visant l’interdiction des armes nucléaires en Amérique Latine”, 133 *Recueil des cours de l’Académie de droit international de La Haye [RCADI]* (1971), p. 103, and cf. p. 71.

<sup>275</sup> *Ibid.*, p. 99, and cf. p. 102.

<sup>276</sup> Which was originally prompted by a reaction to the Cuban Missile Crisis of 1962.

<sup>277</sup> United Nations, *Las Zonas Libres de Armas Nucleares en el Siglo XXI*, N.Y./Geneva, UN-OPANAL/UNIDIR, 1997, pp. 9, 25, 39 and 153.

<sup>278</sup> Those Protocols contain the undertaking not only not to use nuclear weapons, but also not to threaten their use; cf. M. Roscini, *op. cit. infra* note 286, pp. 617-618.

ance with the obligations regularly engages the IAEA<sup>279</sup>. Each of the five aforementioned treaties (Tlatelolco, Rarotonga, Bangkok, Pelindaba and Semipalatinsk) creating nuclear-weapon-free zones has distinctive features, as to the kinds and extent of obligations and methods of verification<sup>280</sup>, but they share the common ultimate goal of preserving humankind from the threat or use of nuclear weapons.

244. The second nuclear-weapon-free zone, established by the Treaty of Rarotonga (1985), with its three Protocols, came as a response<sup>281</sup> to long-sustained regional aspirations, and increasing frustration of the populations of the countries of the South Pacific with incursions of NWS in the region<sup>282</sup>. The Rarotonga Treaty encouraged the negotiation of a similar zone, — by means of the 1995 Bangkok Treaty, — in the neighbouring region of Southeast Asia, and confirmed the “continued relevance of zonal approaches” to the goal of disarmament and the safeguard of humankind from the menace of nuclear weapons<sup>283</sup>.

245. The third of those treaties, that of Bangkok, of 1995 (with its Protocol), was prompted by the initiative of the Association of South-East Asian Nations (ASEAN) to insulate the region from the policies and rivalries of the nuclear powers. The Bangkok Treaty, besides covering the land territories of all ten Southeast Asian States, is the first treaty of the kind also to encompass their territorial sea, 200-mile exclusive economic zone and continental shelf<sup>284</sup>. The fourth such treaty, that of Pelindaba, of 1996, in its turn, was prompted by the continent’s reaction to nuclear tests in the region (as from the French nuclear tests in the Sahara in 1961), and the aspiration — deeply-rooted in African thinking — to keep nuclear weapons out of the region<sup>285</sup>. The Pelindaba Treaty

<sup>279</sup> The Treaty of Tlatelolco has in addition counted on its own regional organism to that end, the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (OPANAL).

<sup>280</sup> Cf., in general, M. Roscini, *Le Zone Denuclearizzate*, Turin, Giappichelli Ed., 2003, pp. 1-410; J. Goldblat, “Zones exemptes d’armes nucléaires: une vue d’ensemble”, *Le droit international des armes nucléaires* (Journée d’études, Ed. S. Sur), Paris, Pedone, 1998, pp. 35-55.

<sup>281</sup> Upon the initiative of Australia.

<sup>282</sup> M. Hamel-Green, “The South Pacific — The Treaty of Rarotonga”, *Nuclear Weapons-Free Zones* (ed. R. Thakur), London/N.Y., MacMillan/St. Martin’s Press, 1998, p. 59, and cf. p. 62.

<sup>283</sup> *Ibid.*, pp. 77 and 71.

<sup>284</sup> This extended territorial scope has generated resistance on the part of nuclear-weapon States to accept its present form; A. Acharya and S. Ogunbanwo, “The Nuclear-Weapon-Free Zones in South-East Asia and Africa”, *Armaments, Disarmament and International Security — SIPRI Yearbook* (1998), pp. 444 and 448.

<sup>285</sup> United Nations, *Las Zonas Libres de Armas Nucleares en el Siglo XXI*, *op. cit. supra* note 277, pp. 60-61; and cf. J. O. Ihonvbere, “Africa — The Treaty of Pelindaba”, *Nuclear-Weapons-Free Zones*, *op. cit. supra* note 282, pp. 98-99 and 109. And, for a general study, cf. O. Adeniji, *The Treaty of Pelindaba on the African Nuclear-Weapon-Free Zone*, Geneva, UNIDIR, 2002, pp. 1-169.

(with its three Protocols) appears to have served the purpose to eradicate nuclear weapons from the African continent.

246. The fifth such treaty, that of Semipalatinsk, of 2006, contains, like the other treaties creating nuclear-weapon-free zones (*supra*), the basic prohibitions to manufacture, acquire, possess, station or control nuclear explosive devices within the zones<sup>286</sup>. The five treaties at issue, though containing loopholes (e.g., with regard to the transit of nuclear weapons)<sup>287</sup>, have as common denominator the practical value of arrangements that transcend the non-proliferation of nuclear weapons<sup>288</sup>.

247. Each of the five treaties (of Tlatelolco, Rarotonga, Bangkok, Pelindaba and Semipalatinsk) reflects the characteristics of each of the five regions, and they all pursue the same cause. The establishment of the nuclear-weapon-free zones has been fulfilling the needs and aspirations of peoples living under the fear of nuclear victimization<sup>289</sup>. Their purpose is being served, also in withholding or containing nuclear ambitions, to the ultimate benefit of humankind as a whole.

248. Nowadays, the five aforementioned nuclear-weapon-free zones are firmly established in densely populated areas, covering most (almost all) of the landmass of the southern hemisphere land areas (while excluding most sea areas)<sup>290</sup>. The adoption of the 1967 Tlatelolco Treaty, the 1985 Rarotonga Treaty, the 1995 Bangkok Treaty, the 1996 Pelindaba Treaty, and the 2006 Semipalatinsk Treaty, have disclosed the shortcomings and artificiality of the posture of the so-called political “realists”<sup>291</sup>, which insisted on the suicidal strategy of nuclear “deterrence”, in their characteristic subservience to power politics.

249. The substantial Final Report of 1999 of the UN Disarmament Commission underlined the relevance of nuclear-weapon-free zones and

<sup>286</sup> M. Roscini, “Something Old, Something New: The 2006 Semipalatinsk Treaty on a Nuclear Weapon-Free Zone in Central Asia”, 7 *Chinese Journal of International Law* (2008), p. 597.

<sup>287</sup> As to their shortcomings, cf., e.g., J. Goldblat, “The Nuclear Non-Proliferation Régime: Assessment and Prospects”, 256 *Recueil des cours de l’Académie de droit international de La Haye* (1995), pp. 137-138; M. Roscini, *op. cit. supra* note 286, pp. 603-604.

<sup>288</sup> J. Enkhsaikhan, “Nuclear-Weapon-Free Zones: Prospects and Problems”, 20 *Disarmament — Periodic Review by the United Nations* (1997), No. 1, p. 74.

<sup>289</sup> Cf., e.g., H. Fujita, “The Changing Role of International Law in the Nuclear Age: from Freedom of the High Seas to Nuclear-Free Zones”, *Humanitarian Law of Armed Conflict: Challenges Ahead — Essays in Honour of F. Kalshoven* (eds. A. J. M. Delissen and G. J. Tanja), Dordrecht, Nijhoff, 1991, p. 350, and cf. pp. 327-349.

<sup>290</sup> J. Prawitz, “Nuclear-Weapon-Free Zones: Their Added Value in a Strengthened International Safeguards System”, *Tightening the Reins — Towards a Strengthened International Nuclear Safeguards System* (eds. E. Häckel and G. Stein), Berlin/Heidelberg, Springer-Verlag, 2000, p. 166.

<sup>291</sup> Cf. United Nations, *Las Zonas Libres de Armas Nucleares en el Siglo XXI*, *op. cit. supra* note 277, pp. 27, 33-38 and 134.

of their contribution to the achievement of nuclear disarmament<sup>292</sup>, “expressing and promoting common values” and constituting “important complementary” instruments to the NPT and the “international regime for the prohibition” of any nuclear-weapon explosions<sup>293</sup>. Drawing attention to the central role of the United Nations in the field of disarmament<sup>294</sup>, the aforementioned Report added:

“Nuclear-weapon-free zones have ceased to be exceptional in the global strategic environment. To date, 107 States have signed or become parties to treaties establishing existing nuclear-weapon-free zones. With the addition of Antarctica, which was demilitarized pursuant to the Antarctic Treaty, nuclear-weapon-free zones now cover more than 50 per cent of the Earth’s land mass.

.....  
 The establishment of further nuclear-weapon-free zones reaffirms the commitment of the States that belong to such zones to honour their legal obligations deriving from other international instruments in force in the area of nuclear non-proliferation and disarmament to which they are parties.”<sup>295</sup>

250. Moreover, the 1999 Final Report of the UN Disarmament Commission further stated that, for their part, NWS should fully comply with their obligations, under the ratified protocols to the treaties on nuclear-weapon-free zones, “not to use or threaten to use nuclear weapons”<sup>296</sup>. It went on to encourage Member States of those zones “to share experiences” with States of other regions, so as “to establish further nuclear-weapon-free zones”<sup>297</sup>. It concluded that the international community, by means of “the creation of nuclear-weapon-free zones around the globe”, should aim at “general and complete disarmament under strict and effective international control, so that future generations can live in a more stable and peaceful atmosphere”<sup>298</sup>.

251. To the establishment of aforementioned five nuclear-weapon-free zones other initiatives against nuclear weapons are to be added, such as the prohibitions of placement of nuclear weapons, and other kinds of

<sup>292</sup> UN, *Report of the Disarmament Commission — General Assembly Official Records* (Fifty-Fourth Session, supplement No. 42), UN doc. A/54/42, of 6 May 1999, Annex I, pp. 6-7, paras. 1, 6 and 9.

<sup>293</sup> *Ibid.*, p. 7, paras. 10-11 and 13.

<sup>294</sup> *Ibid.*, Annex II, p. 11 3rd preambular paragraph.

<sup>295</sup> *Ibid.*, Annex I, p. 7, para. 5; and p. 8, para. 28.

<sup>296</sup> *Ibid.*, p. 9, para. 36.

<sup>297</sup> *Ibid.*, p. 10, para. 41.

<sup>298</sup> *Ibid.*, p. 10, para. 45.



weapons of mass destruction, in outer space, on the sea-bed, on the ocean floor and in the subsoil beyond the outer limit of the territorial sea-bed zone, — “denuclearized” by the Treaties of Antarctica (1959), Outer Space (1967) and the Deep Sea Bed (1971), respectively, to which can be added the Treaty on the Moon and Other Celestial Bodies (1979), established a complete demilitarization thereon<sup>299</sup>.

252. The fact that the international community counts today on five nuclear-weapon-free zones, in relation to which States that possess nuclear weapons do have a particular responsibility, reveals an undeniable advance of right reason, of the *recta ratio* in the foundations of contemporary international law. Moreover, the initiative of nuclear-weapon-free zones keeps on clearly gaining ground. In recent years, proposals are being examined for the setting up of new denuclearized zones of the kind<sup>300</sup>, as well as of the so-called single-State zone (e.g., Mongolia)<sup>301</sup>. That initiative further reflects the increasing disapproval, by the international community as a whole, of nuclear weapons, which, in view of their hugely destructive capability, constitute an affront to right reason (*recta ratio*).

#### XVIII. CONFERENCES ON THE HUMANITARIAN IMPACT OF NUCLEAR WEAPONS (2013-2014)

253. In the course of the proceedings in the present case of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, several references were made to the more recent series of Conferences on the Humanitarian Impact of Nuclear Weapons (2013-2014), and in particular to the statement made therein (in the second of those conferences) by the Marshall Islands, asserting that NWS should fulfil their obligation, “long overdue”, of negotiation to achieve complete nuclear disarmament (cf. *infra*). The Marshall Islands promptly referred to its own statement in the Nayarit Conference (2014) in its Memorial in the *cas d’espèce*, as well as in its oral arguments before the ICJ.

<sup>299</sup> Cf. G. Venturini, “Control and Verification of Multilateral Treaties on Disarmament and Non-Proliferation of Weapons of Mass Destruction”, 17 *University of California Davis Journal of International Law and Policy* (2011), pp. 359-360.

<sup>300</sup> E.g., in Central and Eastern Europe, in the Middle East, in Central and North-East and South Asia, and in the whole of the southern hemisphere.

<sup>301</sup> Cf. A. Acharya and S. Ogunbanwo, *op. cit. supra* note 284, p. 443; J. Enkhsaikhan, *op. cit. supra* note 288, pp. 79-80. Mongolia in effect declared its territory as a nuclear-weapon-free zone (in 1992), and in February 2000 adopted national legislation defining its status as a nuclear-weapon-free State. This was acknowledged by UN General Assembly resolution 55/33S of 20 November 2000.

254. In effect, the Conferences on the Humanitarian Impact of Nuclear Weapons (a series initiated in 2013) were intended to provide a forum for dialogue on, and a better understanding of, the humanitarian consequences of use of nuclear weapons for human beings, societies, and the environment, rather than a substitute of bilateral and multilateral fora for disarmament negotiations. This forum for dialogue and better understanding of the matter has counted on three Conferences to date, held, respectively, in Oslo in March 2013, in Nayarit in February 2014, and in Vienna in December 2014.

255. This recent series of Conferences has drawn attention to the humanitarian effects of nuclear weapons, restoring the central position of the concern for human beings and peoples. It has thus stressed the importance of the human dimension of the whole matter, and has endeavoured to awaken the conscience of the whole international community as well as to enhance the needed humanitarian co-ordination in the present domain. May I next proceed to a survey of their work and results so far.

#### *1. First Conference on the Humanitarian Impact of Nuclear Weapons*

256. The First Conference on the Humanitarian Impact of Nuclear Weapons took place in Oslo, Norway, on 4-5 March 2013, having counted on the participation of delegations representing 127 States, United Nations agencies, the International Committee of the Red Cross (ICRC), the Red Cross and the Red Crescent movement, international organizations, and civil society entities. It should not pass unnoticed that only two of the NWS, India and Pakistan, were present at this Conference (and only India made a statement)<sup>302</sup>. On the other hand, neither the Marshall Islands, nor the permanent members of the UN Security Council, attended it.

257. The Oslo Conference addressed three key issues, namely: (a) the immediate human impact of a nuclear weapon detonation; (b) the wider economic, developmental and environmental consequences of a nuclear weapon detonation; and (c) the preparedness of States, international organizations, civil society and the general public to deal with the predictable humanitarian consequences that would follow from a nuclear weapon detonation. A wide range of experts made presentations during the Conference.

258. Attention was drawn, e.g., to the nuclear testing's impact during the Cold-War period, in particular to the detonation of not less than 456 nuclear bombs in the four decades (between 1949 and 1989) in the testing ground of Semipalatinsk, in eastern Kazakhstan. It was reported (by UNDP) that, according to the Kazakh authorities, up to 1.5 million people were affected by fall-out from the blasts at Semipalatinsk; the

<sup>302</sup> [https://www.regjeringen.no/globalassets/upload/ud/vedlegg/hum/hum\\_india.pdf](https://www.regjeringen.no/globalassets/upload/ud/vedlegg/hum/hum_india.pdf).

nuclear test site was shut down in mid-1991. Other aspects were examined, all from a humanitarian outlook<sup>303</sup>. References were made, e.g., to General Assembly resolutions (such as resolution A/RES/63/279, of 24 April 2009), on humanitarian rehabilitation of the region. Such a humanitarian approach proved necessary, as the “historical experience from the use and testing of nuclear weapons has demonstrated their devastating immediate and long-term effects”<sup>304</sup>.

259. The key conclusions of the Oslo Conference, as highlighted by Norway’s Minister of Foreign Affairs in his closing statement<sup>305</sup>, can be summarized as follows. First, it is unlikely that any State or international body (such as UN relief agencies and the ICRC) could address the immediate humanitarian emergency caused by a nuclear weapon detonation in an adequate manner and provide sufficient assistance to those affected. Thus, the ICRC called for the abolition of nuclear weapons as the only effective preventive measure, and several participating States stressed that elimination of nuclear weapons is the only way to prevent their use; some States called for a ban on those weapons.

260. Secondly, the historical experience from the use and testing of nuclear weapons has demonstrated their devastating immediate and long-term effects. While the international scenario and circumstances surrounding it have changed, the destructive potential of nuclear weapons remains. And thirdly, the effects of a nuclear weapon detonation, irrespective of its cause, will not be constrained by national borders, and will affect States and peoples in significant ways, in a trans-frontier dimension, regionally as well as globally.

## 2. *Second Conference on the Humanitarian Impact of Nuclear Weapons*

261. The Second Conference on the Humanitarian Impact of Nuclear Weapons took place in Nayarit, Mexico, on 13-14 February 2014, having counted on the participation of delegations representing 146 States. The Marshall Islands, India and Pakistan attended it, whereas the United Kingdom did not. In addition to States, other participants included the ICRC, the Red Cross and the Red Crescent movement, international organizations, and civil society entities. During the Nayarit Conference, the delegate of the Marshall Islands stated that NWS States were failing to fulfil

<sup>303</sup> For accounts of the work of the 2013 Oslo Conference, cf., e.g., *Viewing Nuclear Weapons through a Humanitarian Lens* (eds. J. Borrie and T. Caughley), Geneva/N.Y., UN/UNIDIR, 2013, pp. 81-82, 87, 90-91, 93-96, 99, 105-108 and 115-116.

<sup>304</sup> Norway/Ministry of Foreign Affairs, *Chair’s Summary — Humanitarian Impact of Nuclear Weapons*, Oslo, 5 March 2013, p. 2.

<sup>305</sup> [https://www.regjeringen.no/en/aktuelt/nuclear\\_summary/id716343/](https://www.regjeringen.no/en/aktuelt/nuclear_summary/id716343/).

their obligations, under Article VI of the NPT and customary international law, to commence and conclude multilateral negotiations on nuclear disarmament; in his words:

“the Marshall Islands is convinced that multilateral negotiations on achieving and sustaining a world free of nuclear weapons are long overdue. Indeed we believe that States possessing nuclear arsenals are failing to fulfil their legal obligations in this regard. Immediate commencement and conclusion of such negotiations is required by legal obligation of nuclear disarmament resting upon each and every State under Article VI of the Non-Proliferation Treaty and customary international law. It also would achieve the objective of nuclear disarmament long and consistently set by the United Nations, and fulfil our responsibilities to present and future generations while honouring the past ones.”<sup>306</sup>

262. Earlier on, the Minister of Foreign Affairs of the Marshall Islands stated, at the UN High-Level Meeting on Nuclear Disarmament, on 26 September 2013, that the Marshall Islands “has a unique and compelling reason” to urge nuclear disarmament, namely,

“The Marshall Islands, during its time as a UN Trust Territory, experienced 67 large-scale tests of nuclear weapons. At the time of testing, and at every possible occasion in the intervening years, the Marshall Islands has informed UN Members of the devastating impacts of these tests — of the deliberate use of our people as unwilling scientific experiments, of ongoing health impacts inherited through generations, of our displaced populations who still live in exile or who were resettled under unsafe circumstances, and then had to be removed. Even today, science remains a moving target and our exiled local communities are still struggling with resettlement.

.....  
 Perhaps we [the Marshallese] have one of the most important stories to tell regarding the need to avert the use of nuclear weapons, and a compelling story to spur greater efforts for nuclear disarmament.” (Pp. 1-2.)<sup>307</sup>

<sup>306</sup> Marshall Islands’ Statement, Second Conference on the Humanitarian Impact of Nuclear Weapons, Nayarit, Mexico, 13-14 February 2014 (<http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nayarit-2014/statements/MarshallIslands.pdf>). The text is also quoted by the Marshall Islands in its Memorial in *Marshall Islands v. United Kingdom*, Annex 72.

<sup>307</sup> [Http://www.un.org/en/ga/68/meetings/nucleardisarmament/pdf/MH\\_en.pdf](http://www.un.org/en/ga/68/meetings/nucleardisarmament/pdf/MH_en.pdf). And the Marshall Islands’ Minister of Foreign Affairs (Ph. Muller) added that:

“It should be our collective goal as the United Nations to not only stop the spread of nuclear weapons, but also to pursue the peace and security of a world without

263. The Marshall Islands' statement in the 2014 Nayarit Conference was thus one of a few statements in which the Marshall Islands has articulated its claim, whereon they rely in the *cas d'espèce*, *inter alia*, to substantiate the existence of a dispute, including with the United Kingdom, which was not present at the Conference<sup>308</sup>. The Nayarit Conference participants also heard the poignant testimonies of five *Hibakusha*, — survivors of the atomic bombings of Hiroshima and Nagasaki, — who presented their accounts of the overwhelming devastation inflicted on those cities and their inhabitants by the atomic blasts (including the victims' burning alive, and carbonized or vaporized, as well as the long-term effects of radiation, killing survivors over seven decades).

264. They stressed the “moral imperative” of the abolition of nuclear weapons, as humanity and nuclear weapons cannot co-exist. A group of delegations of no less than 20 States called expressly for a ban of nuclear weapons, already long overdue; this was the sword of Damocles hanging over everyone's heads. The “mere existence” of nuclear weapons was regarded as “absurd”; attention was also drawn to the 2013 UN General Assembly High-Level Meeting on Disarmament, and to the obligations under international law, including those deriving from the NPT as well as common Article 1 of the Geneva Conventions on IHL<sup>309</sup>.

265. Furthermore, an association of over 60 entities of the civil society, from more than 50 countries, stated<sup>310</sup> that their own engagement was essential, as responsibilities fell on everyone to prevent the use of nuclear weapons; and prevention required the prohibition and ban of nuclear weapons, in the same way as those of biological and chemical weapons, landmines, and cluster munitions. Both the association, and the *Hibakusha*, condemned the dangerous strategy of nuclear “deterrence”.

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them. Further, the Republic of the Marshall Islands has recently ratified the Comprehensive Test Ban Treaty and urges other Member States to work towards bringing this important agreement into force.

The Marshall Islands is not the only nation in the Pacific to be touched by the devastation of nuclear weapon testing. (. . .) We express again our eventual aspirations to join with our Pacific neighbours in supporting a Pacific free of nuclear weapons in a manner consistent with international security.” (Pp. 1-2.)

<sup>308</sup> Memorial of the Marshall Islands, para. 99.

<sup>309</sup> Mexico/Gobierno de la República, *Chair's Summary — Second Conference on the Humanitarian Impact of Nuclear Weapons*, Mexico, 14 February 2014, pp. 2-3.

<sup>310</sup> On behalf of the International Campaign to Abolish Nuclear Weapons (ICAN), a coalition of over 350 entities in 90 countries.

266. The 2014 Nayarit Conference's conclusions, building on the conclusions of the previous Oslo Conference, can be summarized as follows. First, the immediate and long-term effects of a single nuclear weapon detonation, let alone a nuclear exchange, would be catastrophic. The mere existence of nuclear weapons generates great risks, because the military doctrines of the NWS envisage preparations for the deliberate use of nuclear weapons. Nuclear weapons could be detonated by accident, miscalculation, or deliberately.

267. Delegations of over 50 States from every region of the world made statements unequivocally calling for the total elimination of nuclear weapons and the achievement of a world free of nuclear weapons. At least 20 delegations of participating States in the Conference (*supra*) expressed the view that the way forward would be a ban on nuclear weapons. Others were equally clear in their calls for a convention on the elimination of nuclear weapons or a new legally binding instrument<sup>311</sup>.

268. Secondly, some delegations pointed out the security implications of nuclear weapons, or else expressed skepticism about the possibility of banning nuclear weapons as such. There were those which favoured a "step-by-step" approach to nuclear disarmament (within the framework of the NPT Action Plan), and called for the participation of NWS in this process. For their part, the nuclear-weapon-free States, in their majority, were however of the view that the step-by-step approach had failed to achieve its goal; they thus called for a new approach to nuclear disarmament.

269. Thirdly, for the Chairman of the Conference, a ban on nuclear weapons would be the first step towards their elimination; such a ban would also rectify the anomaly that nuclear weapons are the only weapons of mass destruction that are not subject to an explicit legal prohibition. He added that achieving a world free of nuclear weapons is consistent with States' obligations under international law, including under the NPT and common Article 1 to the Geneva Conventions on IHL. He at last called for the development of new international standards on nuclear weapons, including a legally binding instrument, to be concluded by the seventieth anniversary of the atomic bombings of Hiroshima and Nagasaki<sup>312</sup>.

<sup>311</sup> For example, for its part, India favoured a step-by-step approach towards the elimination of nuclear weapons, ultimately leading to "a universal, non-discriminatory convention on prohibition and elimination of nuclear weapons"; cf. [www.reachingcriticalwill.org/images/documents/Disarmament-fora/nayarit-2014/statements/India.pdf](http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nayarit-2014/statements/India.pdf).

<sup>312</sup> Cf. <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nayarit-2014/chairs-summary.pdf>.

### 3. *Third Conference on the Humanitarian Impact of Nuclear Weapons*

270. The third Conference on the Humanitarian Impact of Nuclear Weapons took place in Vienna, Austria, on 8-9 December 2014, having carried forward the momentum created by the previous Conference in Mexico. It counted on the participation of delegations of 158 States, as well as the UN, the ICRC, the Red Cross and Red Crescent movement, civil society entities and representatives of the academic world. For the first time, of the NWS, the United Kingdom attended the Conference; delegates from India, Pakistan, and the Marshall Islands were present as well.

271. Once again, the Conference participants heard the testimonies of survivors, the *Hibakusha*. Speaking of the “hell on earth” experienced in Hiroshima and Nagasaki; the “indiscriminate massacre of the atomic bombing” showed “the illegality and ultimate evil of nuclear weapons”<sup>313</sup>. In its statement, the Marshall Islands, addressing the testing in the region of 67 atomic and hydrogen bombs, between 1946 and 1958, — the strongest one having been the Bravo test (of 1 March 1954) of a hydrogen bomb, 1000 times more powerful than the atomic bomb dropped over Hiroshima, — referred to their harmful impacts, such as the birth of “monster-like babies”, the continuous suffering from “thyroid cancer, liver cancer and all types of radiogenic cancerous illnesses”, extending over the years<sup>314</sup>.

272. For its part, the ICRC stated that nuclear weapons ignore the principle of proportionality, and stand in breach of IHL (both conventional and customary) by causing unnecessary suffering to civilians; it expressed “significant concerns about the eventual spread of radiation to civilian areas and the radiological contamination of the environment” and everyone<sup>315</sup>. The ICRC further observed that, after “decades of focusing on nuclear weapons primarily in technical-military terms and as symbols of power”, a fundamental and reassuring change has occurred, as debates on the matter now shift attention to what those weapons “would mean for people and the environment, indeed for humanity”<sup>316</sup>.

<sup>313</sup> Cf. Vienna Conference on the Humanitarian Impact of Nuclear Weapons (8-9 December 2014), Vienna, Austria’s Federal Ministry for Europe, Integration and Foreign Affairs, 2015, p. 19.

<sup>314</sup> *Ibid.*, p. 34.

<sup>315</sup> *Ibid.*, p. 58.

<sup>316</sup> *Ibid.*, p. 17.

273. The UN Secretary-General (Ban Ki-moon) sent a statement, read at the Conference, wherein he condemned expenditures in the modernization of weapons of mass destruction (instead of meeting the challenges of poverty and climate change). Recalling that the obligation of nuclear disarmament was one of both conventional and customary international law, he further condemned the strategy of nuclear “deterrence”; in his own words,

“Upholding doctrines of nuclear deterrence does not counter proliferation, but it makes the weapons more desirable. Growing ranks of nuclear-armed States does not ensure global stability, but instead undermines it. (. . .) The more we understand about the humanitarian impacts, the more it becomes clear that we must pursue disarmament as an urgent imperative.”<sup>317</sup>

274. The Vienna Conference contributed to a deeper understanding of the consequences and risks of a nuclear detonation, having focused to a larger extent on the legal framework (and gaps therein) with regard to nuclear weapons<sup>318</sup>. It was reckoned that the impact of nuclear weapons detonation, irrespective of the cause, would go well beyond national borders, and could have regional and even global consequences, causing destruction, death, diseases and displacement on a very large scale, as well as profound and long-term damage to the environment, climate, human health and well-being, socioeconomic development and social order. They could, in sum, threaten the very survival of humankind. It was acknowledged that the scope, scale and interrelationship of the humanitarian consequences caused by nuclear weapon detonation are catastrophic, and more complex than commonly understood; these consequences can be large scale and potentially irreversible.

275. States expressed various views regarding the ways and means of advancing the nuclear disarmament agenda. The delegations of 29 States called for negotiations of a legally-binding instrument to prohibit or ban nuclear weapons. A number of delegations considered that the inability to make progress on any particular step was no reason not to pursue negotiations in good faith on other effective measures to achieve and maintain a nuclear-weapon-free world. Such steps have been taken very effectively in regional contexts in the past, as evidenced by nuclear-weapon-free zones.

<sup>317</sup> Cf. Vienna Conference on the Humanitarian Impact of Nuclear Weapons (8-9 December 2014), Vienna, Austria’s Federal Ministry for Europe, Integration and Foreign Affairs, 2015, p. 16.

<sup>318</sup> Cf. *ibid.* pp. 1-88.



276. As the general report of the Vienna Conference observed, the three Conferences on the Humanitarian Impact of Nuclear Weapons (of Oslo, Nayarit and then Vienna), have contributed to a “deeper understanding” of the “actual risks” posed by nuclear weapons, and the “unspeakable suffering”, devastating effects, and “catastrophic humanitarian consequences” caused by their use. As “nuclear deterrence entails preparing for nuclear war, the risk of nuclear weapon use is real”. (. . .) The only assurance against the risk of a nuclear weapon detonation is the total elimination of nuclear weapons”, in “the interest of the very survival of humanity”; hence the importance of Article VI of the NPT, and of the entry into force of the CTBT<sup>319</sup>.

277. The 2014 Vienna Conference’s conclusions can be summarized as follows. First, the use and testing of nuclear weapons have demonstrated their devastating immediate, mid- and long-term effects. Nuclear testing in several parts of the world has left a legacy of serious health and environmental consequences. Radioactive contamination from these tests disproportionately affects women and children. It contaminated food supplies and continues to be measurable in the atmosphere to this day.

278. Secondly, as long as nuclear weapons exist, there remains the possibility of a nuclear weapon explosion. The risks of accidental, mistaken, unauthorized or intentional use of nuclear weapons are evident due to the vulnerability of nuclear command and control networks to human error and cyber-attacks, the maintaining of nuclear arsenals on high levels of alert, forward deployment and their modernization. The dangers of access to nuclear weapons and related materials by non-state actors, particularly terrorist groups, persist. All such risks, which increase over time, are unacceptable.

279. Thirdly, as nuclear deterrence entails preparing for nuclear war, the risk of the use of nuclear weapons is real. Opportunities to reduce this risk must be taken now, such as de-alerting and reducing the role of nuclear weapons in security doctrines. Limiting the role of nuclear weapons to deterrence does not remove the possibility of their use, nor does it address the risks stemming from accidental use. The only assurance against the risk of a nuclear weapon detonation is the total elimination of nuclear weapons.

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<sup>319</sup> Cf. Vienna Conference on the Humanitarian Impact of Nuclear Weapons (8-9 December 2014), Vienna, Austria’s Federal Ministry for Europe, Integration and Foreign Affairs, 2015, pp. 5-7.

280. Fourthly, the existence itself of nuclear weapons raises serious ethical questions, — well beyond legal discussions and interpretations, — which should be kept in mind. Several delegations asserted that, in the interest of the survival of humankind, nuclear weapons must never be used again, under any circumstances. Fifthly, no State or international organ could adequately address the immediate humanitarian emergency or long-term consequences caused by a nuclear weapon detonation in a populated area, nor provide adequate assistance to those affected. The imperative of prevention as the only guarantee against the humanitarian consequences of nuclear weapons use is thus to be highlighted. Sixthly, participating delegations reiterated the importance of the entry into force of the CTBT as a key element of the international nuclear disarmament and non-proliferation regime.

281. Seventhly, it is clear that there is no comprehensive legal norm universally prohibiting the possession, transfer, production and use of nuclear weapons, that is, international law does not address today nuclear weapons in the way it addresses biological and chemical weapons. This is generally regarded as an anomaly — or rather, a nonsense, — as nuclear weapons are far more destructive. In any case, international environmental law remains applicable in armed conflict and can pertain to nuclear weapons, even if not specifically regulating these latter. Likewise, international health regulations would cover effects of nuclear weapons. In the light of the new evidence produced in those two years (2013-2014) about the humanitarian impact of nuclear weapons, it is very doubtful whether such weapons could ever be used in conformity with IHL.

#### 4. *Aftermath:* *The “Humanitarian Pledge”*

282. At the 2014 Vienna Conference, although a handful of States expressed scepticism about the effectiveness of a ban on nuclear weapons, the overwhelming majority of NPT States parties expected the forthcoming 2015 NPT Review Conference to take stock of all relevant developments, including the outcomes of the Conferences on the Humanitarian Impact of Nuclear Weapons (*supra*), and determine the next steps for the achievement and maintenance of a nuclear-weapon-free world. At the end of the Vienna Conference, the host State, Austria, presented a “Pledge” calling upon States parties to the NPT to renew their commitment to the urgent and full implementation of existing obligations under Article VI, and to this end, to identify and pursue effective measures

to fill the legal gap for the prohibition and elimination of nuclear weapons<sup>320</sup>.

283. The Pledge further called upon NWS to take concrete interim measures to reduce the risk of nuclear weapons detonations, including by diminishing the role of nuclear weapons in military doctrines. The Pledge also recognized that: (a) the rights and needs of the victims of nuclear weapon use and testing have not yet been adequately addressed; (b) all States share the responsibility to prevent any use of nuclear weapons; and (c) the consequences of nuclear weapons use raise profound moral and ethical questions going beyond debates about the legality of these weapons.

284. Shortly before the Vienna Conference, 66 States had already endorsed the Pledge; by the end of the Conference, 107 States had endorsed it, thus “internationalizing” it and naming it at the end as the “Humanitarian Pledge”<sup>321</sup>. On 7 December 2015, the UN General Assembly adopted the substance of the Humanitarian Pledge in the form of its resolution A/RES/70/48. As of April 2016, 127 States have formally endorsed the Humanitarian Pledge; unsurprisingly, none of the NWS has done so.

285. Recent endeavours, such as the ones just reviewed of the Conferences on the Humanitarian Impact of Nuclear Weapons have been rightly drawing attention to the grave humanitarian consequences of nuclear weapons detonations. The reframing of the whole matter in a people-centred outlook appears to me particularly lucid, and necessary, keeping in mind the unfoundedness of the strategy of “deterrence” and the catastrophic consequences of the use of nuclear weapons. The “step-by-step” approach, pursued by the NWS in respect to the obligation under Article VI of the NPT, appears essentially State-centric, having led to an apparent standstill or deadlock.

286. The obligation of nuclear disarmament being one of result, the “step-by-step” approach cannot be extended indefinitely in time, with its insistence on the maintenance of the nuclear sword of Damocles. The “step-by-step” approach has produced no significantly concrete results to

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<sup>320</sup> [Http://www.bmeia.gv.at/fileadmin/user\\_upload/Zentrale/Aussenpolitik/Abruestung/-HINW14/HINW14Vienna\\_Pledge\\_Document.pdf](http://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/-HINW14/HINW14Vienna_Pledge_Document.pdf). The Pledge only refers to States’ obligations under the NPT and makes no mention of customary international law.

<sup>321</sup> *Ibid.*

date, seeming to make abstraction of the numerous pronouncements of the United Nations upholding the obligation of nuclear disarmament (cf. *supra*). After all, the absolute prohibition of nuclear weapons, — which is multifaceted<sup>322</sup>, is one of *jus cogens* (cf. *supra*). Such weapons, as the Conferences on the Humanitarian Impact of Nuclear Weapons have evidenced, are essentially inhumane, rendering the strategy of “deterrence” unfounded and unsustainable (cf. *supra*).

287. Ever since those Conferences (2013-2014), there has been a tendency (in 2014-2016) of slight reduction of nuclear warheads<sup>323</sup>, though NWS have kept on modernizing their respective nuclear armament programs, in an indication that nuclear weapons are likely to remain in the foreseeable future<sup>324</sup>. Yet, the growing awareness of the humanitarian impact of nuclear weapons has raised the question of the possibility of developing “a deontological position according to which the uniquely inhumane suffering that nuclear weapons inflict on their victims makes it inherently wrongful to use them”<sup>325</sup>.

288. *Tempus fugit*. There remains a long way to go to achieve a nuclear-weapon-free world. The United Nations itself has been drawing attention to the urgency of nuclear disarmament. It has done so time and time again, and, quite recently, in the convocation in October 2015, of a new Open-Ended Working Group (OEWG), as a subsidiary body of the UN General Assembly, to address concrete and effective legal measures to attain and maintain a world without nuclear weapons<sup>326</sup>. It draws attention therein to the importance of multilateralism, to the relevance of “inclusiveness” (participation of all UN Member States) and of the contribution, in addition to that of States, also of international organizations, of entities of the civil society, and of the academia<sup>327</sup>. And it reaffirms “the urgency of securing substantive progress in multilateral nuclear disarmament negotiations”, in order “to attain and maintain a world without nuclear weapons”<sup>328</sup>.

<sup>322</sup> Encompassing measures relating to any use, threat of use, development, production, acquisition, possession, stockpiling and transfer of nuclear weapons.

<sup>323</sup> From around 16,300 nuclear warheads in 2014 to 15,850 in 2015, and to 15,395 in early 2016.

<sup>324</sup> Cf. *SIPRI Yearbook 2016: Armaments, Disarmament and International Security*, Stockholm-Solna, SIPRI, 2016, Chap. 16, pp. 609-667.

<sup>325</sup> ILPI, *Evidence of Catastrophe — A Summary of the Facts Presented at the Three Conferences on the Humanitarian Impact of Nuclear Weapons*, Oslo, ILPI, 2015, p. 15.

<sup>326</sup> UN General Assembly doc. A/C.1/70/L.13/Rev.1, of 29 October 2015, pp. 1-3.

<sup>327</sup> *Ibid.*, preamble, paras. 8 and 14-15.

<sup>328</sup> *Ibid.*, operative part, para. 2.

289. It should not pass unnoticed that all the initiatives that I have just reviewed in the present dissenting opinion (NPT Review Conferences, the establishment of nuclear-weapon-free zones, and the Conferences on Humanitarian Impact of Nuclear Weapons), referred to by the Contending Parties in the course of the proceedings before the ICJ in the present case of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, have gone beyond the inter-State outlook. In my perception, there is great need, in the present domain, to keep on looking beyond States, so as to behold peoples' and humankind's quest for survival in our times.

XIX. FINAL CONSIDERATIONS: *OPINIO JURIS COMMUNIS*  
EMANATING FROM CONSCIENCE (*RECTA RATIO*),  
WELL ABOVE THE "WILL"

290. Nuclear weapons, as from their conception, have been associated with overwhelming destruction. It may be recalled that the first atomic bombs were fabricated in an epoch of destruction and devastation, — the Second World War, — of the abominable "total war", in flagrant breach of IHL and of the ILHR<sup>329</sup>. The fabrication of nuclear weapons, followed by their use, made abstraction of the fundamental principles of international law, moving the world into lawlessness in the current nuclear age. The strategy of "deterrence", in a "dialectics of suspicion", leads to an unforeseeable outcome, amidst complete destruction. Hence the utmost importance of negotiations conducive to general disarmament, which, — as warned by Raymond Aron [already] in the early 1960s, — had "never been taken seriously" by the super-powers<sup>330</sup>.

291. Last but not least, may I come back to a key point which I have dwelt upon in the present dissenting opinion pertaining to the *opinio juris communis* as to the obligation of nuclear disarmament (cf. Part XV, *supra*). In the evolving law of nations, basic considerations of humanity have an important role to play. Such considerations nourish *opinio juris* on matters going well beyond the interests of individual States. The ICJ has, on more than one occasion, taken into account resolutions of the

<sup>329</sup> For an account, cf., e.g., *inter alia*, J. Lukacs, *L'héritage de la Seconde Guerre Mondiale*, Paris, Ed. F.-X. de Guibert, 2011, pp. 38-39, 55, 111 and 125-148; and cf. I. Kershaw, *To Hell and Back — Europe 1914-1949*, London, Penguin, 2016, pp. 7, 356, 407, 418, 518 and 521.

<sup>330</sup> R. Aron, *Paz e Guerra entre as Nações* [1962], Brasília, Edit. Universidade de Brasília, 1979, pp. 413, 415, 421-422 and 610. R. Aron's book contains his reflections on the new age of nuclear weapons, amidst the tensions of the cold-war era, and the new challenges and dangers it imposed, — persisting to date, — for the future of humankind; cf., for the French edition, R. Aron, *Paix et guerre entre les nations*, 8th ed., Paris, Éd. Calmann-Lévy, 2015, pp. 13-770.

United Nations (in distinct contexts) as a means whereby international law manifests itself.

292. In its *célèbre* Advisory Opinion (of 21 June 1971) on *Namibia*, for example, the ICJ dwelt upon, in particular, two UN General Assembly resolutions relevant to the formation of *opinio juris*<sup>331</sup>. Likewise, in its Advisory Opinion (of 16 October 1975) on the *Western Sahara*, the ICJ considered and discussed in detail some UN General Assembly resolutions<sup>332</sup>. In this respect, references can further be made to the ICJ's Advisory Opinions on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (of 9 July 2004)<sup>333</sup>, and on the *Declaration of Independence of Kosovo* (of 22 July 2010)<sup>334</sup>. In its 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons*, the ICJ admitted, even if in a rather restrictive way, the emergence and gradual evolution of an *opinio juris* as reflected in a series of resolutions of the UN General Assembly (*I.C.J. Reports 1996 (I)*, pp. 254-255, para. 70). But the ICJ could have gone (much) further than that.

293. After all, *opinio juris* has already had a long trajectory in legal thinking, being today endowed with a wide dimension. Thus, already in the nineteenth century, the so-called “historical school” of legal thinking and jurisprudence (of F. K. von Savigny and G. F. Puchta) in reaction to the voluntarist conception, gradually discarded the “will” of the States by shifting attention to *opinio juris*, requiring practice to be an authentic expression of the “juridical conscience” of nations and peoples. With the passing of time, the acknowledgment of conscience standing above the “will” developed further, as a reaction against the reluctance of some States to abide by norms addressing matters of general or common interest of the international community.

294. This had an influence on the formation of rules of customary international law, a much wider process than the application of one of its formal “sources”. *Opinio juris communis* came thus to assume “a considerably broader dimension than that of the subjective element constitutive

<sup>331</sup> On the principle of self-determination of peoples, namely, General Assembly resolutions 1514 (XV) of 14 December 1960, and 2145 (XXI) of 27 October 1966; cf. *I.C.J. Reports 1971*, pp. 31, 45 and 49-51.

<sup>332</sup> Cf. *I.C.J. Reports 1975*, pp. 20, 23, 26-37, 40, 57 and 67-68.

<sup>333</sup> Cf. *I.C.J. Reports 2004 (I)*, pp. 171-172, paras. 86-88.

<sup>334</sup> Cf. *I.C.J. Reports 2010 (II)*, p. 437, para. 80 (addressing a General Assembly resolution “which reflects customary international law”).

of custom”<sup>335</sup>. *Opinio juris* became a key element in the *formation* itself of international law, a *law of conscience*. This diminished the unilateral influence of the most powerful States, fostering international law-making in fulfilment of the public interest and in pursuance of the common good of the international community as a whole.

295. The foundations of the international legal order came to be reckoned as independent from, and transcending, the “will” of individual States; *opinio juris communis* came to give expression to the “juridical conscience”, no longer only of nations and peoples — sustained in the past by the “historical school” — but of the international community as a whole, heading towards the universalization of international law. It is, in my perception, this international law of conscience that turns in particular towards nuclear disarmament, for the sake of the survival of humankind.

296. In 1983, Wang Tieya wrote against minimizing the legal significance of resolutions of the General Assembly, in particular the declaratory ones. As they clarify principles and rules of international law, he contended that they “cannot be said to have no law-making effect at all merely because they are not binding in the strict sense. At the very least, since they embody the convictions of a majority of States, General Assembly resolutions can indicate the general direction in which international law is developing”<sup>336</sup>. He added that those General Assembly resolutions, reflecting the position of “an overwhelming majority of States”, have “accelerated the development of international law”, in helping to crystallize emerging rules into “clearly defined norms”<sup>337</sup>. In the same decade, it was further pointed out that General Assembly resolutions have been giving expression, over the years, to “basic concepts of

<sup>335</sup> A. A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, *op. cit. supra* note 111, p. 137, and cf. p. 138; and cf. R. Huesa Vinaixa, *El Nuevo Alcance de la ‘Opinio Juris’ en el Derecho Internacional Contemporáneo*, Valencia, Tirant lo Blanch, 1991, pp. 30-31 and 36-38, and cf. pp. 76-77, 173, 192, 194, 199 and 204-205; R. E. Piza Escalante, “La ‘Opinio Juris’ como Fuente Autónoma del Derecho Internacional (‘Opinio Juris’ y ‘Jus Cogens’)”, 39 *Relaciones Internacionales — Heredia/C.R.* (1992), pp. 61-74; J. I. Charney, “International Lawmaking — Article 38 of the ICJ Statute Reconsidered”, *New Trends in International Lawmaking — International ‘Legislation’ in the Public Interest* (Proceedings of the Kiel Symposium, March 1996), Berlin, Duncker & Humblot, 1997, pp. 180-183 and 189-190.

<sup>336</sup> Wang Tieya, “The Third World and International Law”, *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (eds. R. St. J. Macdonald and D. M. Johnston), The Hague, M. Nijhoff, 1983, p. 964.

<sup>337</sup> *Ibid.*, pp. 964-965.

equity and justice, or of the underlining spirit and aims” of the United Nations<sup>338</sup>.

297. Still in the 1980s, in the course I delivered at the Institute of Public International Law and International Relations of Thessaloniki, in 1988, I began by pondering that customary and conventional international law are interrelated, — as acknowledged by the ICJ itself<sup>339</sup> — and UN General Assembly resolutions contribute to the emergence of *opinio juris communis*<sup>340</sup>. I stood against the “strictly voluntarist position” underlying the unacceptable concept of so-called “persistent objector”, and added that dissent from “one or another State individually cannot prevent the creation of new customary rules” or obligations, ensuing from *opinio juris communis* and not from *voluntas*<sup>341</sup>.

298. In the evolution of international law in time, I proceeded, voluntarist positivism has shown itself “entirely incapable” of explaining the consensual formation of customary international obligations; contrary to “the pretensions of positivist voluntarism” (with its stubborn emphasis on the consent of individual States), “freedom of spirit is the first to rebel” against immobilism, in devising responses to new challenges affecting the international community as a whole, and acknowledging obligations incumbent upon all States<sup>342</sup>.

299. In my “repudiation of voluntarist positivism”, I concluded on this point that the attention to customary international law (“incomparably less vulnerable” than conventional international law to voluntarist temptations) is in line with the progressive development (moved by conscience)

<sup>338</sup> B. Sloan, “General Assembly Resolutions Revisited (Forty Years Later)”, 58 *British Year Book of International Law* (1987), p. 80, and cf. pp. 116, 137 and 141.

<sup>339</sup> For example, in the course of the proceedings in the *Nuclear Tests* cases (1973-1974), one of the applicant States (Australia) recalled, in the public sitting of 8 July 1974, that the ICJ had held, in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 41), that a conventional norm can pass into the general *corpus* of international law thus becoming also a rule of customary international law; cf. *I.C.J. Pleadings, Nuclear Tests (Australia v. France)*, Vol. I, p. 503. In effect, may I add, just as a customary rule may later crystallize into a conventional norm, this latter can likewise generate a customary rule. International law is not static (as legal positivists wrongfully assume); it is essentially dynamic.

<sup>340</sup> A. A. Cançado Trindade, “Contemporary International Law-Making: Customary International Law and the Systematization of the Practice of States”, *Sources of International Law (Thesaurus Acroasium*, Vol. XIX), Thessaloniki, Institute of Public International Law and International Relations, 1992, pp. 68 and 71.

<sup>341</sup> *Ibid.*, pp. 78-79.

<sup>342</sup> *Ibid.*, pp. 126-129.



of international law, so as to provide a common basis for the fulfilment of the needs and aspirations of all peoples<sup>343</sup>. Today, almost three decades later, I firmly restate, in the present dissenting opinion, my own position on the matter, in respect of the customary and conventional international obligation to put an end to nuclear weapons, so as to rid the world of their inhuman threat.

300. May I here, furthermore, ponder that UN General Assembly or Security Council resolutions are adopted on behalf not of the States which voted in favour of them, but more precisely on behalf of the United Nations Organization itself (its respective organs), being thus *valid for all UN Member States*. This applies to the resolutions surveyed in the present dissenting opinion. It should be kept in mind that the UN is endowed with an international legal personality of its own, which enables it to act at international level as a distinct entity, independently of individual Member States; in this way, it upholds the juridical equality of all States, and mitigates the worrisome vulnerability of factually weaker States, such as the NNWS; in doing so, it aims — by multilateralism — at the common good, at the realization of common goals of the international community as a whole<sup>344</sup>, such as nuclear disarmament.

301. A small group of States — such as the NWS — cannot overlook or minimize those reiterated resolutions, extended in time, simply because they voted against them, or abstained. Once adopted, they are valid for all UN Member States. They are resolutions of the United Nations Organization itself, and not only of the large majority of UN Member States which voted in favour of them. UN General Assembly resolutions, reiteratedly addressing matters of concern to humankind as a whole (such as existing nuclear weapons), are in my view endowed with normative value. They cannot be properly considered from a State voluntarist perspective; they call for another approach, away from the strict voluntarist-positivist one.

302. Conscience stands above the “will”. The universal juridical conscience stands well above the “will” of individual States, and resonates in resolutions of the UN General Assembly, which find inspiration in general principles of international law, which, for their part, give expression to values and aspirations of the international community as a whole, of

<sup>343</sup> *Op. cit. supra* note 340, pp. 128-129. And cf., more recently, in general, A. A. Cançado Trindade, “The Contribution of Latin American Legal Doctrine to the Progressive Development of International Law”, 376 *Recueil des cours de l’Académie de droit international de La Haye* (2014), pp. 9-92, esp. pp. 75-76.

<sup>344</sup> Cf., in this sense, A. A. Cançado Trindade, *Direito das Organizações Internacionais*, 6th rev. ed., Belo Horizonte/Brazil, Edit. Del Rey, 2014, pp. 51 and 530-531.

all humankind<sup>345</sup>. This — may I reiterate — is the case of General Assembly resolutions surveyed in the present dissenting opinion (cf. *supra*). The values which find expression in those *prima principia* inspire every legal order and, ultimately, lie in the foundations of this latter.

303. The general principles of law (*prima principia*), in my perception, confer upon the (national and international) legal order its ineluctable axiological dimension. Notwithstanding, legal positivism and political “realism”, in their characteristic subservience to power, incur into their basic mistake of minimizing those principles, which lie in the foundations of any legal system, and which inform and conform the norms and the action pursuant to them, in the search for the realization of justice. Whenever that minimization of principles has prevailed the consequences have been disastrous<sup>346</sup>.

304. They have been contributing, in the last decades, to a vast *corpus juris* on matters of concern to the international community as a whole, such as nuclear disarmament. Their contribution to this effect has overcome the traditional inter-State paradigm of the international legal order<sup>347</sup>. This can no longer be overlooked in our days. The inter-State mechanism of the *contentieux* before the ICJ cannot be invoked in justification for an inter-State reasoning. As “the principal judicial organ” of the United Nations (UN Charter, Article 92), the ICJ has to bear in mind not only States, but also “we, the peoples”, on whose behalf the UN Charter was adopted. In its international adjudication of contentious cases, like the present one of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, the ICJ has to bear in mind basic considerations of humanity, with their incidence on questions of admissibility and jurisdiction, as well as of substantive law.

## XXI. EPILOGUE: A RECAPITULATION

305. Coming to the end of the present dissenting opinion, I feel in peace with my conscience: from all the preceding considerations, I trust

<sup>345</sup> A. A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, *op. cit. supra* note 111, pp. 129-138.

<sup>346</sup> A. A. Cançado Trindade, *A Humanização do Direito Internacional*, 2nd rev. ed., Belo Horizonte/Brazil, 2015, pp. 6-24; A. A. Cançado Trindade, *Os Tribunais Internacionais e a Realização da Justiça*, *op. cit. supra* note 234, pp. 410-418.

<sup>347</sup> A. A. Cançado Trindade, *Direito das Organizações Internacionais*, *op. cit. supra* note 344, pp. 530-537.

to have made it crystal clear that my own position, in respect of all the points which form the object of the present Judgment on the case of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, stands in clear and entire opposition to the view espoused by the Court's split majority that the existence of a legal dispute has not been established before it, and that the Court has no jurisdiction to consider the Application lodged with it by the Marshall Islands, and cannot thus proceed to the merits of the case. Not at all: in my understanding, there is a dispute before the Court, which has jurisdiction to decide the case. There is a conventional and customary international law obligation of nuclear disarmament. Whether there has been a concrete breach of this obligation, the Court could only decide on the merits phase of the present case.

306. My dissenting position is grounded not only on the assessment of the arguments produced before the Court by the Contending Parties, but above all on issues of principle and on fundamental values, to which I attach even greater importance. As my dissenting position covers all points addressed in the present Judgment, in its reasoning as well as in its conclusion, I have thus felt obliged, in the faithful exercise of the international judicial function, to lay on the records, in the present dissenting opinion, the foundations of my dissenting position thereon. I deem it fit, at this last stage, to recapitulate all the points of my dissenting position, expressed herein, for the sake of clarity, and in order to stress their inter-relatedness.

307. *Primus*: According to the *jurisprudence constante* of the Court, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests; The existence of an international dispute (at the time of lodging a claim) is a matter for the objective determination of the Court. The existence of a dispute may be inferred. *Secundus*: The objective determination of a dispute by the Court is not intended to protect respondent States, but rather and more precisely to secure the proper exercise of the Court's judicial function. *Tertius*: There is no requirement of prior notice of the applicant State's intention to initiate proceedings before the ICJ, nor of prior "exhaustion" of diplomatic negotiations, nor of prior notification of the claim; it is, in sum, a matter for objective determination of the Court itself.

308. *Quartus*: The Marshall Islands and the United Kingdom/India/Pakistan have pursued distinct arguments and courses of conduct on the matter at issue, evidencing their distinct legal positions, which suffice for the Court's objective determination of the existence of a dispute. *Quintus*: There is no legal ground for attempting to heighten the threshold for the determination of the existence of a dispute; in its *jurisprudence constante*,

the Court has expressly avoided a formalistic approach on this issue, which would affect access to justice itself. The Court has, instead, in its *jurisprudence constante*, upheld its own *objective determination* of the existence of a dispute, rather than relying— as it does in the present case — on the subjective criterion of “awareness” of the respondent States.

309. *Sextus*: The distinct series of UN General Assembly resolutions on nuclear disarmament over the years (namely, warning against nuclear weapons, 1961-1981; on freeze of nuclear weapons, 1982-1992; condemning nuclear weapons, 1982-2015; following-up the ICJ’s 1996 Advisory Opinion, 1996-2015) are endowed with authority and legal value. *Septimus*: Their authority and legal value have been duly acknowledged before the ICJ in its advisory proceedings in 1995. *Octavus*: Like the General Assembly, the Security Council has also expressed its concern on the matter at issue, in its work and its resolutions on nuclear disarmament.

310. *Nonus*: The aforementioned United Nations resolutions, in addition to other initiatives, portray the longstanding saga of the United Nations in the condemnation of nuclear weapons. *Decimus*: The fact that weapons of mass destruction (poisonous gases, biological and chemical weapons) have been outlawed, and nuclear weapons, far more destructive, have not been banned yet, is a juridical absurdity. The obligation of nuclear disarmament has emerged and crystallized nowadays in both conventional and customary international law, and the United Nations has, over the decades, been giving a most valuable contribution to this effect.

311. *Undecimus*: In the *cas d’espèce*, the issue of United Nations resolutions and the emergence of *opinio juris communis* in the present domain of the obligation of nuclear disarmament has grasped the attention of the Contending Parties in submitting their distinct arguments before the Court. *Duodecimus*: The presence of evil has marked human existence for centuries. Ever since the eruption of the nuclear age in August 1945, some of the world’s great thinkers have been inquiring whether humankind has a future, and have been drawing attention to the imperative of respect for life and the relevance of humanist values. *Tertius decimus*: Also in international legal doctrine there have been those who have been stressing the needed prevalence of human conscience, the universal juridical conscience, over State voluntarism.

312. *Quartus decimus*: The UN Charter is attentive to peoples; the recent cycle of World Conferences of the United Nations has had, as a common denominator, the recognition of the legitimacy of the concern of the international community as a whole with the conditions of living and

the well-being of peoples everywhere. *Quintus decimus*: General principles of law (*prima principia*) rest in the foundations of any legal system. They inform and conform its norms, guide their application, and draw attention to the prevalence of *jus necessarium* over *jus voluntarium*.

313. *Sextus decimus*: The nature of a case before the Court may well require a reasoning going beyond the strictly inter-State outlook; the present case concerning the obligation of nuclear disarmament requires attention to be focused on peoples, in pursuance of a humanist outlook, rather than on inter-State susceptibilities. *Septimus decimus*: The inter-State mechanism of adjudication of contentious cases before the ICJ does not at all imply that the Court's reasoning should likewise be strictly inter-State. Nuclear disarmament is a matter of concern to humankind as a whole.

314. *Duodevicesimus*: The present case stresses the utmost importance of fundamental principles, such as that of the juridical equality of States, following the principle of humanity, and of the idea of an objective justice. *Undevicesimus*: Factual inequalities and the strategy of "deterrence" cannot be made to prevail over the juridical equality of States. *Vicesimus*: "Deterrence" cannot keep on overlooking the distinct series of UN General Assembly resolutions, expressing an *opinio juris communis* in condemnation of nuclear weapons. *Vicesimus primus*: As also sustained by general principles of international law and international legal doctrine, nuclear weapons are in breach of international law, of IHL and the ILHR, and of the UN Charter.

315. *Vicesimus secundus*: There is need of a people-centred approach in this domain, keeping in mind the fundamental right to life; the *raison d'humanité* prevails over the *raison d'Etat*. Attention is to be kept on the devastating and catastrophic consequences of the use of nuclear weapons. *Vicesimus tertius*: In the path towards nuclear disarmament, the peoples of the world cannot remain hostage of individual State consent. The universal juridical conscience stands well above the "will" of the State. *Vicesimus quartus*: The absolute prohibitions of arbitrary deprivation of human life, of infliction of cruel, inhuman or degrading treatment, and of infliction of unnecessary suffering, are prohibitions of *jus cogens*, which have an incidence on ILHR and IHL and ILR, and foster the current historical process of humanization of international law.

316. *Vicesimus quintus*: The positivist outlook unduly overlooks the *opinio juris communis* as to the illegality of all weapons of mass destruction, including [and starting with] nuclear weapons, and the obligation of

nuclear disarmament, under contemporary international law. *Vicesimus sextus*: Conventional and customary international law go together, in the domain of the protection of the human person, as disclosed by the Martens clause, with an incidence on the prohibition of nuclear weapons. *Vicesimus septimus*: The existence of nuclear weapons is the contemporary tragedy of the nuclear age; today, more than ever, human beings need protection from themselves. Nuclear weapons have no ethics, and ethics cannot be separated from law, as taught by jusnaturalist thinking.

317. *Vicesimus octavus*: Humankind, a subject of rights, has been a potential victim of nuclear weapons already for a long time. *Vicesimus nonus*: The law of nations encompasses, among its subjects, humankind as a whole (as propounded by the “founding fathers” of international law). *Trigesimus*: This humanist vision is centred on peoples, keeping in mind the humane ends of States. *Trigesimus primus*: *Opinio juris communis necessitatis*, upholding a customary and conventional obligation of nuclear disarmament, has been finding expression in the NPT Review Conferences, in the relevant establishment of nuclear-weapon-free zones, and in the recent Conferences of Humanitarian Impact of Nuclear Weapons, — in their common cause of achieving and maintaining a nuclear-weapon-free world. *Trigesimus secundus*: Those initiatives have gone beyond the State-centric outlook, duly attentive to peoples’ and humankind’s quest for survival in our times.

318. *Trigesimus tertius*: *Opinio juris communis* — to which UN General Assembly resolutions have contributed — has a much broader dimension than the subjective element of custom, being a key element in the formation of a law of conscience, so as to rid the world of the inhuman threat of nuclear weapons. *Trigesimus quartus*: UN (General Assembly and Security Council) resolutions are adopted on behalf of the United Nations Organization itself (and not only of the States which voted in their favour); they are thus valid for *all* UN Member States.

319. *Trigesimus quintus*: The United Nations Organization, endowed with an international legal personality of its own, upholds the juridical equality of States, in striving for the realization of common goals such as nuclear disarmament. *Trigesimus sextus*: Of the main organs of the United Nations, the contributions of the General Assembly, the Security Council and the Secretary-General to nuclear disarmament have been consistent and remarkable over the years.

320. *Trigesimus septimus*: United Nations resolutions in this domain address a matter of concern to humankind as a whole, which cannot thus

be properly approached from a State voluntarist perspective. The universal juridical conscience stands well above the “will” of individual States. *Trigesimus octavus*: The ICJ, as the principal judicial organ of the United Nations, is to keep in mind basic considerations of humanity, with their incidence on questions of admissibility and jurisdiction, as well as of substantive law. *Trigesimus nonus*: In sum, the ICJ has jurisdiction to consider the *cas d'espèce*, and there is a conventional and customary international law obligation of nuclear disarmament; whether there has been a breach of this obligation, the Court could only decide on the merits phase of the present case.

321. *Quadragesimus*: A world with arsenals of nuclear weapons, like ours, is bound to destroy its past, dangerously threatens the present, and has no future at all. Nuclear weapons pave the way into nothingness. In my understanding, the International Court of Justice, as the principal judicial organ of the United Nations, should, in the present Judgment, have shown sensitivity in this respect, and should have given its contribution to a matter which is a major concern of the vulnerable international community, and indeed of humankind as a whole.

(Signed) Antônio Augusto CANÇADO TRINDADE.

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