

Presentation for the Seminar and roundtable

*Steps toward a Nuclear Weapons Convention:
Exploring and developing legal and political aspects*

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**The Era of the Ultimate Weapon or
"the greatest level of savagery" (Albert Camus)**

[uncorrected draft]

1. The arrival of nuclear weapons has radically changed the human condition and destiny of man. A nuclear weapon has a specific nature and unique characteristics, giving it unprecedented destructive power. After its use in Hiroshima and Nagasaki, Albert Camus commented: *"Our technological civilization has just reached its greatest level of savagery."*
2. The destructive power of nuclear weapons is insane. The 1987 report from the commission chaired by Gro Brundtland, former Prime Minister from Norway, *"Our Common Future"* said that the power of a single thermonuclear bomb at 20 megatons is bigger than that of all explosives used during wars which pierced the history of humankind, meaning higher than that of all the explosives used in combat by humans since the invention of gunpowder.
3. The International Court of Justice noted that humanity is in the presence of weapons of *"A catastrophic nature"* whose destructive power *"cannot be contained in either space or time... These weapons have the potential to destroy all civilization and the entire ecosystem of the planet."*¹ They lead humanity into a "nuclear winter" with casualties to present and future civilian populations. The nature of these weapons of mass destruction is such that it is impossible to confine their destructive impact in space and time to only military targets. Future generations would not be spared. The explosion is accompanied by instantaneous radiation and radioactive fallout. This is incremented by the ionizing radiation to both human beings and the environment. The "period" (necessary to expend the harmful effects) of one of the byproducts of a nuclear explosion, plutonium 239, is over 20,000 years, which speaks volumes about the suffering future generations may still endure.
4. Such "special nature" of nuclear weapons is not devoid of legal consequences.
 - a) First the principle of "anything not prohibited is allowed" cannot possibly be so when it comes to a weapon of such nature and it would be better to say "anything that is not prohibited, is not necessarily and automatically allowed. ";

¹ "The Legality of Nuclear Weapons", ICJ Advisory Opinion 1996, p. 243, paragraph 35.

- b) Then, more specifically, under the law of armed conflict and humanitarian law, i.e. jus in bello, the specific nature of nuclear weapons plays a key role when referring to the application of the principle of distinction between civilians and combatants, and the principle of limiting the choice of means used against the enemy, the principles of necessity and proportionality and finally the "Martens clause".
- c) In addition, and because of radiation alia, the use of nuclear weapons does not respect the basic distinction between warring states and neutral countries. The fifth Hague Convention of 1907 stipulates in Article 1 that "the territory of neutral powers is inviolable", that the use of nuclear weapons can not ensure, particularly in light of these ionizing radiation intrinsic to this weapon. Thus, in nuclear war, a neutral country is necessarily involved, against their position on it, and against their will.

Some states see another consequence on the specific nature of nuclear weapons. According to them, the sole possession of weapons of this nature, capable of imposing total destruction of the enemy, is portrayed as a case of unrivaled unequal power. By its very existence, a nuclear arsenal in the hands of a State constitutes a threat of the first magnitude for security and even survival of any other State. A formidable power stems from the possession of weapons of this kind if; "The national interest", "vital interest", the imperatives of "national security", the "raison d'Etat", could enjoy with nuclear weapons a fantastic instrument of execution. We observe that for some states, the very nature of nuclear weapons makes it possible to establish a relationship between the possession of this weapon and the threat of use. So the mere fact for a state to possess nuclear weapons constitutes a threat to other States.

5. Given this situation, as perilous to humanity as it is, is international law helpless? At first glance one could dismay if one considers that the International Court of Justice, concerned with respecting State sovereignty, declared itself powerless to limit the degree of weaponization of that State. Thus, in the case Nicaragua vs. USA, it held that "There are no international law rules, other than those the State concerned can

accept, through treaty or otherwise, imposing limitation on the level of armaments of a sovereign state."² One might add "not only the level but also the nature of armaments", which is the real question here. As the written statement submitted by France to the ICJ in the case of "Legality of the Threat or Use of Nuclear Weapons": "It is not the judicial function of the Court... to directly or indirectly assess the current strategic balance or on the defence policy of any particular State, nor to attempt to regulate, *lex ferenda*, this policy."³ We will see later how the Court answered this question.

Let us for the moment examine how people have responded in different fora.

II. Nuclear weapons before various fora

1. Nuclear weapons before the I.C.R.C.

The I.C.R.C. monitors daily compliance with the law of armed conflict and humanitarian law which is part and parcel of it. In its action, it is supposed to implement a set of principles and rules that become a "genuine right of humanity".

It is to this "genuine right of humanity" that the nuclear weapon was convened. The conduct of armed operations must obey the rules because "the belligerents do not have an unrestricted right to choose their harm to the enemy", as already stated in Article 22 of Regulations of 1907 concerning the Laws and Customs of War on Land. *These general rules now cover issues as diverse as the weaponry used, the status of combatants, staff and sanitation, protection of civilian populations, areas cleared, non-military targets, safeguarding of cultural heritage, the protection of journalists in dangerous missions, etc...* The weapons outlawed are those that unnecessarily exacerbate the suffering of those placed outside combat or make their deaths inevitable. Indeed, the Regulations Respecting the Laws and Customs of War on Land, annexed to the IV Hague Convention of 1907 prohibits "To employ arms, projectiles, or material calculated to cause unnecessary suffering"

² "Military and Paramilitary Activities in and against Nicaragua", ICJ REP. 1986, p. 135.

³ "Briefing No. 19: Letter from the French Minister of Foreign Affairs", June 20, 1995, p. 20.

(Article 23). This regulation was indeed repeated on the St. Petersburg Declaration of 1868 and the Hague Declaration of 1899.

From these texts and others, as the four Geneva Conventions of 12 August 1949 and the Additional Protocols I and II of 1977, clearly emerged two key principles: first, the distinction between combatants (only theoretically concerned by the conflict) and non-combatants (who should be spared) and the second, the duty not to cause unnecessary suffering of combatants. ***It is by taking into consideration these two truly general and paramount principles, that early humanitarian law has logically banned certain weapons, since on the one hand they confused in the same tragic fate, combatant and civilians, and on the other hand they cause unnecessary suffering to combatants.***

Thus the broad codification of humanitarian law, the universality of membership it has trained, non-use and disuse of the right of denunciation, have enabled the international community to have a body of treaty rules, become customary for most, corresponding to the greatest universally recognized humanitarian principles. These rules indicate the normality of conduct and behaviour expected of States.

The basic texts mentioned above, all insist on the prohibition of weapons or means of combat which victimize indiscriminately or which cause unnecessary suffering to combatants. What about nuclear weapons? The definition given, imposes the ban.

Referring to napalm, the I.C.R.C. said that these are weapons that cause unnecessary injury or unnecessary suffering. They indistinctly reach civil populations and combatants; their harmful effects escape the control of those who employ them. This reasoning applies to nuclear weapons, all the more.

The proclamation of the principle of respect of non-combatant and civilian populations as the first law of humanitarian law did not prevent civilians from being the main victims of major conflicts, with the aggravated result during the Second World War, of having cities annihilated with atomic weapons. The emergence of this Promethean weapon with its panoply of ways to destroy man has dramatically destabilized the golden rule, accepted by all: to safeguard the civilian population. It could not therefore be free of a certain discomfort when the International Military Tribunal at Nuremberg declared a war crime the destruction of towns and villages without apparent reason, however, the allied forces had destroyed just a few months earlier, various German cities and devoured the innocent civilian populations of Hiroshima and Nagasaki through nuclear fire. This is undoubtedly why the Nuremberg

Tribunal had finally renounced to any prosecution and conviction of the chiefs of destruction of towns or villages. *The "nuclear issue" arose already.*

It became even more unrelenting when the *Diplomatic Conference in Geneva* met to develop the four Conventions of 12 August 1949. Fittingly interrogated of proposals to prohibit the use of atomic weapons, the court declared itself, with some embarrassment, "incompetent" on this chapter. A little later, in 1956, New Delhi, where the ICRC put forth the "nuclear issue" at the International Conference of the Red Cross, the problem was again dodged. And the unavoidable contradiction inevitably broke this time within the *Diplomatic Conference in Geneva, which drew up the two Protocols of 1977*, which updated the four Conventions of 12 August 1949. Some nuclear powers tried to exclude participants from holding formal work on atomic weapons by the Conference .

The situation appeared quite confused in legal terms, at least at first examination. It is clear, however:

- a) that the nuclear powers have not accepted any discussion on the regulation or limitation by humanitarian law on the use of their nuclear weapons;
- b) the Conference of 1974-1977 did not devote any substantive discussion to the "nuclear issue" nor has it offered any specific solution;
- c) it would be nonetheless inaccurate to draw the conclusion that the use of nuclear weapons is legal, as Protocol I could not cancel at any time and in any way the customary general rules that apply to all methods and means of combat;
- d) Protocol I did not rule out nuclear weapons from its scope since it took over and incorporated these mandatory customary rules;
- e) it would be very racy and absurd to assume otherwise with this Protocol, as it would mean that we prohibit unnecessary suffering when inflicted by conventional weapons, but tolerate it when done so by nuclear weapons;
- f) that ultimately the problem of the ban on nuclear weapons has been somewhat rekindled - and well revived - in the amended Protocol I of 1977.

The current legal status of nuclear weapons remains unsatisfactory.

Humanitarian law, which continues to legitimately prohibit weapons with indiscriminate effects which cause excessive injury or unnecessary suffering cannot allow nuclear weapons which it is not yet clear how they would avoid such effects.

2. Nuclear weapons before the United Nations

From January 1946, ie less than six months after the atomic bombings of Hiroshima and Nagasaki, the United Nations created a commission to:

*"make specific proposals for the (...) elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction."*⁴

Each of the two main bodies concerned, General Assembly and Security Council, has applied in accordance with its constitutional competence, to safeguard the security of nations, neither could ignore the nuclear risk management for humanity.

For several decades a number of United Nations Member States have mobilized to the General Assembly to declare nuclear weapons "outlawed", cognizant that the resolutions of this main body are not binding. It was obviously ruled out to go before the Security Council with a similar purpose given the risk of triggering one or two or even five vetoes, rejecting any resolution banning nuclear weapons. If Nuclear Weapon States naturally wish for nuclear disarmament, they can not ignore their responsibilities in a complex world. ***Thus, one speaks to the Security Council more willing to fight against nuclear proliferation horizontally, while in the General Assembly on places greater emphasis on the illegality of nuclear weapons and its banishment, and the general and complete disarmament.***

A. The action of the Security Council

a) Strengthen confidence in the N.P.T.

The Security Council has been somewhat active when it comes to strengthening the confidence on the Non Proliferation Treaty of 1968. For example, in Security Council Resolution 255 of 19 June 1968, the USA, the UK and the Soviet Union have offered *"positive security*

assurances" to non-nuclear-weapon and parties to the NPT, which would be subject to nuclear threats or to being victims of nuclear aggression. In this regard, the Security Council recalled its general liability and that of nuclear powers as well as, the right of individual and collective self defence.

This means that the policy based on *"deterrence"* was greater than that of *disarmament*, but with its shadows and its ambiguities.

b) Condemn proliferation amongst States non- party to the NPT. The case of India and Pakistan

In its resolution 1172 (1998) of 6 June 1998, the Security Council has unanimously condemned India and Pakistan for nuclear tests they had just completed. The challenge for the Security Council in this case was that it had no legal basis to force these two states to comply with the NPT, a treaty which they have not ratified, nor could the Council impose ratification by them.

c) Condemn proliferation amongst countries bound by the NPT : The case of termination of the treaty by North Korea

It was a long fifteen year history of crisis, in which the Security Council was unable to play the leading role to extinguish it. North Korea had often protested against the existence of U.S. nuclear weapons in South Korean territory, especially since the Pan Mun Jom Armistice - had never been followed by a treaty ending the war between the two Koreas. A state of war legally persistent over the past half-century between North and South and the American nuclear presence in South Korea, were two elements theoretically justifying North Korea to withdraw from NPT. But the denunciation, based on Article X, paragraph 1 of the NPT, is possible only if "extraordinary events (...) have jeopardized the supreme interests" of the state party. Neither the persistent state of war, nor the existence of the U.S. nuclear arsenal, constituted "extraordinary" events that occurred suddenly in the Korean political landscape. These two events pre-existed at the accession of North Korea to the NPT on December 12, 1985. Besides South Korea had ratified the NPT over ten years ago, on April 23, 1975.

But those fifteen years of crisis have finally, after long and difficult negotiations amongst six, during which China has played a decisive role, revealing its marginalization from the Security Council and by substantial gains by North Korea . The latter managed to obtain, in addition to the denuclearization of the Korean

⁴ General Assembly Resolution (I) of 24 January 1946.

peninsula, the withdrawal of the U.S. nuclear arsenal, economic assistance, food aid, cooperation and assistance for the command of civilian nuclear power and providing a certain amount of oil, against an expected renunciation of nuclear weapons. The exchange of state visits between the two Koreas did the rest for the normalization of the situation.

d) Prevent non-proliferation among the States Parties to the NPT : Iran's case

What makes the Iranian case peculiar is the fact that Iran, which is one of the first countries to have ratified the NPT (February 2 1970), *does not declare its desire to denounce the treaty nor manufacture nuclear weapons. It acknowledges, however, that it is engaged in uranium enrichment, but for peaceful purposes and believes that it therefore violates no international obligation.* American intelligence services have officially and publicly declared Iran has stopped its preparations for control of nuclear weapons, since 2003 but this fact has not changed the opinion of the president of USA who remains convinced to the contrary .

Iran has clearly acknowledged in September 2002, the existence of its programme of enriched fuel fabrication and has even sought the cooperation of member states of the IAEA who are more technically advanced. In the aftermath, the Iranian government has even accepted the inspection of its facilities by the IAEA. During the verification visit which took place in February 2003, the Islamic Republic has unveiled a part, hitherto kept secret, its nuclear programme. The crisis was then declared. The resulting report from the Director of the Vienna Agency, dated 18 June 2003, stressed that Iran had breached its international obligations by failing to declare some of its activities.

In addition, in a statement dated September 25, 2005, three European countries, Germany, France and the United Kingdom, have asserted that Iran has only one nuclear power plant currently in construction destined to civilian purposes, and whose fuel is to be supplied by Russia through a ten year agreement. Iran could not and should not produce this fuel as it has no other nuclear power plant likely to receive the fuel that it continues to enrich for said civilian purpose.

Western nuclear powers have asked Iran to suspend uranium enrichment not destined to any existing civil nuclear plant, yet continued to be stored. The IAEA. then acknowledged that the required suspension is not justified by any formal obligation of the NPT, States have the right to enrich uranium, and to store it until its intended usage appears as civilian or military the day it is actually used. Until then, breach of

NPT has not been proven... *So Iran is now suspected of "intention" of wanting to hijack a fuel for military purpose.*

Accordingly, the Board of Governors of the IAEA decided on September 25, 2005 to petition the Security Council of the United Nations and officially forwarded the file on February 4, 2006. In a presidential statement on March 29, 2006, the Council demanded Iran to suspend its uranium enrichment. Then, through its Resolution 1696 of 31 July 2006, it cautiously opened the way for Chapter VII of the Charter by merely taking precautionary measures simply on the basis of Article 40. Since the suspension it had requested in his view is a *"confidence-building measure"* expected of Iran pending the development of a verification procedure which would provide the necessary clarification about the suspected misuse of fuel it receives.

Iran does not abide by this resolution. A new decision in 1737 of 23 December 2006 invokes Article 41 of the Charter and prescribes gradual sanctions to prevent Iran from obtaining sensitive technologies for its nuclear programs and missiles from any state. The Council also decided to monitor the movement of persons associated with nuclear programs in Iran and ordered the freezing of assets available to these people. All these measures are only intended to *"block out the sensitive activities developed"*⁵ by Iran.

In another resolution 1747 dated 24 March 2007, the Council prescribes states to be vigilant with regard to individuals associated with Iran's proliferation of sensitive nuclear activities or for the development of nuclear weapon delivery systems, and everything relating to trade in heavy weapons. It also cut off public aid to Iran by International Financial Institutions. Clearly the Council seems embarrassed to decide on sanctions which would be effective while not divisive of its permanent members, Russia and China have positions less committed against Iran on this issue.

The crisis is not over, but the Council is not in a rush because, to summarize best the situation, we can say that:

"Iran can not be formally considered as a proliferating State, even if its intentions to acquire nuclear weapons are suspect. There is a lack of transparency and infringement

⁵ Philippe Weckel: "The Security Council and Nuclear Weapons," French Yearbook of International Law, LII, 2006, (p. 178-197), p. 191

with regard to its obligations to the IAEA, but it has not been established that it does not respect the principle of non-proliferation. Measures have been taken to prevent the risk of acquiring and expanding nuclear weapons, but the pressure on Iran is intended to persuade rather than coerce."⁶

e) Preventing non-state proliferation

The Security Council took an important resolution 1540 on April 28, 2004 to prevent the transnational activities of non-state proliferation. The "security initiative against proliferation" advocated earlier by the USA to mobilize on a voluntary basis, states in an anti-terrorist cooperation, having reached its limits, the Security Council has resorted to Chapter VII of the Charter and the States imposed by that resolution 1540, increased cooperation to prevent and suppress the proliferation of nuclear, biological and chemical weapons and their delivery systems.

Resolution 1540 offers a global vision. States now have a shared obligation to prohibit proliferation, including by isolating the State involved. Additionally now, this proliferation is viewed as a criminal activity. In this regard the resolution in question appears to be an international criminal legislation established by the Security Council, then it should have been so through the conclusion of a treaty.

The resolution established a Security Council committee in charge of centralizing the national reports that the United Nations Member States must make on the measures they take to fight against proliferation.

B. Efforts of the General Assembly to "Outlaw" Nuclear Weapons

In accordance with Article 11 of the Charter, the General Assembly is competent to establish the principles of disarmament, Article 26 grants the Security Council the responsibility for preparing its plans. But the Council has often been paralysed, while the General Assembly suffers from its inability to make binding decisions. In addition, the disarmament issue surges most often in other forums. The General Assembly has encouraged and adopted many projects that have furthered the cause of disarmament, but most of the time it engages as proposals are already being negotiated by the key powers and finally approve them

Attempts to qualify nuclear weapons as illegal are only the result of the United Nations General Assembly. Let us highlight them.

a) The Declaration on the Prohibition of the Use of Nuclear Weapons of 1961

Through its resolution 1653 (XVI), entitled "*Declaration on the Prohibition of the Use of Nuclear Weapons*", adopted on 24 November 1961 by 55 votes against 20 with 26 abstentions, the General Assembly has declared that:

"Use of nuclear and thermonuclear weapons (...) is (...) a direct violation of the Charter, (...) is (...) contrary to the rules of international law and the laws of humanity, (...) (and) Is a war directed (...) against humanity in general. "

b) The "Final Document" of the tenth Extraordinary General Assembly, in 1978 was devoted to the issue of disarmament

At the end of the tenth Extraordinary General Meeting, an important "Final Document" had been adopted. It includes an "*action programme*." The Special Meeting stresses the urgent need to conclude "*a convention prohibiting the development, manufacture, stockpiling and use of radiological weapons*."

c) The 1978 Regular Session of the General Assembly: "Prohibition" of Nuclear Weapons

At that session which followed the special session by a few months, the draft Indo-Ethiopian resolution had not yet been adopted was finally done so there. That resolution 33/71 B "*Non-use of nuclear weapons and prevention of nuclear war*" received 103 votes against 18 with 18 abstentions.

With this resolution, the idea of "*prohibition*" of nuclear weapons made its entry into the vocabulary of the General Assembly.

d) The regular sessions of 1980 and 1981: the "threat" of nuclear weapons

These sessions were completed, as the 1978 one, by adopting resolutions initiated by the same co-authors. The difference to highlight is that the resolution of 1980 prohibits not just the use of nuclear weapons, but also the "*threat*" thereof.

⁶ Ibid.

The above named issue thus arises, of the policy of nuclear "*deterrence*." According to some analyses, the very nature of nuclear weapons completely justifies to assimilate the mere fact of its *possession and the threat* of use.

e) The second extraordinary session of 1982 on disarmament and the idea of a "Convention on the Prohibition of Nuclear weapons"

Among other projects, a proposed resolution accompanied by a draft "*Convention on the Prohibition of the Use of Nuclear Weapons*" was presented by India at this special session in June-July 1982. Article 1 of the Convention calls on States parties "*not to use or threaten to use nuclear weapons under any circumstance*."

The 37th ordinary session of the General Assembly (Fall 1982), which followed a few months this second special session, had actually adopted on December 13, 1982 resolution 37/100.C, entitled "Convention on the Prohibition of the Use of Nuclear Weapons" with 117 votes against 17 and 8 abstentions.

The Indian proposal committed the General Assembly to decide on its own to adopt a convention in this field. Resolution 37/100.C, finally passed the contrary called the "*Committee on Disarmament*" (later called "Conference on Disarmament") to undertake "*negotiations to reach agreement on an international convention*."

In resolution 37/100.C. there is the phrase "*the use or threat of use of nuclear weapons*," which involved the possession and deterrence.

f) Evaluation of the "normative" value or "relevance" of resolutions of the General Assembly

It is neither political, nor legal, to put aside by a mere sweep of a hand, the resolutions of the United Nations General Assembly, under the guise that they would not be binding. The reality is much richer and more nuanced and its correct analysis involves several elements which should be taken into full account.

A significant number of resolutions, year after year, sought to establish that the use of nuclear weapons be illegal *per se*. If we focus away from the debate around the "mandatory" character of these resolutions, we would be left to assess their "*relevance*" in relation to our theme. A resolution of this nature may well be the "reflection" of State practice as confirming the existence of a standard, more or less vigorously

expressing the existence of an *opinio juris* to establish a new norm. The persistent repetition of these resolutions with a constant regularity is by itself non-negligible.

It is not extraneous to verify if these resolutions are the expression of an existing well established standard or if they are engaging in the process of setting a new standard. An analysis of the voting results by which they were adopted and especially the material content of these texts is then required.

Through its resolution 1653 (XVI), (Article 1, paragraph d) of 1961, the General Assembly declared that the use of nuclear weapons is "*contrary to international law*." The following resolutions, e.g. 33/71, 36/92 or 35/152 believe that such usage "*must be banned*" pending nuclear disarmament. Resolution 38/75 states that nuclear war is a denial of the right to life of any being, etc... Most of these texts say that the threat or use of nuclear weapons is a "*direct violation of the Charter*." Other resolutions call on Member States to conclude as soon as possible, a convention banning nuclear weapons.

To check whether a resolution expresses *opinio juris* of the international community, we need to know if it has obtained the approval not only of the "*vast majority of States*," but still certain categories of them. This was not the case for the first point in the early years, but today the vast majority of nations support persevering in this kind of resolution. By contrast on the second point, it is noted that the nuclear Powers have generally not given their support to such resolutions. So much so that, one must say, without engaging in a sterile discussion on "*persistent opposition*", which *opinio juris* expressed so far has been flawed and does not establish the existence of a new standard bearer of an intrinsic wrongfulness of nuclear weapons.

But in all these resolutions, there is still something. And the International Court of Justice has been right to clarify as follows:

"(...) The adoption each year by the General Assembly, by a large majority of resolutions recalling the content of resolution 1653 (XVI) and urging Member States to conclude a convention banning the use of nuclear weapons in all circumstances is indicative of the desire of a very large part of the international community to proceed with a specific and express prohibition of the use of nuclear weapons, a significant step on the road to complete nuclear disarmament. The appearance, as lex lata, a customary rule specifically prohibiting the use of nuclear weapons as such faces the

*tensions that remain between, on the one hand, a nascent opinio juris, and on the other, a still strong adherence to the practice of deterrence."*⁷

3. Nuclear weapons before the powers that are equipped with them

Through resolution 1378 (XIV), the United Nations has set for the world an ultimate goal of general and complete disarmament. This is primarily but not exclusively the responsibility of great powers. This does not mean neglecting any State in the mobilization of all to achieve that goal. But it is clear that, as I indicated, the issue of disarmament has always been discussed in two separate fora. Under the United Nations framework, it has had, say the "moral" result, which we have just seen. Another forum, independent from setting of the United Nations, was led primarily by the two Super-Powers, especially during the four decades of the cold war, with more substantive results, but sometimes challenged by their authors themselves .

A. Agreement, key word on Disarmament

No doubt that there is a *universal adherence* to the ultimate goal of *complete elimination* of nuclear weapons. The preamble to the Non-Proliferation Treaty clearly prescribed the liquidation of all existing stocks and the elimination of nuclear weapons from national arsenals. But it is equally undeniable that, in the case of an issue as crucial and vital as this one, there exists a collective *distrust difficult to overcome*.

Therefore, it is not surprising that disarmament can only be achieved **through an agreement**. There is, of course, the existence of unilateral disarmament, freely chosen and decided by a State or imposed by a State winner on a State defeated. In the first case, a government takes the *"risk of peace."* Thus the Constitution of Costa Rica prohibits maintaining a military, as well as the announcement in 1969 by the USA of

⁷ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 255, paragraph 73. See contra, Weil, Prosper: "The advisory opinion on the legality of the Threat or Use of Nuclear Weapons", in "Writings of international law", Paris, P.U.F., (p. 57-65) p. 58-62 and "Liber Amicorum Judge Mohammed Bedjaoui, The Hague, Kluwer Law International, 1999, (p. 545-552), p. 546-550; the distinguished author considers in this opinion "the mystery of custom (...) remains wide, as dense and impenetrable as ever." After an evolution the "opinio juris was reduced (...) to a "ectoplasm" and the customary rule has come (...) "in a state of reduced legal weightlessness(...)."

their intention to unilaterally destroy certain biological weapons, and finally in 1988 the USSR manifested its intention to reduce its forces by 500,000 men. NGOs are still pushing states to take initiatives of this kind, but the results of unilateral disarmament remain marginal.

The process of an agreement is the one most often used. Nuclear law remains primarily treaty law, as the field is vital to the State. States have no intention of being party to any customary usage in this respect. That is why it has not been proven that the 50 years of non-use of nuclear weapons has created a customary banishment of this weapon. Similarly all General Assembly resolutions of the United Nations could not, for the past half a century, generate an *opinio juris* making nuclear weapons illicit.

Disarmament **is a process and as a result of any action taken under a legal obligation contracted resulting in a reduction in the level of existing weapons**. The agreement may be *bilateral* (usually between two Super-Greats) or *multilateral*.

The conventional disarmament measures can be of three types:

Measures of "limitations": they are reduced to limit testing, or production, or possession or deployment, or transfer, or finally usage of one or several types of specified weapons;

Measures of "bans" that go beyond the limitations in these areas and provide their complete prohibition;

Measures of "destruction" and "conversion" of stocks of existing weapons, vehicles for transport or launch systems.⁸

B. Monitoring, key word of the agreement

The control issue is obviously the most difficult to resolve. All human imagination and all appeals made to machines, have indeed never been enough. We've tried just about everything, from outside control to instruments, through seismic, hydroacoustic and ultrasound methods, even the unannounced inspection on the ground, even engaged in a particular mutually agreed espionage, from space, or through the mobilization of

⁸ See Lavieille, Jean-Marc: "International Law of Disarmament and Arms Control", op. cit., p. 51-52.

international institutions such as the IAEA, which was chiefly responsible for ensuring that gets civilian technology does not become diverted for military purposes.

Disarmament is usually done in stages, each one carefully controlled. A State will not wish to engage with its counterpart in a next step if the control performance of the previous stage did not allow complete satisfaction. We note this system in place especially in agreements on the permanent destruction of a specific weapon and the machinery used to produce it.

Under the Washington Treaty of 1959 on the Antarctica, States have a real obligation to "report" any State party to the treaty or not, that does not comply with the denuclearization and demilitarization of that area. One could also cite the "*London Club*" founded in 1975, which brings together all exporters of sensitive technologies considered for better cooperation amongst them and to better control the final destination of their products. The Treaty on *Open Skies*, signed at Helsinki on 24 March 1992, allows parties to carry out aerial surveys of a state for verification purposes. But it is clear that this possibility is in fact reserved to those major powers controlling sophisticated technology and capable of doing such overflights.

It may also be noted that at the IAEA, the main virtue of a diplomatic instrument known as the "*Additional Protocol*", where even nuclear powers are striving to obtain ratification by the non-weapon nuclear ones, lies in the fact that this text deploys a very heavy and detailed arsenal of measures contributing to obtaining a high degree of verification and particularly intrusive nuclear activities of the State.

In this sensitive area, one should also cite those "measures" of so-called "*transparency*" organized by Article 7 of the Ottawa Convention from 4 December 1997, on banning anti-personnel mines. The States parties should, on completion of their operations destroy these devices, not just send reports to UN Secretary-General, but also allow any on-site monitoring carried out by "fact-finding missions" on demand either by the State suspected or by the Assembly of States Parties to the Convention.

Finally one should note that the Comprehensive Nuclear-Test-Ban Treaty from 24 September 1996, includes **article IV, which is quite symptomatic, no less than 68 paragraphs are devoted to control!**

C. Distrust, explanatory watchword for limited results

The result of nuclear disarmament is so far unsatisfactory.

Nuclear powers are responsible for achieving nuclear disarmament, balanced in each of its steps. The efforts thus so far show that much remains to be done to secure the planet. The panorama of bilateral and multilateral agreements governing the field as substantial as they seem, at first glance does not hide the still impressive capacity to "overkill".

D. Illusion, watchword of nuclear weapons

a) The fallacy of a weapon of war to ensure an era of peace

With nuclear weapons, we have often cultivated the paradox until the absurd. This weapon of war would, as has been stated, provide mankind an era of peace, never before experienced. ***Nuclear weapons would not be an instrument of war, but rather a means of preventing war and depriving it of any rationality.***

Deterrence by nuclear weapons would feed and justify the following calculation: "the certainty of your death is the guarantee of my life".⁹ On a potential aggressor, it would have such an absolute deterrent effect that there would not even be a need to use it in order to make him give up his criminal intentions. In other words, nuclear weapons would be "***a weapon of deterrence not intended to ever be used.***"

We see the trouble with such a fallacy. If the nuclear-weapon State possesses them to never use them, such a situation would mean that the potential aggressor would no longer believe in the deterrent effect and that becomes less of a poker move. If the use of nuclear weapons would cause fear in the aggressor and be the potential disincentive to commit his crime, it would equally instill fear in the state that seeks to dissuade him, if only by ionizing radiation which would also affect it not including the real escalation dangers. Therefore nuclear weapons do not necessarily guarantee peace. They could perhaps ensure ***the renunciation of nuclear war, not conventional war.*** And that is what has actually happened the past 60 years. Assuming that we have so far have avoided a

⁹ Philippe Delmas: *The future of War*, Paris, Gallimard, 1995, p. 19

global conflict solely due to the policy of deterrence, it is not enough to make us forget the considerable number of local or regional wars that the earth has experienced since 1945. Quite often in the shadow of mutual nuclear deterrence, forms of conventional wars have proliferated, limited by the number of its participants, by their geographical extent and nature of resources committed. In addition, a state with nuclear weapons and engaged in a conventional war which it fails to overcome (in a war called "asymmetric"), is tempted to ultimately use nuclear weapons to end this conflict.

b) Deterrence, miscalculation

It is correctly, in my view, that **some experts consider deterrence based on a miscalculation.** The policy of deterrence can at most try to retaliate if it is not too late, and if one knows by whom one was attacked. It is not total protection. Moreover, nuclear weapons are not "defensive" weapons; they are always likely "offensive". Additionally, possession nuclear weapons also means that the region where they are stored represents a pole of signaled attraction for additional attacks: indeed any aggressor would naturally start by trying to neutralize the arsenals of the opponent. Therefore, the site of nuclear missiles, far from being a perfect protection for the country that has them, it represents a double, or even a triple danger to its own security. And from military point of view, possession, deterrence, and the threat or use of nuclear weapons seems quite absurd. Threatening to use nuclear weapons would be contrary to the clear interest of a country which might thus dangerously attract on its facilities and nuclear weapons not only states but also terrorist organizations.

c) The vanity and futility of nuclear weapons as a "rational" weapon of war

Henrik Salander, Ambassador for Disarmament at the Permanent Mission of Sweden to the United Nations in Geneva, wrote:

"It seems almost inconceivable that nuclear weapons can be used - at least as a means of "rational" warfare. Their military value may be smaller than ever since it has been shown so clearly that they present no solution to the conflicts of today. But on the other hand, the actual risk of their use, by

*miscalculation, accident or desperation in a regional conflict, is probably greater today than in quite some time."*¹⁰

* *

III. Nuclear Weapons and International Justice

On July 8, 1996, the International Court of Justice gave its advisory opinion on the request from the General Assembly. In its resolution 49/75K of 15 December 1994, the question posed by the assembly was as follows: "*Is the threat or use of nuclear weapons permitted in any circumstances under international law?*" The resolution asked the court to render its opinion "urgently."

1. The Content of the Advisory Opinion

A. The Law applicable to armed conflicts

Finding neither a conventional rule of general application nor a customary rule specifically forbidding the threat or use of nuclear weapons as such, the Court thereupon approached one of the most delicate questions presented to it: **determining whether recourse to nuclear arms should be considered illicit in view of the principles and rules of international humanitarian law applicable in armed conflicts, as well as the law of neutrality.**

a) The cardinal principles of humanitarian law

In proceeding to the examination of international humanitarian law, the Court highlighted two cardinal principles. **The first** established the distinction between combatants and non-combatants: States must never target civilians, nor use arms that are incapable of distinguishing between civilian and military targets. **The second** principle affirms that it is not permitted to cause superfluous harm to combatants: thus, States do not have an unlimited right as to the arms they may utilize. The court also referred to the "**Martens clause**" according to which civilians and combatants remain under the protection and rule of the principles of the Law of nations, as they

¹⁰ Salander, Henrik: "What Next For the NPT?" Disarmament Forum, UN-2000, p. 4.

result from established customs, from the Laws of humanity, and from the requirements of the public conscience.

For me there is no doubt that most of the principles and rules of humanitarian law—and, in any case, the two principles forbidding the use of weapons with indiscriminate effects on the one hand, and on the other, the use of weapons causing superfluous harm—are part of *jus cogens*.

b) Applicability of these principles to nuclear weapons

Moving to the question of the applicability of the principles and rules of humanitarian law to the possible threat or use of nuclear weapons, the court stressed that it was not possible to conclude that these principles and rules do not apply to nuclear weapons. According to the court, such a conclusion would in effect misconstrue **the intrinsically humanitarian nature of the judicial principles at issue, which permeate the entire law of armed conflict and apply to all forms of war and to all weapons, those of the past and those of the present and future.** But at the same time the Court did remark that *the consequences* that should be drawn from the applicability of humanitarian law to nuclear weapons are controversial.

In short, this means that the Court was fully aware that “*nuclear weapons*” clearly have a double nature: on the one hand, they are *weapons* thus justiciable under the general legal system applying to all weapons; and on the other, they are *nuclear*, and thus necessarily subject to a special regime because of this characteristic.

The Court found that, as regards the unique characteristics of nuclear weapons, the use of these weapons seemed scarcely reconcilable with respect for the demands of the law applicable in armed conflict.

B. The Court’s uncertainty

Nonetheless, the court did consider that ***it did not have at its disposal adequate elements to permit concluding with certainty that such a use would necessarily be contrary in all circumstances to the principles and rules of the law applicable in armed conflict.*** The Court had to find that ***it could not reach a definitive conclusion on the legality or***

illegality of the use of nuclear weapons by a State in an extreme circumstance of legitimate defense in which its very survival would be at stake.

C. The only way out of the uncertainty: the obligation to negotiate in good faith and bring nuclear disarmament to actuality

Having reached this conclusion, the court insisted on noting that in the end, [international law, and with it the stability of the international order it is intended to govern, would necessarily have to put up with differences of opinion on the legal status of a weapon as murderous as a nuclear weapon. Therefore it judged that there was reason to end this state of affairs: ***the complete nuclear disarmament promised for so long seems [[to the Court]] to be the best means of reaching this outcome.*** In these circumstances the Court emphasized the great importance of the consecration, in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, of a good-faith obligation to negotiate nuclear disarmament. And the court recalled that this double obligation—to negotiate in good faith and to arrive at nuclear disarmament in every aspect—formally concerns the 182 States party to the Non-Proliferation Treaty, i.e., the very large majority of the international community, and requires the cooperation of all the States.

D. The obstacles which the Court has had to confront

Such being the legal situation, it was suitable for the Court to present its conclusions. It did so in a particularly cautious manner, to avoid possible misinterpretation. In examining the legal situation, the Court declared itself confronted with questions it could not decide definitively and in utter clarity, in one sense or another, and especially because of the state of international law on the matter. It felt it could not go beyond what the law says, such as it had interpreted the law. It thus made a special effort to avoid two major obstacles in describing the legal situation --- to show, depending on the case, that existing international law

- 1) *would permit the threat or use of nuclear weapons;* or on the contrary,
- 2) *would prohibit such threat and such use.*

Beyond the need for the court to deal with these obstacles, each of its members was also confronted with a very serious problem of conscience, since none of

them failed to recognize the stakes involved -- the very survival of humankind. Witness the adoption by a 7-to-7 vote, with the President's deciding vote, on Clause 2 of the final paragraph of the advisory opinion. This conclusion of the court, very synthesized and marked by its balanced structure, reads:

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

The Court itself was quite clearly aware right away of the unsatisfactory nature, on first view, of the response it was offering to the General Assembly. It will be seen how much criticism it provoked for having apparently quit in mid-course the task it had been assigned.

In the second clause of Point 2) E, the Court indicates that it reached a point in its reasoning beyond which it could only go at the risk of failing before the two obstacles I have cited—that is, adopting a conclusion that would go beyond what it deemed legitimate. This is ***the Court's position as a judicial body***. A number of judges have taken this position, but probably each of them with his/her own approach and interpretation. It is clear that the distribution of the votes, as many in favor as against Point 2)E, followed no geographic or ideological cleavage, which is a sign of the independent thinking of the members of the Court, I am pleased to emphasize.

The court thus limited itself to an observation, even as it felt unable to go further.

We can say that the vote was not easy for certain judges. The first clause of paragraph E declares the illegality of nuclear weapons. It is good to note that two judges from countries belonging to the “Nuclear Club” did nonetheless vote to confirm it. The idea of the second clause was to accommodate everyone by leaving the door open to both legality and illegality. It was approved by two judges from the Third World and rejected by three others on one hand, and on the other it won the

favorable vote of two judges from nuclear nations and negative votes from three others.

So: Paragraph E had positive votes from two judges from the third world, two European judges from countries without nuclear weapons, and two judges from nations who do have such weapons: It is hard to imagine a better spread. Against Paragraph E, the vote was three judges from the third world, two judges from countries who do possess the weapons, and one judge whose country had been a victim to its use. So there too the votes were thoroughly mixed.

The distribution of the votes certainly showed the independent thinking of the members of the Court, and demonstrated that its members are not in the least ruled by clan spirit or the concern to accommodate their countries of origin.

2. The lessons to be drawn from the opinion

A. The Court has recognized the pertinence of the Law of Armed Conflict, including humanitarian law, prohibiting the use of nuclear weapons

This is a major point on which it is more than ever important to focus attention. The Court has, in my view, fully recognized that ***the cardinal principles of international humanitarian law***, such as:

- the distinction between combatants and non-combatants, which prohibits the state to target the civilian population,
- the prohibition to cause superfluous harm to combatants, which makes it clear that the State cannot have limitless choice as to what weapons it may use,
- the principles drawn from the law of neutrality, which the use of nuclear weapons cannot possibly honor given their radiation and radioactive fallout over space and time
- the “Martens clause,” which provides that civilian populations and combatants remain under the protection of the laws of humanity and the dictates of the public conscience, ***render the use of nuclear weapons completely illegal.***

Thus it is important that, in any further initiative, its argumentation must bear essentially on the radical incompatibility existing in principle between the use of nuclear weapons and respect for international humanitarian law.

It is true that the Court has declared that there exists no conventional or customary law prohibiting nuclear weapons as such. However very fortunately and by way of compensation, the whole body of law in armed conflict, and especially humanitarian law, indirectly prohibit this highly murderous weapon.

It is my concern for the realities that has led me to assert. Clearly, in the declaration I attached to the opinion, that nuclear weapons seem to me absolutely of a nature to make victims without discrimination, mingling combatants and non-combatants and furthermore causing needless suffering to both. ***The nuclear weapon, a blind weapon, thus by its nature destabilizes humanitarian law, the law of discernment in the use of weapons. Thus the very existence of nuclear weapons constitutes a great challenge to the very existence of humanitarian law,*** quite apart from the long term injurious effects on the human environment required for the exercise of the right to life. Because of its indiscriminate effects, the nuclear weapon constitutes the negation of humanitarian law. ***Nuclear war and humanitarian law thus stand as antithesis which radically exclude each other, the existence of one necessarily presuming the non-existence of the other.*** And that remains true no matter how exceptional the situation confronting any eventual user of the nuclear weapon.

I would add, especially, that any use of the nuclear weapon, even in such a situation, would risk the survival of mankind, through the setting off of terror and of the escalation in the use of such arms.

In the declaration I appended to the opinion, my interpretation of Paragraph E and especially of its second clause was simply summarized by an obvious statement: ***a “fragment” cannot be saved if the “whole” is destroyed; a “part” cannot be saved at the cost of destroying the “whole”:***

“the use of nuclear weapons by a State in circumstances in which its survival is at stake risks in its turn endangering the survival of all mankind, precisely because of the inextricable link between terror and escalation in the use of such weapons. It would thus be quite foolhardy unhesitatingly to set the survival of

a State above all other considerations, in particular above the survival of mankind itself.”⁽¹¹⁾

So we may wonder why the World Court did not stop at this conclusion and purely and simply declare the prohibition of the use of nuclear arms on the grounds of humanitarian law alone. *In my opinion, but it is a completely personal opinion,* even while recognizing the non-pertinence of taking so-called “clean” nuclear weapons into account, I feel the Court remained somewhat troubled by the possibility of such weapons, present or future. That is a point that deserves attention for any future initiative, as will be seen..

B. *The Court recognized the non-pertinence of taking so-called “clean” nuclear weapons into account.*

In the Court’s dossier there are, as elements of fact, reports provided by various States concerning the existence of “*low-yield nuclear weapons,*” “*clean weapons,*” “*reduced-effect weapons*” or “*tactical weapons.*”

Speculation has been put forward that science has *progressed to the point where there presently may exist intelligent nuclear weapons capable of discrimination and in particular, able to strike combatants while sparing non-combatants.*

The Court should not have credited such reports, in particular because it had not received any evidence to prove the existence of nuclear weapons that emit no radiation and have no prolonged effects in space and time. It has correctly declared that their existence was “*impossible*” (paragraph 35 of the opinion), for these would no longer be “nuclear” weapons but rather some new and wholly other type of classical or conventional weapon, lying beyond the “nuclear threshold”. Weapons of a type releasing less heat or less blast could certainly be invented; they would still remain “nuclear” weapons so long as they retained their *fundamental characteristic of emitting ionizing radiation* which is particularly devastating in time and space. If technological progress should eliminate that characteristic, we would no longer be looking at a “*nuclear*” weapons.

¹¹ (1). « Declaration of President Bedjaoui », *I.C.J. Reports*, 1996, p. 273. paragraph 22.

The Court was correct to declare those reports insufficient, fragmentary, and lacking in probative significance. And in any case, the nuclear weapon, thus “improved,” would not really be a “nuclear weapon” if its explosive core was “denatured” by technological advances to the point where it no longer continued to emit its devastating ionizing radiation over decades, even centuries. ***If certain unique characteristics of a nuclear weapon should disappear through the effect of scientific progress, we would then be in the presence not of a nuclear weapon but of some entirely different weapons. The court, however, was asked to rule on the nuclear weapon; to rule on a weapon of an entirely different nature would have been beyond its mandate.***

It must be one or the other: either it has become possible to build a type of weapon without destructive radiation in time and space, but this would be a different weapon, one not involved in the debate before the court; or else one has conceived and produced a weapon properly described as “nuclear” but low-yield; but then that means that its *nature* has not been modified, that is to say it has still crossed the “*nuclear threshold*” that distinguishes it from the classical weapon; therefore the reports offered concerning this “weak” or “clean” type of weapon in no way change the debate.

Let us read carefully Paragraph 35 of the Court’s advisory opinion; it is particularly instructive and revealing. On what type of weapons has the high international jurisdiction been asked to give its opinion? On “nuclear weapons, ***as they exist today,***” not on some other type of weapon of tomorrow. How are they characterized? By several elements including ***“the phenomenon of radiation which is considered particular to nuclear weapons.”*** Now, “ionizing radiation”, which is the essential element characterizing these weapons, is “a powerful and ***prolonged*** radiation,” with an especially long life ravaging the environment and compromising the survival of future generations. Hence the Court’s conclusion, in the same paragraph: ***“the destructive poser of nuclear weapons cannot be contained in time nor in space.”*** It is exclusively on these weapons, and not on some new type (about which, besides, we do not know whether it can lessen the duration in time and the dispersion in space of its devastating effects) that the court has been asked to rule. In its reasoning, there could be no room for considering some possible “advances” which, in any case, would place us before weapons quite different from the nuclear arms of today. And the Court repeated its conclusion in more direct terms: ***“The nature of these weapons of mass***

destruction is such that it is thus impossible to limit their destructive impacts in time and space solely to military targets.” This ***impossibility*** of limiting their effects to military objectives alone, duly cited by the Court, ***necessarily*** places nuclear weapons in ***manifest contradiction*** with the principles and rules of the law of armed conflict and of humanitarian law, and cannot therefore do otherwise than make it a weapon prohibited under international law. Any possible or claimed advances in the conception of the weapon can have no effect on this situation. The court could only take account of the nuclear weapon’s “unique characteristics,” which it very carefully specified, in particular ***“of their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come.”***⁽¹²⁾ It was that weapon, and no other, that stood in judgment before the Court.

And for this reason the Court declared, very simply but very clearly, the following:

The Court does not consider that, in giving an advisory opinion in the present case, it would necessarily have to write “scenarios,” to study various types of nuclear weapons, and to evaluate highly complex and controversial technological, strategic, and scientific information”⁽¹³⁾.

C. A “clean” bomb nonetheless polluting the atmosphere of the Court

The Court therefore, as indicated above, seems to have thrown out the door the question of the “clean” weapon. But I wonder--and this is of course a completely personal feeling-- whether in fact it was able completely to exclude from its thinking this “clean” bomb that would somehow, providentially, emerge to become compatible with respect for humanitarian law.

I have the impression that this idea of a possible “advance” which would make the nuclear weapon a “clean” bomb has not totally vanished from the discourse of the court, despite its repeated assertions. The Court has not completely cleansed its

¹² (1). Paragraph 36 of the Advisory Opinion.

¹³ (1). *I.C.J. Reports*, 1996, p. 273. paragraph 15.

argumentation of this element that may perhaps have weighed on the minds of some of the judges. *Herein lies the whole problem of Paragraph E of the dispositif. That is the Gordian knot of the whole business.* Unfortunately this problem of “clean weapons,” or of “low yield” has left something in the atmosphere.

One could, after all, believe in all sincerity that there exists, or could exist in a near future, a “clean” weapon (but could it still be called “nuclear”?) that could satisfy the fundamental principles of humanitarian law which call primarily for distinguishing between combatants and non-combatants. It’s not entirely impossible. In any case, the Court’s consideration of technological advances, without its having to say so, seemed to me to have become something of an underlying argument that allowed the court to confess its uncertainty as to the legality of these weapons without risking the criticism of one camp or another. And after having asserted, in the first clause of Paragraph E, the patent contradiction between the nuclear weapon (as it is known) and humanitarian law, the Court cautiously wondered, in the second clause, whether “in view of *“the elements of fact at its disposal,”* it could or could not declare the nuclear weapon legal or illegal.

On this question of technological advances toward making nuclear weapons “clean” weapons, the judges and the Court were told too much, or not enough, but were not provided with unassailable certainties. The Court was unable to expunge completely and soundly this pseudo-scientific chiaroscuro which, thus distilled, finally managed to seep into some interstices of its reasoning. At least, that is my personal interpretation of the advisory opinion rendered.

**D. One possible reason for the intrusion
of Clause 2 Paragraph E into the Court’s Opinion**

Thus, it is primarily these “factual elements” of possible advances in the mastery of nuclear weapons that have troubled the Court and left it in a quandary. Yet the Court did not venture so far as to declare, in that second clause, that those factual elements enabled it to say that nuclear weaponry answers perfectly to the requirements of the law of armed conflict and notably to those of humanitarian law. It confined itself to confessing ignorance, and avoiding any statement of support for either this thesis or its opposite.

E. The World court recognized, unanimously, the existence of an obligation to pursue in good faith and bring to a conclusion negotiations for nuclear disarmament

This is a new and critical point. It is also welcome for easing the sense of dissatisfaction or frustration that international public opinion may have felt at seeing the Court’s indecision about declaring nuclear arms either legal or illegal.

Any subsequent initiative meant to lead to the eradication of such weapons should, in my opinion, take into account this important declaration by the Court, and try to reinforce it and make it prevail fully. For this revolutionary pronouncement which, through the grace of its unanimity has acquired legal value, is still fragile in that a sizeable portion of legal doctrine continues to contest the validity of this courageous declaration.

It is to the credit of the International Court of Justice that not only has it recalled to all the States party their good faith duty to negotiate nuclear disarmament in accordance with Article VI of the NPT, which they ratified, but also went on to task them with a second, vigorous obligation-- to “bring these negotiations to conclusion” –which is nothing more nor less than actually to bring about concrete nuclear disarmament.

These are the main lessons to be drawn from the advisory opinion of 8 July 1996.

3. The double obligation: to negotiate and to bring to conclusion

A. The grounds (customary and conventional) for the obligation to negotiate in good faith

- a) The primary and powerful grounds for the obligation to negotiate in good faith are found in the United Nations Charter, which imposes on all member States a *general obligation of disarmament*, without prejudice to the right of legitimate self-defense. The Charter makes disarmament a means of assuring collective security. The obligation at issue here concerns the States party to the NPT. But it can be said that this obligation in fact commits the entire international community insofar as resolutions of the

United Nations General Assembly containing that obligation have on several occasions been adopted *unanimously*.

- b) Already four decades ago international law articulated a conventional obligation to negotiate in good faith toward complete nuclear disarmament. Article VI of the 1968 Non-Proliferation Treaty mandates, that obligation, but this stipulation merely crystallizes, that is to say codifies, what certainly already existed as a *customary obligation*--one whose constituent elements began to take shape starting in the earliest months of existence of the United Nations Organization. Well before 1968, actually, the path to this mandate was carefully paved by several expressions of the conviction in the international community of the necessity for nuclear disarmament. In 1946 already, the *very first resolution* adopted by the General Assembly of the United Nations provided for the creation of a commission one mandate of which was to present propositions with a view, *inter alia*, to

“eliminate from national armaments, atomic weapons and all other important weapons capable of producing mass destruction.”⁽¹⁴⁾

- c) The obligation to negotiate nuclear disarmament in good faith is also *specific in its purpose* insofar as it concerns a matter--nuclear disarmament--that sets forth, on one hand, the vital interests of a handful of States possessing a nuclear strike force and, on the other, the no less fundamental interests of humankind as a whole. ***The extreme importance of the stakes for humankind in the issue of nuclear disarmament therefore requires the utmost rigor in assessing the protagonists’ conduct regarding the obligation to negotiate such a disarmament in] good faith.***

- d) It is again worthwhile to point out that while *de facto* the States which are party to the negotiations on nuclear disarmament all belong to the narrow circle of States that possess nuclear weapons, all the States signatory to the NPT treaty are *de jure* considered to be party to these negotiations.⁽¹⁵⁾ In consequence, **any State that**

is party to the treaty has the right to demand that the negotiations be conducted in good faith, and thus has the right to invoke, should it occur, any failure of the obligation laid out by article VI.

e) In these circumstances, then, we see the paramount importance of article VI’s mandated obligation to negotiate a disarmament treaty in good faith. In fact, the legal meaning of that obligation exceeds by far that of a mere obligation of behavior whose content was defined by international jurisprudence in connection with the obligation to negotiate generally; the obligation at issue here is to achieve a particular result. ***The obligation articulated by article VI of the NPT is an obligation to achieve a precise result—nuclear disarmament—by adopting a specifically prescribed behavior—the pursuit in good faith of negotiations toward that end.***

B. *The obligation to negotiate nuclear disarmament in good faith: an obligation to adopt a certain behavior to achieve a certain result*

While it is true that the obligation to negotiate in good faith has a varying legal scope depending on circumstances, it is useful here to look more closely at the wording of the obligation set out in Article VI of the NPT as well as at the general setting into which it is inserted.

When issues of border delimitation or debt recovery are involved the obligation of good faith negotiation aims at levelling existing differences, at bringing about a system acceptable to the parties; it takes on a quite particular aspect when it concerns nuclear disarmament. ***In fact, here it has all the appearance of an obligation to negotiate in order to achieve a very precise result: nuclear disarmament.*** The objective of the negotiation is denuclearization, total nuclear disarmament of the States that are party to the negotiation. ***Nuclear disarmament is an objective on which a consensus exists since 1945***, as attested by the number and quality of legal instruments expressing the conviction of the international community as to the importance and necessity of general and complete disarmament, including in the nuclear realm. ***In itself, this objective can certainly be subject to compromise, but as a series of steps leading toward the final goal; in particular, the focus of negotiations is the schedule to follow for bringing to life the objective which is the purpose of the negotiation.***

¹⁴ (1). Resolution 1(1), 24 January 1946, adopted unanimously

¹⁵ (1). In practice, those actually obliged to negotiate nuclear disarmament in good faith seem to represent only a minuscule fraction of the States subject to the obligations laid out under Article VI of the TNP.

In short, at the same time, in the spirit of the NPT negotiators, Article VI, which lays out the obligation to negotiate nuclear disarmament in good faith, was clearly conceived as **the necessary counterpart to the commitment by the non-nuclear States not to manufacture or acquire nuclear weapons; it is without a doubt one of the essential elements of the “acceptable equilibrium of mutual responsibilities and obligations between nuclear powers and non-nuclear powers” which, according to the General Assembly, was to be established by the nuclear Non-Proliferation Treaty which it called for in 1965. In 1995, at the time of the fifth Conference of Parties, which decided the extension of the NPT for an indefinite duration, the reciprocal nature of the said obligations was vigorously reaffirmed.**⁽¹⁶⁾ **Article VI should for this reason be considered an essential provision of the NPT, the violation of which could be considered “substantial” in terms of Article 60 of the Vienna Convention on the law of Treaties**⁽¹⁷⁾ **and could entail the legal consequences thereunto attached.**⁽¹⁸⁾

The States party to the NPT and especially the nuclear states have *the obligation to execute in good faith their obligation to negotiate nuclear disarmament in good faith.* The good faith conduct of the negotiations by the nuclear States mandates, among other things, **that they not betray the legitimate trust which the non-nuclear states could reasonably have invested in the hope that the promised negotiations would lead swiftly to an agreement on nuclear disarmament. But the progress made so far by states possessing nuclear weapons in commencing good faith negotiations toward nuclear disarmament do not seem to reach the level of expectations of the countries without such weapons.**

On the occasions of the Conferences of Parties organized every five years since the Treaty entered into force, the non-nuclear states have in fact regularly called

¹⁶ (1). See for example the argument of the representative of Iran in the framework context of the two advisory opinions; according to the latter,

“It should however be specified that the decision concerning the prorogation of the treaty (NPT) occurred within a group of three interdependent transactional decisions; the two other decisions bore, one on the ‘reinforcement of the examination processus [scrutiny?] of the treaty’ –all Parties, especially the nuclear powers, being urged to move farther along that path— and, the other on the ‘principles and objectives of nuclear nonproliferation and disarmament,’ with ‘the ultimate objective the complete elimination of nuclear weapons and a treaty of general and complete disarmament’ being reiterated.” --

¹⁷ (1). In the terms of its paragraph 3, a substantial [substantive?] violation of a treaty consists, among other items, in “the violation of an essential.

¹⁸ (1). Voir le paragraphe 2 de cet article 60.

attention to the absence of implementations of the obligation of good faith negotiation called for by Article VI of the Treaty. The 1990 conference of the Parties is symptomatic in this regard insofar as, in the absence of agreement, *no final declaration could be adopted*, essentially because of the fact that the non-aligned States felt that the nuclear powers were making inadequate efforts toward disarmament.

In its Resolution 984 (1995) of 11 April 1995, the Security Council made a point of reaffirming that it was

“necessary that all the States party to the Treaty on the Non-Proliferation of Nuclear Weapons comply fully with all their obligations,” and urged *“all States, as provided for in article VI of the Treaty on Non-Proliferation of Nuclear Weapons, to pursue negotiation 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 objective.”*

4. Significance of the addition of “good faith” to article VI NPT

A. General significance of an addition of this kind in any treaty.

Good faith, the essential vector of law.

Good faith is a fundamental principle of international law, without which all international law would collapse. Georg Schwarzenberg rightly calls it

“a fundamental principle which can be eradicated from international law at the price of the destruction of international law itself.”⁽¹⁹⁾

The adage “*pacta sunt servanda*”, cited in this abbreviated form, really reads in its integral version “*pacta sunt servanda bona fide*”. Agreements must be respected in good faith.

In the wording of Article 26 of the Vienna Convention,

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

¹⁹ (1). Cited in Robert Kolb : « *La bonne foi...* », *op. cit.*

Nor has the International Court of Justice failed to recall it in the following terms:

“One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith.”⁽²⁰⁾

In relations between states good faith occupies exceptional importance. *It is the guarantor of international stability*, because it allows state A to foresee the behavior of its partner, state B, and thus makes it possible for the former to align its behavior on that of the latter. There is a “standard” of good faith. It is a concept which evolves with changes in international life. It is this standard which determines the obligation and which gives it its quality and its dimensions. Resisting proof, good faith is presumed and its opposite, bad faith, is its foil. It excludes fraud, ruses, the intention to hurt, shameful motives, dissimulation, malice and in general every kind of trickery.

a) Good faith, generator of legitimate expectations

The essential characteristic of good faith is that it has legal effects resulting from a legitimate expectation nourished by the contracting state. In international relations, states which are supposed to act in good faith are obliged to take into account, in their behavior, their respective legitimate expectations. Each of them has with respect to the others a right, created by good faith, not to be deceived in these expectations. *Good faith thus gives birth to legitimate confidence.*

b) Good faith in the light of trust

Trust plays an important part in all types of relations, between persons as well as between states. Without trust international society would be a jungle or chaos. Individuals, states and even animals submit themselves to a social order based above all on the exclusion of deceitful behavior.

B. The specific significance of this addition to the NPT

In the particular context of the NPT, one can vigorously affirm that the principle of good faith illuminates the entirety of the negotiations called for by article VI. In becoming parties to the NPT, all states have agreed *to execute in good faith their obligation*

²⁰ (1). Nuclear Tests (Australia v. France), Judgment of 20 December 1974, *I.C.J. Reports* 1974, p. 268, paragraph 46.

to pursue in good faith negotiations concerning general and complete disarmament. This means that these states must display good faith behavior both in the conduct of the negotiations and while the negotiations last. ***They must therefore abstain from performing any act which would deprive the treaty on general and complete disarmament of its object and its aim. It is obvious that any act bolstering its nuclear arsenal by a state party to the NPT would be such an act.***

Let us examine these aspects more closely.

In order to have an idea of the enrichment which good faith brings to the disarmament negotiations, let us indicate hereafter what kind of behavior this good faith implies and requires:

a) Significance of a negotiation qualified as “in good faith”

i) The negotiations must be conducted with
“good faith as properly to be understood; sustained upkeep of the negotiation over a period appropriate to the circumstances; awareness of the interests of the other party; and a persevering quest for an acceptable compromise.”⁽²¹⁾

ii) *“The negotiations to be conducted must be guided by the following principles:*

- *They should be meaningful and not merely consist of a formal process of negotiations. Meaningful negotiations could not be conducted if either party insisted upon its own position without contemplating any modification of it.*
- *Both parties were under an obligation to act in such a way that the principles of the agreement are applied in order to achieve a satisfactory and equitable result.”⁽²²⁾*

²¹ (1). Aminoil Case, Kuwait v. Independent Oil Co., 1982 *International Legal Reports*, vol. 66, p. 578.

²² (1). Case concerning the agreement on the German foreign debts, Greece c. Federal Republic of Germany, 1972, *Recueil des sentences arbitrales*, vol. XIX, p. 56-57 and *International Legal Reports*, vol. 47, p. 422 (it's the resumption of the formulas used by the International Court of Justice in particular in the cases « Plateau continental de la mer du Nord » (*C.I.J.*, *Recueil*, 1969, p. 47) and « Golfe du Maine » (*C.I.J.*, *Recueil*, 1984, p. 299).

- iii) The addition of “good faith” to the negotiation called for by article VI is in no way a simple redundancy. According to the World Court, its mention, made with a view to a result as capital as nuclear disarmament, confers upon the said negotiation an exceptional importance given the global stakes involved:

“The obligation expressed in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons includes its fulfillment in accordance with the basic principle of good faith (...). The importance of fulfilling the obligation expressed in Article VI (...) was also reaffirmed in the final document of the Review and Extension Conference of the parties to the Treaty on the Non-Proliferation of Nuclear Weapons, held from 17 April to 12 May 1995. In the view of the Court, it remains without any doubt an objective of vital importance to the whole international community today.”

b) Interpretation, in the light of good faith, of NPT and of all specialized disarmament treaties already concluded

In a domain as vital and also as delicate as progressive nuclear disarmament, the stakes of which are capital, each state party, which is sovereign, understands that it is not bound beyond what it has really agreed to. The principle “*Pacta sunt servanda*” must be entirely accepted, but without trampling on the sovereignty of the state party. The Vienna Convention of 1969 on the Law of Treaties includes an essential rule, that of the double respect for the treaty and for the sovereignty of the state party, thanks to a “*good faith interpretation*” of the said treaty, formulated in its article 31, paragraph 1: *priority of and submission to the text, but without neglecting the intention of the parties*. Tamerlaine, having negotiated the surrender of a town and having promised to shed no more blood, decided in effect to spill not another drop of blood of the soldiers of the town’s garrison, by burying them alive. Good faith prohibits clinging to the meaning of a phrase in order to escape that of the parties.

c) Obligation to preserve the object and aim of the NPT and to respect its integrity

Good faith prohibits every act, behavior, declaration, initiative tending to deprive the NPT of its object and purpose. It forbids every measure whose effect is to injure the essence of the treaty. Good faith behavior takes the form of a series of obligations “not to do”, or obligations of “preservation”, such as:

- i) The obligation to refrain from acts incompatible with the object and purpose of the NPT: Prohibition to disrupt the general scheme of the NPT; proscription of every initiative the effect of which would be to render impossible the conclusion of the contemplated disarmament treaty;
- ii) The obligation to refrain from enacting, at the national level, laws and rules incompatible with the aim of the treaty;
- iii) The obligation to refrain from concluding an agreement manifestly incompatible with the aim of the treaty;
- iv) The obligation to respect the integrity of the treaty; a specialist on the question of good faith in international law has rightly written the following on this subject:

“a treaty must be considered executory in all its provisions, whether they are favorable or unfavorable to the contracting party. Good faith prohibits selectivity according to the interests of the moment.”⁽²³⁾

This rule is perfectly embedded in the doctrine. One could, however, ask whether, when dealing with a question as crucial as nuclear disarmament, it would not be suitable to be more flexible and to practice, with discernment, a certain selectivity in the matters to be resolved, if it appears that such an approach could serve to bring the parties closer to the ultimate purpose of the NPT.

One example of conduct apt to safeguard the object and purpose of the treaty could be the SALT II agreements. The Soviet invasion of Afghanistan occurred at the very moment when the Senate of the United States was getting ready to review these agreements. Fearing that this unfortunate situation might compromise the ratification of SALT II, President Carter asked the Senate to postpone its review until later. And the Department of State published on January 4, 1980 the following declaration, by which the Americans and the Soviets intended to see to the preservation of the object and purpose of the treaty:

“The United States and the Soviet Union share the view that under international law a State should refrain from taking action which could defeat the object and the purpose of a treaty it has signed subject to ratification.”

²³ (1). Robert Kolb, “*La bonne foi en droit international public...*”, op. cit. p. 295.

d) Obligation to take all positive measures for the realization of NPT.

Good faith requires each state party to take, individually and in concert with every other state, whether or not party to the NPT, all positive measures likely to bring the international community closer to the purpose of the NPT, nuclear disarmament. It imposes on all states party *a general and permanent obligation to act positively*, i.e. in a sense which serves the correct fulfillment of the NPT.

With this mention in a treaty concerning a domain as crucial as that of global nuclear disarmament, good faith acquires a more imperative connotation than ever before, since its task thus becomes to protect the fundamental values of *the entire international community* and to reinforce *the international public order*.

e) General duty to cooperate in good faith.

Good faith implies a general obligation of cooperation among states party to the NPT. In the context of the eradication of nuclear weapons, good faith confers upon this duty to cooperate a particularly high degree and makes it all the more imperative. The states party must necessarily maintain an appropriate level of consultation in order to cooperate in the solution of the considerable difficulties which will inevitably be encountered in this gigantic disarmament endeavor.

f) General obligation of information and communication

Within the framework of the general obligation to cooperate there exists an obligation to inform which takes on a character of necessity all the more imperative as it is difficult for a state party, acting in good faith, to know perfectly the concerns of another state party. Questions of national defense are in effect marked by the seal of state secrets. This obligation of information naturally does not aim to unveil defense secrets and to profit from doing so against another state party, which would be contrary to good faith.

The obligation to inform arises each time it touches on the correct execution of the NPT. The parties must fairly communicate to each other documents required for an understanding of the matters at issue, or necessary for an understanding of the interests of the other parties.

In certain hypotheses, the silence of a state party looks like a violation of good faith, whenever the circumstances are such that the silence is incompatible with the necessary honesty established between the parties.

g) Obligation to compromise

The NPT is a “*pactum de negociando*”.

“*A pactum de negociando is also not without legal consequences. It means that both sides would make an effort, in good faith, to bring about a mutually satisfactory solution by way of a compromise, even if that meant the relinquishment of a strongly held position taken earlier. It implies a willingness for the side (to go) part way.*”⁽²⁴⁾

h) Prohibition of abuse of process

Abuse of process is generally based on unacceptable conduct. It becomes particularly serious when it manifests itself in an area as crucial as nuclear disarmament. Good faith prohibits abuse of process in all its manifestations such as fraud or deceit. Negotiations intended to derive advantage in any manner from the good faith of others constitute bad faith.

But there is the very difficult and delicate problem of proof.

²⁴ (1). Case regarding the agreement on the German foreign debts, *Recueil des sentences arbitrales*, vol. XIX, p. 56.

i) Unjustified termination of good faith negotiations

The time of negotiation is variable and, in the case of nuclear disarmament it can be very long, taking into account the extreme complexity of the problems to be resolved and the exceptional importance of what is at stake. The world knows that negotiations in this field have already lasted for decades although we cannot say that we are on the verge of disarmament.

After the review conference of 2005 the world observed an alarming halt in the negotiations. One thing is certain: A manifestly unjustified breaking off of negotiations is radically incompatible with good faith.

5°/ Building confidence

To begin, I must ask a little indulgence and understanding, for having ventured into a complex realm where I lack expertise. The following remarks on the theme of “confidence-building” will seem excessively simplistic and elementary. I offer them merely by way of indication, because I find it difficult to end this “Paper” on the eradication of nuclear weapons without mentioning the overriding factor that is “confidence-building,” which remains the powerful engine of nuclear disarmament.

This said, I know that because of their overly simplified nature, these notes will bring nothing to the great specialists on this question. Such experts will doubtless elevate the discussion on this theme to the appropriate level

A. First elementary law: *Opacity breeds opacity*

In a realm so heavily determinative for the security of each State, the problem of “confidence-building” assumes a major importance that must be stressed.

Let us approach these complex matters with a few simple ideas.

It is clear that the nuclear arms policies of States are among those that, by nature and by definition, require secrecy. The opacity of activities connected to nuclear weapons is an essential element of the nuclear age.

If a State A has reason—objective or subjective, real or supposed-- to think that State B is engaged in experiments, research, testing, or a quantitative or qualitative increase in its weaponry, especially when nuclear materials are involved, it is unimaginable that we would reasonably expect State A to harbor much confidence about State B. It is a simple law that states that “*opacity provokes opacity in return;*” it generates it and feeds it. Opacity and secrecy inevitably turn contagious. State A will seek to establish imperiously the same degree of opacity in its activities and behavior, and go even farther than State B in that direction.

B. Second Elementary law: *Opacity breeds the arms race*

The arms race is the obvious manifestation of the law of opacity, feeding on the fear of the Other. States tend constantly toward an “ever more and ever better” that draws them into an exhausting and costly escalation.

Another manifestation of opacity consists of the tendency of the State to hide events like nuclear accidents, accidental irradiations of troops, or any event that could expose its activities in the handling of nuclear weapons.

C. Third elementary law: *In the end ,transparency generates transparency*

Through repeated resolutions, the United Nations General Assembly has regularly called on States for “*Transparency in Weapons*” and encouraged States to engage in “Transparency Talks” to arrive at substantial “*Multilaterally Agreed Transparency Measures.*” The doctrine of the United Nations is that such transparency contributes significantly to building and reinforcing confidence and security among States.

The opposite of opacity in nuclear activities-- transparency and openness— is likely, if the terrain is favorable to a “*break in the vicious circle of opacity,*” to bring about similar behavior by other States. Of course, this does not have the rigor, and the automatic nature of a law; transparency by one party can be met by dissembling

from the other. But this negative behavior only “pays off” over the short term, for dissembling in the one will snuff out transparency in the other as soon as the latter notices the negative attitude of his partner. There is reason to think that, insofar as it exists, transparency can end by generating a similar behavior.

This idea does not spring from some irresponsible, sweet naïvety. But it is clear that transparency cannot “prosper” unless it is fed by *converging wills*. In other words, transparency cannot survive and grow strong except in conformity with a basic and highly comprehensible law of *strict reciprocity*.

**D. Fourth elementary law:
The tyranny of the “psychological factor”**

As an underlying aspect of “confidence building,” it must not be denied that there exists what I would call “a complex mirror play/” fed by a series of images that States send back and forth about their respective armament situations, real or presumed. These images, set up face to face, produce a panorama in which the real and the virtual change at the whim of each State’s perceptions of the other, but the psychological factor is always present. The “complex mirror-play” is actually fed mainly by reflexes of suspicion, of difficulty with trusting, of permanent reaction against a credulity judged to be too dangerous. Each State develops fears and anxious presumptions about the arms policy of the Other.

So the “psychological factor” is an element to be treated with very special attention. It is not enough to demand the eradication of nuclear weapons with great efforts, with meetings and conferences. Precious and influential, a powerful wave of international public opinion in favor of the abolition of nuclear weapons certainly makes for a positive effect on the mind. But that does not authorize disregard for the importance of the “*psychological factor*” that drives a State’s leaders, and makes that abolition directly dependent on the State’s ability to overcome its *legitimate anxieties*.

It is this area too that calls for action, to help a State surmount its fears, action to be coupled with public pressures and the whole arsenal of persuasion.

For nuclear weapons are not weapons of power; they are and they remain weapons of fear above all. Fear of the Other. Fear of being wiped out, for possibly underestimating a mortal danger.

Therefore, it is crucial to reduce subjectivity.

**E. Fifth elementary law:
Reduce subjectivity to increase objectivity**

To this end, the international community is working to create “*confidence-building measures*” (CBM). As we know, the notion of “*confidence and security-building measures*” was broached in 1984-6 at the Stockholm conference. It has been developed more deeply over time by the OSCE.

CBMs are generally defined as being

“tools that adversarial States can use to reduce tensions and avert the possibility of military conflict”

More thoroughly stated:

“the primary goal of confidence-building measures is to reduce the risk of arms conflict by building trust and reducing misperceptions and miscalculations in international relations, thereby contributing to international peace and security.”⁽²⁵⁾

These measures are neither substitutes nor pre-conditions for effective disarmament measures. Their purpose is to create conditions that favor progress toward disarmament.

It is useful to draw attention to various regional experiences with CBM. The efforts made in the framework of the OSCE are interesting in this regard, for

“The system of confidence- and security-building measures in OSCE now constitutes a stable and effective foundation for a culture of

²⁵ (1). “Working paper submitted by Greece on behalf of European Union”

*cooperation, transparency, and predictability as regards military-political matters for the 55 States Members of the Organization.*²⁶⁾

F. Sixth Elementary law Support verification

The measures for reinforcing “confidence-building” are very numerous, and they depend on circumstances; it would be impossible to list them all. But the *exchange of information and communications* between States plays a major role. And it is in this area that *the ability to verify* the truth of reported information can play a role. The more that communications can be confirmed by appropriate verification techniques the more subjectivity will regress, to the benefit of objectivity.

Obviously, monitoring remains the most uncomfortable problem to resolve. All of human imagination, all the results drawn from the machine, have never truly sufficed. Almost every method has been tried, from exterior oversight through seismic, hydro-acoustic, or ultra-sound instrumentation, to unannounced on-site inspections, and notably including mutually accepted espionage, from space or through the work of international institutions like AIEA, which has been enlisted notably to detect the diversion of civilian technologies to military purposes.

Disarmament generally occurs in stages, each of them meticulously monitored. A State is unwilling to move on to a next stage unless it is fully satisfied that its partner’s preceding stage has been properly monitored.. This system is seen mainly in agreements for the definitive destruction of a some particular weapon and the machines that produced it.

The panorama of various experiments in disarmament certainly shows the range of verification possibilities that States have conventionally accepted. For instance, in the framework of the 1959 Washington Treaty on the Antarctic, the States have an absolute obligation to “denounce” any State, whether or not party to the treaty, that fails to respect the denuclearization and demilitarization of that region. Another example is the *Club of London* created in 1975, which brings together all the

exporters of technologies considered sensitive, for better cooperation among themselves and better control of the final destination of their products. The Helsinki treaty of 24 March 1992, called the “Open Skies” treaty, authorizes aerial overflight of States for purposes of verification. But clearly, such an option would in fact only be available to the large powers who have the sophisticated technologies to carry out such overflights.

We may also remark that at the level of the A.I.E.A., the main virtue of a diplomatic instrument known as “Additional Protocol,” to which the nuclear powers seek ratification from non-nuclear States, resides in the fact that this text sets out a very heavy and detailed arsenal of measures meant to obtain an extremely advanced verification, and a particularly thorough one of a State’s nuclear activities.

In this very sensitive area, we should also cite the “measures” called “transparent” listed in Article 7 of the Ottawa Convention of 4 December 1997 on the prohibition of anti-personnel mines. The member States must, when they have finished destroying these devices, not only send reports to the Secretary General of the United Nations, but also cooperate with any on-site monitoring by “fact-finding missions” carried out at the request of either the suspected State or the Assembly of States who are party to the Convention.

A reading of some treaties shows the States’ great attachment to the problem, and the minute detail with which their plenipotentiaries have worked it out. For instance, the Test Ban Treaty of 24 September 1996 contains ***an Article IV comprised of— and this is completely symptomatic—no fewer than...68 paragraphs devoted to monitoring and verification.***

Yet it is clear that the need to nourish confidence by the exchange of information and communications contains its own limits. In a number of agreements there occurs *a so called “confidentiality” clause*, by which the parties commit not to make public the content of these exchanges. Thus:

²⁶ (1). “Working paper submitted by Greece..”, *op. cit.*, paragraph 5.

“Each Party undertakes not to release to the public the information provided pursuant to the agreement except with the express consent of the Party that provided such information.”⁽²⁷⁾

G. Seventh Elementary Law The legal status of the CBMs, between necessary rigidity and desirable flexibility

The legal status of the “confidence-building measures” is generally rather imprecise. It is the product of two contradictory lines of force. On the one hand, State A must feel that the confidence-building measure chosen by State B is a reliable measure, binding on the State taking it, such that State A, concerned with trustworthiness, would like to see said measure given a legal status that is firm and thoroughly binding on State B. But on the other hand, the imprecision surrounding the legal status of the measure would have the advantage of offering the states greater flexibility, which might encourage them to consider and accept such a measure.

But everything depends on circumstances. If, according to some hypotheses, the CBMs have the nature of an international treaty, by definition binding on the parties, this can only come about through the express will of the States concerned.

In the framework of negotiation for some aspect of disarmament, it is rather absence of rigidity, a flexibility, that seem to be sought. The legal status of written or oral communications or of proposals offered by a State in the course of negotiations raise a question. In such a case, as in others, good faith must serve as guide, and Judge Mosler is right to declare that

“the legal effect to be attributed to a behavior exhibited during negotiations depends on the circumstances in which these actions take place.”⁽²⁸⁾

Indeed, it is in order to *protect confidentiality* that the International Court of Justice has often ruled that the proposals a State may make in the course of negotiations cannot

²⁷ (1). “Agreement on confidence-building measures related to systems to counter ballistic missiles other than strategic ballistic missiles”, septembre 1997, article VII.

²⁸ (1). Mosler: “General Course on International Public Law”, *Recueil des cours de l'Académie de droit international*, vol 140, 1974-IV, p.111.

bind it definitively, especially when those negotiations have not come to a conclusion.⁽²⁹⁾

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As declared in the document presented by Greece for the European Union, and cited above,

“The building of confidence is a dynamic process, and a gradual step-by-step approach.”⁽³⁰⁾

The steps have different levels of importance. The most significant ones in nuclear disarmament have been made outside the United Nations. Today more than ever, it is important to attribute a more decisive role to the U.N. in the coherent, democratic conduct of an integrated process of nuclear disarmament, with a realistic and reasonable schedule. The need is clear for more effective and consistent involvement of the United Nations throughout the process, going beyond the simple labors of the sessions of the Disarmament Commission.

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IV. Preliminary summary evaluation of the current parameters influencing the advent of a world without nuclear weapons

There are negative factors and positive elements in this area.

1. Negative phenomena

A. A less safe world. A worrying state of the planet

A less safe world "generates and maintains fear." Fear inspires and nurtures the desire to arm itself. The willingness to arm itself secretes and perpetuates the refusal of disarmament.

²⁹ (1). Cf. *Affaire Notttenbohm*, CIJ, *Recueil* 1955, p.20; *Affaire des Minquiers et des Ecrehous*, CIJ, *Recueil* 1953, p.71; *Affaire de la delimitation maritime et des questions territoriales entre Qatar et Bahrein*, compétence et recevabilité, CIJ, *Recueil*, 1994, p. 125-126.

³⁰ (1). “Working paper...”, *op.cit.*, paragraph 19.

Maybe now more than in all eras of humanity before, **our time, in our world so complex and sophisticated, has become one of violence**, inside as outside, that of family breakup, centrifugal forces at national levels, extreme conflicts in the world of work, challenge of our traditional beliefs, concerns about inequities facing certain progresses of science, technology, biology and medicine, breaking the ethical barriers and calling into question the fundamental moral values, finally the offensive playbacks of powerful waves of **fear and insecurity of mankind**. Our anguished era is one of ruptures: internal ruptures in the conscience of man and concentric fractures in various spheres from family to the system of international relations, through the worlds of school, city, and nation. We live in an era where national consensus is eroded and the international consensus dangerously eroded.

The parameters of this international environment remain a concern. The scope of intolerance has widened and the world finds it difficult to find a common language. Fundamentalist terrorism grows by feeding itself of the errors of those who fight sometimes indiscriminately. Some extremists of all persuasions are led by men who reject themselves out of any universality of humans, because they believe possess absolute truth so to them it is exclusive of all others. This is a characteristic of our time, already experienced by the world, especially at the time of the Wars of Religion in Europe. From this point of view, **intolerances can be observed in all latitudes and longitudes** and no continent has any lesson to give to another, not for the recent past, nor for the more distant past.

The United Nations, like its predecessor, the League of Nations is, however, born of a global conflict whose winners were promised that it would be the last. Indeed, they were unable to prevent the emergence and persistence of regional conflicts, even if they have encouraged or maintained in closed fields East - West, a third major conflict has been avoided, sometimes just barely as during the Berlin crisis or that of Cuba. Thus, for over four decades the fate of humanity depended on how to hear and to apply the concept of **"Mutual Assured Destruction" (MAD)**, more commonly recognized in the evocation of the apocalyptic **"Balance of Terror."**

But the end of the "Cold War" with the fall of the Berlin Wall and the collapse of the Soviet Union which followed led to an acceleration of history, the unfreezing of a sudden dynamic long contained and once finally released would provoke prodigious changes whose extent and consequences have barely begun to be measured. A decade should have been sufficient to convince us that the natural

extinction of communist utopia does not generate a reconciled world, relieved to have escaped a widespread nuclear conflict, and finally devote ourselves to the common welfare and the universal understanding.

This is the end of the balance of terror, as welcomed as it was, the strike has cast a light on all raw imbalances that threaten our planet: an arms race, including nuclear, that the end of the "Cold War" has not yet slowed, the gap between rich and poor countries is widening; global warming and the threat to the environment whose effects are more and more devastating, and pandemic diseases decimating each year an impressive number of human beings, a terrorism more eruptive than ever, exacerbated by the finding of various injustices.

Thus, in addition to the threats of a military nature that beset our world and which will be further discussed later, non-military threats, equally disturbing, are proliferating on our planet and will pose a powerful challenges to our collective security. These target not just peace but also the survival of mankind. The international community seems so ill prepared **so ill prepared to take decisive action, most often not for the lack of resources but because of selfish behaviour that make the least developed of the world even more vulnerable to these threats.**

Can we therefore avoid the fact that the victory of the "free world" on communism also, and often takes on the appearance of a comparable victory of the developed world on the majority of humanity which remains chained to poverty, even the distress? Otherwise how to explain this complex of the fortress under siege? Thus the actors and main beneficiaries of globalization discover the limits the moment it imposes sacrifices on them, and they advocate the abolition of borders for their products and nationals, but not for those in developing countries, they lay down prescriptions for universal democratization and good governance without regard to the specific conditions of each country, ; they call for strict observance of human rights, while violating them at home or allowing violation of them in other lands...

Therefore, if the upheavals arising from the end of the "cold war" and the imbalances it has worsened or that it has spawned have radically transformed the face of international relations and their interaction within international organizations, they have not resulted, as the aftermath of two world conflicts, the sense that only a powerful new International Organization entirely different from this could properly take care of the transformations and the immense challenges it is facing now. Never before, have the serious threats and challenges facing humanity so resoundly demanded the formation of the broadest and most sustainable consensus for the

adoption of instruments and measures likely to be right. ***Today the international community is called upon as in the aftermath of the two world conflicts, to take bold initiatives. It must resolutely decide to change the world for the common good and shared prosperity of all humanity. It is no longer up to the international community to rebuild the world around the San Francisco Charter, but to reembark on a new hope, a new impetus, a new world free from the peril of nuclear fire.***

There is, as well a general concern for the state of the planet, noting the "negative factors" acting against the advent of a world without nuclear weapons, in fact, it appears as an active and positive element insofar as it calls on the urgency and in all logic for the denuclearization of a world already too dangerous in itself.

A. The overly long and overly vain delay to reform the United Nations

The United Nations relies on a number of ambitious ideals, including and most importantly, the ideal to *"preserve future generations from the curse of war, which twice in the space of a human life has inflicted humanity with unspeakable suffering."* To achieve this ideal, the *"peoples of the United Nations"* have committed, through their governments, *"to the acceptance of principles and the institution of methods to ensure that it will not be made use of armed force except in the common interest."* The purposes and principles of the UN are only a translation of this desire to ward off the demon of a final war. Indeed, the primary objective of the United Nations is to *"maintain peace and security."* As a result, ***the new World Organization was designed primarily as a universal alliance against war: the war past, but also future wars by acting to prevent them on their root causes or, where appropriate, to stopping them by punishing acts of aggression.***

It is therefore logical that war is being outlawed. Not only is the use of force outlawed, but also the threat of use thereof, by the same token self-defence is strictly regulated so that it may only be the *"last refuge of the lawful use of force in international law."* To give effect to this prohibition of the use of force, the Charter has created a system called *"collective security"* which has at the center, the Security Council. This body has the *monopoly* of legitimate use of armed force and assumes it on behalf of the international community, to the exclusion of any State any other body, *"the primary responsibility for maintaining international peace and security."*

But this mechanism, apparently with teeth, for collective security has been jeopardized by the possible use of the veto of one of the five permanent members of the Security Council.

Since the beginning of the "Cold War", which is usually placed around 1947-1948, the "system of the Charter" has been effectively blocked. Article 43, which creates an obligation to avail troops to the Security Council was immediately the price of an ever growing East-West antagonism, while all the while, the State Committee Staff never saw the light of day. The Security Council has thus been disarmed so to speak.

We must also include the ambiguities in the interpretation of international law as the Charter prohibits the use of force (Article 2, paragraph 4), but allows self-defence (Article 51). It has become, along with relaxed interpretations and practices by some states, as if this Charter rids us of war through the front door, while allowing its' return through the window.

Thus, these last few years, armed force was used in the name of "international legitimacy" in a more than doubtful fashion. This illegal detour coupled with an encroachment on the achievements of people on self-determination on behalf of a "war" (the word was used) against terrorism. The United Nations, the international community, failed to exercise moderation when these abuses were the result of a great power, armed with the additional right of veto. Today's most deadly conflict in Iraq was originated by an act of legally proven aggression and military occupation, that the United Nations refused to authorize, but was nonetheless powerless to prevent. Since 1945 never had a permanent member acted so confronting a resolute majority of the Security Council and had never before shown such a clear commitment to upholding the idea of "preventive war" so difficult to justify in politics as in contemporary international law.

In addition, when a State finds protection from a great, it may pervert the system designed in 1945 by the Charter with impunity. The "collective security" was damaged when a compromise intended to "save face" for the aggressor. The system was sufficiently punitive to be deterrent and it rarely included the return to *status quo ante*. Instead of punishing the aggressor, it placed itself between him and the attacked State: this function assigned to peacekeeping operations was nowhere announced in the Charter.

Finally, the United Nations has not only demonstrated its impotence in areas where it was nevertheless perfectly competent under the Charter, but has been paralysed through its own incompetence in other sectors, left to the exclusive management of certain States. The fact is that ***international relations today are at once too***

interdependent, too complex and too progressive to reflect the support of their balances in the current Charter. We may not have proof of the fact that the bulk of military and economic decisions concerning the future of the planet almost totally escapes the clutches of the United Nations. The WTO on trade, NATO on military operations, or the G8 on issues that go beyond economic aspects, have more weight on international relations that could not be claimed by comparable bodies and UN Agencies where they exist.

We will not lose sight of the fact that United Nations reform, which is included in the agenda for so many years but apparently unattainable, adds even more to the situation, insofar as the bodies of the United Nations in charge of disarmament have lost a lot their credibility. A reform that if achieved, could bring some new blood to some of the organs, including the Security Council if it had been expanded and its operation methods democratized.

The conclusion of all the above is clear. The more United Nations shows its weakness, the more States, especially nuclear weapon States, refuse to give this body the task of watching over their security. Conversely, the more United Nations affirms its jurisdiction and imposes its power, the more states may gradually abandon their nuclear weapons. ***Without the means, without a single and unified command, without a clear and precise mandate, the UN can not pretend to wage war on behalf of States, as it can not be credible in the theatre of operations.*** Peacekeeping must then regain its conceptions of origin in the framework of a genuine collective security and not turn into interventions. Moreover, pure military action is less and less relevant to solving the problems of a world where "stability and security surpass (...) the military sphere," and rely instead on "a set of economic, financial, political, educational, scientific and technological measures which should be formulated in a concerted and timely manner", as highlighted by Federico Mayor. Car la véritable puissance réside non pas dans l'action unilatérale mais dans l'action collective qui découle du concept même de communauté internationale. *Because the real power lies not in unilateral action but in the collective action that stems from the very concept of international community.*

But in general there is a clear difference between the industrialized member states who work for the most part to *reduce the influence of the United Nations in world affairs* and the developing Member States who contrary wish to ***expand and strengthen the Organization's role*** to become key stakeholders in international issues.

B. The alarming erosion of the NPT

a) The content of the NPT or Pandora's box

Most authors and analysts saw in this treaty between the powerful and non-powerful an original instrument, almost anomalous for allowing the resurrection of the famous "*unequal treaties*", although here the acquiescence of States, even though not completely to their favor them, it represented additional credit to this instrument.

The T.N.P. is the most widely ratified multilateral instrument in the world. Only Pakistan, Israel and India have not joined.

To simplify, we say that the T.N.P. rests on three pillars: nuclear non-proliferation, peaceful uses of the atom and disarmament, respectively covered by Articles II, IV and VI of the Treaty. Article II involves a commitment by non-nuclear-weapon States to desist from acquiring them. As sovereign states waive, in the interest of humanity, acquisition, in any form whatsoever of nuclear weapons, this waiver is final. The second pillar, that of Article IV, firmly supports the strong recognition of the inalienable right of all parties to control and develop peaceful uses of nuclear energy. The third pillar completes the construction of the building by the commitment demonstrated by Article VI, for nuclear-weapon States to pursue negotiations on disarmament.

States renouncing to acquire nuclear weapons obtain a double contribution on the part of weapon States, on the one hand they will cooperate for access to civilian nuclear technology and on the other will give "negative guarantees" of non-use against them of the weapon and "positive guarantees" to benefit from their protection if they were attacked by others with nuclear weapons.

The main purpose of the treaty must be remembered. It was designed to contain the "*vertical proliferation*" (enhancement and refinement of existing arsenals) and "*horizontal proliferation*" (limiting the number of nuclear-weapon States.)

By its very drafting such a treaty, which organizes poorly compensated discriminations by uncertain counterparties, could not remain insensitive to the

volatility of international tensions and not know but an instable existence. Professor Serge Sur said somewhere, quite rightly, that the

"T.N.P.s regime has the fundamental characteristic of being constructed totally unbalanced, it creates an inequality between states, those of the "nuclear club" and others, which could have been foreseen from the outset that it would be precarious and temporary and could not be accepted unless it led to nuclear disarmament, ie return to equality."

b) The NPT a locus of contradictions

The NPT is the locus of various contradictions. Let's recall two:

- i) The first contradiction is a measure of the potential instability of the treaty and suggests that the existence of this instrument can only be tumultuous. How can States indeed waive their inherent right to self-defence, while members of the "nuclear club" keep theirs? The right renounced is inherently the right by which the state defines its existence and in the absence of which it can not remain a state. If the right to self-defense involves the use of nuclear weapons, according to the philosophy of deterrence of the "nuclear club", then we can not prevent the construction of the Treaty to yield a strong imbalance, if the nuclear state gets to retain the right while the non-nuclear State is required to surrender it.
- ii) Seen from another angle, the treaty has created and crystallized two groups of States in the international community. One, the "Club" is founded, by virtue of the Treaty, to use nuclear weapons against the other in certain circumstances, while the second is deprived of the right to manufacture the weapon to use against the first.

c) With the NPT, disarmament is stalled

But the most important point is that the disarmament envisaged by the NPT as the cornerstone, is now disabled.

International relations on nuclear issues are today in a situation of very strong uncertainty generated by a mutation, both conceptual and technological, already noticeable at the end of the Clinton administration, but which has seen an acceleration with the Bush administration. What has led Professor Serge Sur to declare

"(...) Not only have the risks of proliferation of nuclear weapons and, more broadly, weapons of mass destruction have increased, moreover existing instruments found themselves weakened"⁽³¹⁾.

Over the past decade, disarmament is marking time. Worse yet, some of its gains have been questioned in connection with a new policy that expresses a certain disaffection towards the disarmament.

The new strategy of rupture in respect to disarmament revolves around three areas: increasing the "vertical proliferation," the policy of "anti-missile shield" and the idea of a trivialization of employment prevention of nuclear weapons.

i) The intensification of the "vertical proliferation"

The members of the "nuclear club", excepting China, are mobilizing today for a modernization of their nuclear weapons. New generations of weapons are being created. The modernisation and maintenance of arsenals announce a "new nuclear age" where we expected a new stage in disarmament. The sophistication of armaments through miniaturization, the hardening of nuclear warheads, stealth, extending the scope of delivery systems, etc... Nuclear weapons stocks in "Club" countries have increased.

³¹ (1). Sur, Serge: "Undertaking Disarmament to the Detriment of a new International Security Context," *Annuaire français des relations internationales*, vol. V, 2004, p. 728.

Faced with the USA well invested in this policy openly favoured by the neo-conservatives in power, Russia does not stay still. The response is in particular by a new generation of vehicles at very long range.

Some members of the "Club" take various measures to indefinitely retain their nuclear capability, which placed their policy at odds with the philosophy of NPT

ii) The strategy of "anti-missile shield"

A U.S. response to threats of proliferation of nuclear weapons was found in the construction of anti-missile defense systems. To implement this new approach, President George W. Bush had decided on December 16, 2001 the withdrawal by the USA from the ABM Treaty, effective June 2002. This has helped begin the deployment of an anti-nuclear missile shield across U.S. territory and that of allied countries. The USA rely on "Ballistic Missile Defense System (BMDS)", which allows them to intercept all types of ballistic missiles in all phases of their flight.⁽³²⁾ This new policy of "anti-missile shield" has so far effectively triggered a new arms race, a situation that confronted head-on the main purpose of the NPT. And if we add the militarization of space, which strategists have once again on their minds, we seem to be witnessing a race to "over-arming" which can only deliver a fatal blow to the NPT.

In response to the US withdrawal from the ABM Treaty, Russia announced the next day, its withdrawal from the START II agreement. It had already announced in 2004 the acquisition of new nuclear weapons.

iii) The trivialization of the preventive use of nuclear weapons

According to the Pentagon, the USA plans to use the new generations of nuclear weapons on the one hand *as a preventive measure* in situations of crisis and on the other hand even if the opponent is a non-nuclear and a party State to the NPT. This would be a direct attack on the obligations arising from this treaty and the "negative security assurances" made by the "nuclear club" and reflected both in the IAEA and the Security Council. This would be, above all, an incredibly dangerous trivialization of the use of nuclear weapons..

With the "Nuclear Posture Review" the Bush administration was keen to considerably lower the bar on the level of tolerance to the use of nuclear weapons⁽³³⁾. In his report to Congress on December 31, 2001, on the "Nuclear Posture Review", Secretary of State Donald Rumsfeld states that the objective is "to implement a major change in our approach to the role of offensive nuclear forces within our strategy of deterrence."

Many studies indicate that

"Of all the factors that have undermined the validity of the NPT as a tool for non-proliferation and nuclear disarmament, implementation of a new "Nuclear Posture Review" (...) in January 2002 it revealed the most serious consequences for the survival of the NPT. "⁽³⁴⁾

Thus develops, a policy marking a clear disavowal to the NPT and a growing disinterest to address disarmament.

³² (1). In an even further move, they are creating a world BMDS. By so doing:
 1°/ they will initiate a global sensor system consisting of satellites and fixed and mobile radars;
 2°/ they plan the installation of sites of "Global Missile Defense" in Europe (the installation in the Czech Republic and Poland provoked a crisis between Washington and Moscow);
 3°/ they have established cooperation for the development of such a system all over the Globe;
 4°/ they sell their anti-missile systems to a large number of countries to gain a global dynamic of multiplied anti-missile defense.

³³ (1). Cf. extracts of the "Nuclear Posture Review" submitted to the United States Congress on December 31, 2001 at <http://www.globalsecurity.org/wmd/library/policy/dod/npr.htm>.

³⁴

(1). I cite a Canadian document here.

iv) The crisis of the NPT

As Professor Pierre-Marie Dupuy noted, nuclear weapons have been the object during the past half century, of a set of dense and diverse international regulations⁽³⁵⁾, without them actually slowing the arms race in general.

The disappearance of the bipolar order would have had to remove its relevance to nuclear deterrence⁽³⁶⁾ and enable humanity to reap the "peace dividend". Instead it delivered nothing.

The main consequence is an increased risk of proliferation in recent years,⁽³⁷⁾ while nuclear weapons are "*seeking ideology*", as stated very well in the "*Report Pierre Lellouche*", at the French Parliament on December 7, 2000.

It is clear that the non-proliferation regime has been considerably weakened first by the ongoing deployment of the "National" and "Global" "Missile Defense System" and by the activities of modernization of nuclear arsenals, followed by freezing negotiations on disarmament, and then by the discovery of underground technology transfers and nuclear materials and finally, by the declaration of possession of weapons (as in North Korea) or by suspected uranium enrichment (in Iran).

At the NPT Review Conference, from April to May 2000, State parties had finally agreed on an action programme of 13 practical steps for the effective implementation of the Treaty to save it from breaking down, but the last NPT

³⁵ (1). Dupuy, Pierre-Marie "it's the regulation and the use of nuclear armes which comes to be more scrutinized in the last two decades." in "*Droit international public*", 8th Edition, 2006, précis Dalloz, p. 675.

³⁶ (1). Amongst other articles see, the one by Olivier Debouzy: "Nuclear Deterrence in the Age of Emptiness", *Politique internationale*, autumn 1997, pp. 321-334.

³⁷

(1). Information Report Pierre Lellouche, Michael Guy Chaveau, Aloyse Warhouver, on the proliferation of weapons of mass destruction and their delivery systems; French National Assembly, National Defense Commission, December 7, 2000, <http://www.assemblee.nationale.fr/rap-info/i.2788.asp>

Review Conference in 2005, has left no room for doubt. States with nuclear weapons have clearly stated that ***the issue of disarmament was no longer on the agenda***. Because they considered having already done much in this area during previous years.

The manifest absence of consensus on the issues to be negotiated within the Conference on Disarmament had the effect that most negotiation committees did not meet. Negotiations scheduled for the conclusion of a treaty providing "negative security assurances" to non-nuclear-weapon States was interrupted as were negotiations on nuclear disarmament.⁽³⁸⁾ As to the Comprehensive Nuclear Test Ban Treaty, the USA has refused to ratify thus far, as have 11 of the 44 states whose ratification is required for its entry into force.

d) Legal Consequences

Mr. Chris Patten, European Commissioner for International Relations said one day to the "*BBC World*":

"It is very difficult for us to argue that it is morally reprehensible that other countries develop their nuclear capabilities while we, countries with nuclear weapons, do not pursue all of our commitments to the NPT."⁽³⁹⁾

Let's try to translate this ethical-political reality in legal terms. The NPT's threefold purpose of preventing further proliferation of nuclear weapons, promoting the use of nuclear energy for peaceful purposes and achieving nuclear disarmament. These three goals are covered by Articles II, IV and VI of the Treaty. They are as essential as the others and the difficulties of framing a treaty as unfair and unbalanced as the NPT has proven, suggest that the three goals were

³⁸ (1). Etienne de Gonneville, an expert on disarmament issues, said there is "gradual disintegration of the regime [of non-proliferation] by accumulation of violations and loss of confidence...", see De Gonneville, Etienne in "The Seventh NPT Review Conference, A step in a crisis plan?", *Annuaire français de relations internationales*, vol. VII, 2006 pp. 17-31.

³⁹ (1). Chris, Patten, interview with James Cow, *BBC World*, « *This week-end* », 10 octobre 2004 (italics added).

established in the negotiation as a "**package**". From this viewpoint alone already, it would not be unfounded to say that if one of the purposes is considered essential, the other two would be just as much. And if a group of states, for example the "*nuclear club*" considers that the goal of non-proliferation is essential, we must equally infer the other group esteems the goal of disarmament to be equally essential. The three objects must have the same status (if not, we would be adding to the many existing contradictions of the Treaty).

However, it is clear that the last NPT Review Conference of 2005 and the new nuclear policies of members of the "*Club*" above show disaffection, even disavowal of disarmament. This situation could be viewed as a *violation of the treaty*. Is it "*substantial*" as defined by the Vienna Convention on the Law of Treaties of 1969?

The violation of Article VI of the Treaty is substantial. It is governed by Article 60 of the Convention on the Law of Treaties and should engage the legal effects attached to them.

Referring to the commentary on paragraph c) of this Article 60, Sir Robert Jennings wrote:

*"The case anticipated under the letter c) is the one where the violation by any party undermines by its nature the very basis of the treaty as a whole and the fact is so serious. The example provided in the relevant part of the commentary in the report of the International Law Commission is a **treaty on disarmament**."*⁽⁴⁰⁾

You can not find a more appropriate comment as this one.

And one can not but agree with the observation of the report of the French Commission on the proliferation of weapons of mass destruction which states:

⁴⁰ (1). Jennings, Robert, sir, *op. cit.*, p. 176. (bold italics added) Sir Humphrey Waldock, Special Reporter on the Law of Treaties in the Commission, in its fifth report, "Special types of treaties - such as *disarmament treaties*, where a breach by one party tends to undermine the entire treaty regime (...)" (*Annuaire de la CDI*, 1966, vol. II, p. 39-40). The comment on the CDI addressed by Sir Robert Jennings appears on the same *Annuaire*, p. 278 : " 8. Alinea c) of paragraph 2 relates to the same du problem (...) concerning certain categories of treaties, such as *disarmament treaties* where the violation by one party tends to undermine the whole regime established by the Treaty on the relationship between all parties."

"...nuclear weapon States do not seem to take seriously their commitment to nuclear disarmament-even though it was an essential part of the deal under the NPT, both when it was established in 1968 and when its validity was indefinitely extended in 1995."⁽⁴¹⁾

D. Volatile international relations

Too many negative signs darken the still poorly lit path of peace. In addition to the persistence of points of tension such as Kashmir, Abkhazia, Ossetia, Chechnya, Western Sahara, Tibet, Darfur, etc... the use of force still exists, moreover as a preventive measure.

In addition, the United Nations Conference on Disarmament failed to adopt a programme of work for a period of ten years. The CTBT, the treaty banning nuclear tests, signed by the Clinton administration, was refused the U.S. Senate. The Review Conference of NPT in 2005 resulted in failure. The USA is considering manufacture of a new nuclear weapon model (RRW) and just signed an agreement with Poland to install anti-missile shield and with the Czech Republic to put a powerful radar, Russia believes all of this is directed against it. Unhappy Russia has resumed its routine long-distance aircraft carrier flights with nuclear weapons. The United Kingdom leaves open the option of pursuing its Trident submarine nuclear programme. China and Pakistan suspect India of wanting to divert to military purposes the agreement it has with the USA to obtain high nuclear technology to produce electricity without carbon dioxide emissions; The USA seem to have sought the conclusion of this agreement on nuclear cooperation with India with a view to oppose it to China, efforts are being made to expand NATO to Ukraine (which has a dispute with Russia regarding the military base at Sevastopol) and Georgia (transit country for oil and gas pipelines,) whose territorial integrity is threatened in Abkhazia and South Ossetia, and recent events with the entry of armoured Russians in its territory, appear to herald a return to the era of "cold war" between East and West; ambition of NATO enlargement does not stop there, moreover, it is looming to Azerbaijan and Kazakhstan, all moves not celebrated by Russia; during a Conference on Security in Munich in February 2007, Mr. Vladimir

⁴¹ (1). Lellouche, Pierre, *op. cit.* p.5.

Putin embarked on a fierce attack against the U.S. policy of preventive war and violation of international law; everywhere the psychosis of fear leads the neighbouring State to seek control of nuclear weapons.⁽⁴²⁾

If the present time does not suggest a disastrous return to the "cold war", at very least it represent a concerning and unprecedented return to an era of "cold peace" which can hardly excuse major states of the nuclear disarmament expected of them under the NPT. In their race to the abysses, they are mainly driven by the glaring interests of the military-industrial complex.

Anything that makes it possible to fight against the current deterioration of international relations can only strengthen the action for nuclear disarmament. The vigilance, determination and mobilization of international public opinion are elements that should not be overlooked. Public opinion can be particularly appealed to on the theme: "You do not need nuclear weapons and aircraft carriers to combat potential terrorists," or the "overkill" of nuclear powers, capable today of eliminating thirty times or more the same opponent.

But positive parameters exist to limit the impact of these negative elements

2°/ Positive factors favouring the advent of a world without nuclear weapons

On the international scene, it is easy to note encouraging signs that could project nuclear weapons as increasingly irrelevant "*instruments*". The *winds of peace have expanded*. It has become unthinkable that two member states of the European Union could wage war, or even that the European Union and Russia could enter into armed conflict. Equally inconceivable is a war between the USA and Mexico, or between the USA and Canada. If we add the conclusion of the 1993 Chemical Weapons Convention (which took twenty years of negotiations), the extension of the NPT in 1995 for an indefinite period, the adoption in 1996 of ban treaty CTBT, the declining number of nuclear warheads, increased from 55,000 during the "Cold War" to about 27,000 today, we can allow ourselves some optimism.

⁴² (1). Pakistan has made its bomb because its neighbor, India, with whom it is in dispute over Kashmir, had the upperhand. Egypt had sought time to get the bomb, without achieving so, because its neighbor, Israel, possesses it. Argentina has tried to control nuclear power for military purposes because its neighbor, Brazil, preceded it in that direction. As for Iran, Robert Gates, U.S. Secretary of State for Defense, said on 6 December 2006, that is surrounded by Pakistan to the east and Israel to the west, two countries with the nuclear weapon.

A. A permanent and universal desire to banish the "weapon of the devil"

All countries, all governments, all people fear the use of nuclear weapons, "weapon of the devil." Its use conjures unanimity against it. A brief historical retrospective shows that those who have first mastered nuclear fire were most prompt to seek to banish it. *Barely three months* after the use of the atomic bomb on Hiroshima and Nagasaki, we sought to definitively remove it from mankind. The first international document established for this purpose consisted of the "*declaration of November 15, 1945, by the USA, UK and Canada,*" by which these three powers proposed the principle of shared benefits of nuclear energy with the rest of the international community "*as soon as it is possible to establish effective and enforceable safeguards against its use for destructive purposes.*"

In addition, these three countries plus the Soviet Union, had agreed, by the end of the year 1945, to propose to the United Nations the establishment of a Commission responsible for Atomic Energy by the General Assembly. The resolution actually created this Commission to submit "*proposals with the express purpose... of eliminating, from national weaponry, nuclear weapons and all other major weapons adaptable to mass destruction*".

Since then, international public opinion mobilized against nuclear weapons. As governments do, international public opinion also recognizes the danger of annihilation of all life on earth by nuclear weapons. There were many -and still are- movements that advocate, the abolition of this weapon. From the outset, the "*Baruch Plan*" of 1946 had proposed the creation of an International Atomic control agency with a global monopoly on nuclear energy for peaceful purposes only. The "*Stockholm Appeal*" of 1950 followed, without success. Thus, half a century was spent in a cold war punctuated by the horrors of the possible use of nuclear weapons.

Various other movements, organizations or NGOs are striving to combat nuclear danger. Among them, we must remember *Greenpeace* and the *International Physicians for the Prevention of Nuclear War* (which in 1985 received the Nobel Peace Prize), the appeal of 1983 from 12,000 physicists from 43 countries for curbing nuclear armament, the Declaration of September 24, 1982 by representatives of 33 academies of sciences and the *International Association of Lawyers Against Nuclear Arms* (IALANA),

which specially, did so much so the United Nations General Assembly would appeal to the International Court of Justice for an advisory opinion on the "*Legality of nuclear weapons....*"

Albert Einstein and Bertrand Russell, the physicist and the philosopher, wrote a "*Manifesto*" and had it endorsed by 11 scientists including Linus Pauling and Joseph Rotblat, in 1955. It served as a basis for the creation of the "***Pugwash Movement***" in 1957. This movement, managed to maintain a fruitful contact between scientists from East and West, is no stranger to government agreements limiting the dangers of nuclear weapons.

The Washington "***Henry Stimson Center***", undertook the initiative to hold discussions, via internet, amongst many international experts who concluded with the urgent need to abolish nuclear weapons.

In addition, on June 9, 1998, the Ministers of Foreign Affairs of South Africa, Brazil, Egypt, Ireland, Mexico, New Zealand, Slovenia and Sweden, have formed a "*New Agenda Coalition*" and produced a statement in which they asked the "nuclear club" to take immediate concrete measures, including lifting the state of alert.

In this brief overview of the efforts to abolish nuclear weapons, we must also mention the action of "*Abolition 2000.*" After the follow-up conference of 1995 of the Nuclear Non-proliferation Treaty, a prodigious set of NGOs, comprising one thousand two hundred organizations in about eighty-six states, has proposed, in his famous resolution "***Abolition 2000***" from April 25, 1995, that the international community adopt for the year 2000 "***a treaty abolishing nuclear weapons.***"

Created in The Hague in 1995, "Abolition 2000 is acting as a global network for the abolition of nuclear weapons. Its members wanted the States agree to establish in 2000 a timetable for the gradual elimination of their nuclear weapons.

Also created in 1995, by the Australian government as an independent commission, a body called "Canberra Commission published a resounding report that summarized in this phrase its very good sense and wisdom: "***The only way to effectively guard against nuclear weapons is to eliminate them completely and ensure they are never produced.***" This report has received support from more than one hundred dignitaries and political leaders of fifty countries and was signed by forty-seven heads of State or

Government, including Jimmy Carter, Mikhail Gorbachev, Helmut Schmidt and James Callaghan.

Unsuccessful decades? Certainly not. Paradoxically, it was during the terrible East-West divide of the "cold war" that the two Super-Great were able to preserve world peace for over forty years, despite the arms race, particularly nuclear weapons, despite challenges posed by the occurrence of serious crises that often stressed their relations. It is because they were acutely aware of the potentially deadly danger for humanity as a whole, that they tamed the effects of fear by the sedative of reason and began a "long march" - with thin results - toward nuclear disarmament.

The debate on nuclear weapons, which is essential to the latter, has recently undergone a marked interest in the USA.

The first to sound the alarm was former President Jimmy Carter who, on the eve of the resumption of talks on the Nuclear Non-Proliferation Treaty in May 2005, published an article in the "*Washington Post*" March 28, 2005, under the title "Let's Save Non-proliferation", in which he considers, in essence, that "*the USA is the main culprit in the erosion of the NPT*" and it is up to this single super-power to take measures to curb the proliferation of nuclear weapons. President Carter offers seven proposals to this end.

Two years later, in 2007, four notables from the USA jointly publish a revealing article : "*A Plea for the Abolition of Nuclear Weapons*" in the "*Wall Street Journal*" of January 4, 2007. These are two former Secretaries of State, Henry Kissinger and George Schultz, a former Secretary of Defense, William Perry and the former Chairman of the Committee on Armed Services of the Senate, Sam Nunn. Unlike President Carter, these four former senior officials avoid charging the USA in a direct way, but invite their country to take an initiative in this area, because "*nuclear weapons today pose terrifying dangers*"

Meanwhile, former Director General of IAEA, the Swedish Professor Hans Blix, has initiated the establishment of an independent international body, the "Commission on the Proliferation of Weapons of Mass Destruction." The report thereof, entitled "*Weapons of Terror*" offers proposals on how the international community could rid the world of nuclear, biological and chemical weapons.

In addition, former President Gorbachev, which somehow echoed the call of US personalities, recalled efforts made by the former Soviet Union under his leadership towards the reduction of nuclear weapons and stressed:

"Accuses the generation of world leaders today, the irony is that, two decades after the end of the Cold War, the world pleads, still under the burden of huge nuclear arsenals of which even a fraction would be enough to destroy civilization. "

This pessimistic view on the future of humanity derives its credibility from converging positions, even unanimous, of former leaders who influenced the fate of their country and that of humanity.

Finally, the request for an advisory opinion made in December 1994 by the United Nations General Assembly to the International Court of Justice on the issue of whether the threat or use of nuclear weapons is legal, has aroused in the "world citizen" a very keen interest. A considerable number of non-governmental organizations, associations and various private individuals of the most diverse nationalities sent messages, documentation, and signatures to the Court in 1995 and 1996, all of it to request the Court to assert the intrinsic wrongfulness of nuclear weapons.

In particular, nearly two million signatures have been received at the Registry of the Court. According to the archivist of the Court, taking account of these documents would have increased the number of signatures to some three million, but he said in a memorandum, *"giving their exact number would be paramount to counting the stars in the sky. "*

In favour of referral to the Court, an unusual heretofore type of action by NGOs was found. They went to offer their assistance to a number of small states, calling on them to be present before the Court in this procedure, by preparing for them drafts of written and oral presentations. It was followed by pressure from big states on these small countries to persuade them not to participate in the proceedings or withdraw their written statements already submitted to the Court.

It can be said that as soon as mankind took scientific control nuclear fire, it immediately sought to "outlaw", unsuccessfully thus far, simply due to the fear of its use by another. The advent of a world without nuclear weapons called by the wishes of the entire international community, depends primarily on the degree of trust established between people. *Therefore the primary task is to constantly multiply concrete and true signs of politics of trust.*

B. A "manual" to achieve a world without nuclear weapons: a "model agreement"

Thanks to a group of lawyers, scientists, diplomats and experts, who met in 1997, we have a *"model convention on nuclear weapons"* which facilitates the task of ambassadors taking into account the legal issues, policies and technicalities necessary to more easily achieve a world without nuclear weapons. It was introduced in 1997 at the United Nations by Costa Rica (A/CI/52/7).

A revised model was presented to the Conference of State Parties to the Non-Proliferation Treaty in 2007⁽⁴³⁾ and published in the book *"Securing our Survival : the Case for a Nuclear Weapons Convention."* This book is particularly valuable because it clearly responds to the questions of what is in this convention, how to achieve it and why it is necessary to have it, the issues involved and when this Convention could see the day.

As pointed out in this model, this document was presented *"to assist State Parties to the NPT in their deliberations on the implementation of article VI"* which provides the dual obligation to negotiate and conclude a full nuclear disarmament. It is *"a useful way to study, develop, negotiate and conclude such an instrument or set of instruments."* Indeed the model facilitates informal discussions initiated by governments, experts, academics or NGOs..

⁴³ (1). Working paper submitted by Costa Rica, First Session, Vienna, NPT/CONF. 2010/P.C.1/WP.17, May 1 2007, and document presented by Costa Rica and Malaysia A/62/650 on January 18 2008, with annex.

This model has the advantage of including the disarmament measures agreed in the final document of the Conference of the Parties to review the NPT in 2000, such as:

- the resolute commitment of nuclear-weapon States to totally eliminate their nuclear arsenals;
- the adoption of concrete agreed measures to further reduce the operational status of nuclear weapons systems;
- the adoption of measures to promote international stability;
- the application of the principle of irreversibility to nuclear disarmament;
- and strengthening the verification measures.

The model provides *five stages* in the process of eliminating nuclear arms: taking nuclear weapons off alert, removing weapons from deployment, removing nuclear warheads from their delivery vehicles, disabling the warheads, removing and disfiguring the “pits” and placing the fissile material under international control.

It does not lose sight of the importance of verification activities which constitute the key to the whole system. These activities are articulated as follows:

- declarations and reports from States;
- routine inspections;
- challenge inspections;
- installation of on-site sensors;
- satellite photography;
- radionuclide sampling and other remote sensors;
- information sharing with other organizations;
- citizen reporting.

The model thus built, and attentively brought forward by Costa Rica and Malaysia, is quite close to the realities and takes into account the complexity of problems, which lead it to propose the conclusion of either a single convention or a set of agreements. The advantage of the existing model is that it shows that nuclear disarmament is possible and that a world without nuclear weapons is not a crazy dream. In this sense can count on the existence of the model among the positive factors present.

* *

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Conclusion

The nuclear weapon is the product both an exhilarating and terrifying, scientific and technological adventure of progress of mankind. Today humanity is a sort of reprieve. Nuclear weapons are now part of the *human condition*. It enters in all calculations, in all scenarios, in all schemes. Under these circumstances fear is not second nature to humans, but the first.

However, one must stress that humanity seems, at least today, more relieved than in the 70s and 80s where it threatened itself in “*star wars*” scenarios. This new terror of the man did reconnect with that of his ancestors: the wind of a deadly cosmic war, full and highly sophisticated, which destroyed our planet, could blow over humanity in these years. Some equipment orbiting the suburbs of the earth could direct their hellish nuclear mouth to our Globe, while military satellites, reconnaissance, observation, surveillance or communication, could multiply. *The deadly system* would be implemented. The “*universal government of death*”, the “*thanatocracy*”, as a French specialist in the history and philosophy of Michel Serre, called it when he said he was ready to install its batteries to all the outskirts of planet..

With these “*star wars*” announced and prepared in the late 70's and early 80s, humanity would live in the middle of the twentieth century under the *terror of prehistoric mankind* who feared the fall upon their head of a storm from the sky responsible for sparks and lightning which terrorized them. During the 80s we were at risk of becoming actors and even victims of terror, with the triple major difference that man, unlike his ancestor, was armed with knowledge of his creation, faced self-

destruction, and finally, the baseless concerns of human prehistory were incomparable to the more real threats facing him in the 80s. The latter, however, *endowed with reason*, has never been so *unreasonable* then in those days, heralding the Apocalypse. His fate was blurred. His conscience darkened. His vision troubled. His ethical compass fallin as though they were like dead leave from the tree of life.

But fortunately detente, followed by the end of the "cold war" put an end to these terrifying preparations.

However, we are still making "rays of death", those lasers, which direct particle beams or high-energy, far more destructive, it seems, then nuclear energy. Although, the Atlantic Charter had promised to "*deliver mankind from fear*" and the one from San Francisco promised to "*preserve future generations*" from the terror of war. A long road still to tread. Relations between states were always influenced by military forces involved. But the *relationship between nuclear forces and diplomatic action* is not measurable by the usual objective criteria. Aucune des puissances nucléaires n'est sensible au bon sens populaire selon lequel la supériorité ou l'infériorité perdraient toute signification au-delà d'une certaine capacité de destruction. None of nuclear powers is sensitive to the popular sense that superiority or inferiority lose any significance beyond a certain capacity for destruction. It continues to indifferently, stock deadly devices beyond any "need". This is the unleashing of "*overkill*".

Medicine teaches us that madness is not a contagious disease. But international politics obeys different rules. The proliferation of nuclear fire is far from being under control, despite the existence of the NPT. Fear and madness could engage to perform a ghastly final dance. Because our world is all the more terrifying and vulnerable today as we are capable of producing large quantities of inexpensive missiles of extreme precision, as well as "pocket" nuclear weapons.

Mankind remains under the effect of a perverse and permanent nuclear blackmail. We must free it. Everyone has the responsibility to do their part in saving humanity.