A Obrigação Universal de Desarmamento Nuclear

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Antônio Augusto Cançado Trindade

A Obrigação Universal de Desarmamento Nuclear

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Brasília – 2017

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Projeto Gráfico:

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Capa:

Teste nuclear, Atol de Bikini, 1946.
Imagem localizada no Museu das Forças Armadas, Estocolmo, Suécia, por
A. A. Cançado Trindade.

Programação Visual e Diagramação:

Gráfica e Editora Ideal

Impresso no Brasil 2017

T833 Cançado Trindade, Antônio Augusto.
A obrigação universal de desarmamento nuclear/ Antônio Augusto Cançado Trindade. – Brasília : FUNAG, 2017.

233 p. - (Direito internacional)

ISBN 978-85-7631-660-2

1. Arma nuclear. 2. Desarmamento nuclear. 3. Desarmamento nuclear controlado. 4. Segurança coletiva. 5. Tratado de Não Proliferação Nuclear (1968). 6. Corte Internacional de Justiça. 7. Nações Unidas (ONU). Conselho de Segurança. I. Título. II. Série.

CDD 341.167

Depósito Legal na Fundação Biblioteca Nacional conforme Lei n° 10.994, de 14/12/2004.

SUMÁRIO

Apresentação.....7
Sérgio Eduardo Moreira Lima
Prefácio..... 27
Sergio de Queiroz Duarte

Estudo de caso – Nota introdutória: O Caso das *Obrigações de Desarmamento Nuclear* (Marshall Islands *versus* Reino Unido *et alii*, 2016) e Voto Dissidente do autor, Antônio Augusto Cançado Trindade..... 41

Anexo documental – Corte Internacional de Justiça, caso das *Obrigações Referentes a Negociações Relativas à Cessação da Corrida das Armas Nucleares e ao Desarmamento Nuclear* (Sentença de 05.10.2016): Voto Dissidente do juiz Antônio Augusto Cançado Trindade / Dissenting Opinion of Judge Antônio Augusto Cançado Trindade..... 53

Livros do mesmo autor 225

APRESENTAÇÃO

Sérgio Eduardo Moreira Lima[*]

> *Este é o momento em que precisamos renovar o objetivo de um mundo sem armas nucleares. As duas superpotências que se enfrentaram por sobre o muro desta cidade chegaram demasiado próximas e com frequência a destruir tudo o que construímos e tudo o que amamos. Com esse muro derrubado, não precisamos ficar imóveis, passivos, assistindo à difusão maior do átomo letal. É hora de garantir a segurança de todos os materiais nucleares dispersos; de fazer cessar a disseminação de armas nucleares; e de reduzir os arsenais de outra era. Este é o momento de começar a trabalhar em busca da paz num mundo sem armamentos nucleares.*
>
> (Barack Obama, Berlim, Alemanha, 24 de julho de 2008)

Introdução

O presente livro trata de um caso específico submetido à Corte Internacional de Justiça (CIJ), na Haia, em que esta decidiu, em outubro de 2016, por sua inadmissibilidade e não considerou o mérito das razões que o fundamentavam. O caso tem a ver com o armamento atômico, em particular com testes com explosivos

* Embaixador, presidente da Fundação Alexandre de Gusmão (FUNAG).

em regiões que se encontravam sob o regime de tutela das Nações Unidas. Bem ilustra o desafio que a questão do desarmamento representa para a humanidade, a ameaça que impõe à paz e à segurança internacional, assim como a fragilidade dos arranjos de redução e controle de arsenais e de não proliferação de armas nucleares. Demonstra também que nem sempre decisões da mais alta corte internacional traduzem a expectativa e os grandes anseios da comunidade das nações.

Ao examinar o caso, convém recordar antecedentes da questão do desarmamento e contextualizá-la, enquanto se avaliam seu significado global e suas implicações, inclusive no que diz respeito à evolução da política externa brasileira sobre desarmamento. O ano de 1945 constitui o marco inaugural da era atômica e o fim da Segunda Guerra Mundial. Esse paradoxo definiu a ordem internacional e as instituições por ela responsáveis no contexto do sistema das Nações Unidas em relação à paz e à segurança.

Passados mais de setenta anos dos ataques atômicos a Hiroshima e Nagasaki, o mundo segue refém das armas nucleares. Os esforços em matéria de desarmamento não foram suficientes para infundir segurança à humanidade. Uma grande parte dela luta para promover o desenvolvimento, em bases sustentáveis, e para vencer as sequelas da pobreza, da falta de educação e de perspectivas de uma vida com dignidade. Mas, já em pleno século XXI, todos continuamos vulneráveis à ameaça maior dos arsenais nucleares e dos materiais físseis utilizados em sua produção.

Apesar da obrigação comum de alcançar o desarmamento, as cinco potências nucleares reconhecidas pelo Tratado de Não Proliferação Nuclear (TNP) – Estados Unidos, Rússia, Reino Unido, França e China – que são também os membros permanentes do Conselho de Segurança das Nações Unidas (CSNU) – mantêm a dissuasão nuclear em suas doutrinas de defesa. A questão não diz

respeito apenas aos Estados, mas igualmente à sociedade e aos indivíduos que a formam. Entidades civis se unem a países para ajudar na defesa de seus interesses e no respeito aos direitos de seus povos. Como são limitados os avanços no campo do desarmamento, diversos apelos têm sido dirigidos aos países nuclearmente armados para fazê-los sentir seus compromissos pendentes.

Mais do que decorrente de atitudes voluntárias, o desarmamento constitui obrigação oriunda do artigo VI do TNP. Esta posição foi ratificada pela Corte Internacional de Justiça (CIJ), em 1996, numa decisão unânime dos juízes de que "existe uma obrigação de buscar de boa-fé e levar a uma conclusão as negociações conducentes ao desarmamento nuclear em todos os seus aspectos"[1].

Passadas duas décadas desse parecer, a CIJ voltou a ser cenário de uma disputa envolvendo a questão do cumprimento do artigo VI do TNP. O autor das ações[2] perante a Corte Internacional de Justiça foram as Ilhas Marshall, uma República proclamada em 1979 e formada por um arquipélago do Pacífico. Invocaram elas o referido artigo contra os nove países detentores de armas nucleares sob o argumento de que o desarmamento não está ocorrendo. Não obstante a expressão política do país, é inquestionável sua autoridade moral na defesa do pleito, tendo em vista o seu histórico como território sob tutela das Nações Unidas, que, em 1945, a transferiu, temporariamente, aos Estados Unidos, com a obrigação de que zelasse pelo território e sua população. Todavia, de 1946 a 1958, os Estados Unidos ali realizaram mais de 60 testes nucleares

1 Opinião consultiva da CIJ de 1996. "Legality of the Threat or Use of Nuclear Weapons. Advisory Opinion of 8 July 1996". <Icj-cij.org>, p. 94. "There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control".

2 "Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament" (Marshall Islands v. United Kingdom et alii). <Icj-cij.org>.

atmosféricos, o que motivou danos e deslocamento de populações autóctones para fugir dos efeitos radiológicos.

As Ilhas Marshall argumentam que os nove Estados com armas nucleares não estão cumprindo o disposto no artigo VI, inclusive os países nucleares que não aderiram ao TNP: Índia, Paquistão, Israel e Coreia do Norte. A ação sustenta que o Tratado seja considerado parte do direito internacional consuetudinário, o qual todos os Estados devem respeitar, independentemente de haverem ou não assinado o TNP. A expectativa de muitos dos que acompanhavam o pleito era de que a natureza do sistema internacional, que dificulta a aplicação do direito internacional, sobretudo em relação aos membros permanentes do CSNU, seria posta à prova e, em consequência, poder-se-ia avaliar o alcance do TNP e as exigências decorrentes das obrigações de desarmamento nuclear.

Nesse sentido, o parecer da CIJ poderia elucidar questões como a possibilidade de a modernização dos arsenais nucleares ser consistente ou não com "negociações de boa-fé" para o fim da corrida armamentista nuclear. Outra indagação importante que poderia ser esclarecida diz respeito à interpretação quanto ao descumprimento das resoluções de desarmamento na Assembleia Geral da ONU ou à recusa em participar de certas iniciativas de desarmamento no sentido de verificar se representam ou não violações da obrigação do TNP de prosseguir com as negociações de boa-fé relativas ao desarmamento nuclear. O regime de controle de armamentos e de não proliferação nuclear estabelecido pelo TNP, especialmente em seu artigo VI, reveste-se de importância por constituir o único compromisso legalmente vinculante em matéria de desarmamento nuclear no âmbito de um tratado multilateral.

As armas nucleares ainda não são sujeitas a uma proibição legal explícita, diferentemente das outras duas categorias de armas de

destruição em massa – as químicas e as biológicas. Nesse contexto, uma ideia vem ganhando força: a negociação de um novo tratado para a proibição de armas nucleares. Esse futuro instrumento instituiria um conjunto de medidas legais relacionadas à fabricação, posse e uso de armas nucleares.

A expectativa é a de que um tratado dessa natureza possa conferir precisão conceitual e a tipificação jurídica necessária para deslegitimar os armamentos nucleares e contribuir assim para sua efetiva redução e eliminação. De todo modo, o tratado poderia iniciar um processo político para sua proscrição a partir do questionamento de sua utilidade e aceitabilidade. O mérito desse processo é a busca de um consenso em torno de uma norma não discriminatória que se aplicasse a todos os detentores de armamento nuclear, inclusive aos que não assinaram o TNP. A iniciativa teria o mérito adicional de aprofundar o diálogo sobre a matéria e promover consultas internas que contribuirão para um juízo mais informado e crítico em âmbito nacional e internacional.

O artigo VI do TNP, os pareceres legais da CIJ, a iniciativa individual de países interessados e a campanha por um tratado de proibição completa das armas nucleares são todos ferramentas úteis na luta para reduzir o valor das armas nucleares e avançar rumo ao desarmamento.

A decisão da Corte e a ideia do livro

Em 5 de outubro de 2016, a Corte Internacional de Justiça (CIJ), principal órgão judiciário das Nações Unidas, decidiu por 8 a 8 (e voto de minerva do presidente) não reconhecer sua jurisdição no caso do desarmamento envolvendo as Ilhas Marshall contra o Reino Unido e mais outros dois países (Índia e Paquistão), sob o argumento de que não se configurava disputa legal quando as ações foram interpostas em abril de 2014. A decisão apertada

da Corte, com o voto de desempate do presidente, demonstrou a divisão de opiniões, bem como a surpresa de muitos, expressa nos votos dissidentes de metade dos juízes. A atitude da CIJ de ignorar que as reivindicações das Ilhas Marshall se fundam em posições divergentes que há muito separam a maioria dos países, de um lado, e um pequeno grupo encabeçado por potências militares detentoras de arsenais nucleares, de outro, frustrou expectativas de que a Corte poderia, ao examinar o caso, esclarecer questões que contribuiriam para uma percepção clara das obrigações das partes do TNP, em particular de seu artigo VI.

O choque de visões entre os juízes da Corte não dirimiu a questão sobre se os países detentores de armas nucleares estão agindo em conformidade com a conclusão unânime da Corte em sua Opinião Consultiva de 1996, citada no parágrafo cinco, de que existe uma obrigação que deve ser cumprida de boa-fé no sentido de concluir negociações que levem ao desarmamento nuclear em todos os seus aspectos. Como os juízes dissidentes também demonstraram, o tribunal não conferiu suficiente peso à articulação de reivindicações nos foros multilaterais antes de que o caso fosse levado à CIJ, bem como em relação às posições discrepantes tão evidentes tomadas pelas Ilhas Marshall e os países acusados no processo judicial após o início do caso.

Vários especialistas que acompanham os trabalhos da CIJ declararam esperar que, no futuro, a Corte possa cumprir suas responsabilidades, como principal órgão judicial das Nações Unidas, de aplicar o direito internacional em questões fundamentais para a paz e a segurança internacional, como no caso dos armamentos nucleares que afetam o destino do planeta. Consideraram que a Corte, de forma convincente, cumprira sua parte na Opinião Consultiva exarada em 1996, quando reconheceu a existência de obrigação para iniciar e concluir negociações para o desarmamento

nuclear. Houve manifestações de interesse em que a Assembleia Geral requeira da Corte na sequência uma opinião consultiva sobre a obrigação de buscar e concluir negociações de desarmamento nuclear e avaliar se os Estados, em particular os detentores de arsenais nucleares, estão cumprindo com essa obrigação[3].

Os países nucleares reconhecem a necessidade de buscar o objetivo final do desarmamento nuclear, mas alegam não existir, por enquanto, condições que permitam fazê-lo (embora, na verdade, tais "condições" nunca foram claramente especificadas). Os Estados que não aceitaram a jurisdição compulsória da Corte, China, Coreia do Norte, Estados Unidos, França, Israel e Rússia, ignoraram ou, no caso da China, declinaram o pedido das Ilhas Marshall, submetido em conformidade com normas estatutárias de procedimento da CIJ, para se apresentarem perante a Corte voluntariamente e defenderem seu histórico na questão do desarmamento nuclear. Por sua vez, os três países que aceitaram a jurisdição compulsória da CIJ, Índia, Paquistão e Reino Unido, manifestaram-se, de forma vigorosa, invocando argumentos de natureza diversa, em sua maioria formais, contrários a que a Corte devesse julgar o mérito das reivindicações das Ilhas Marshall. Assim, os estados detentores de arsenais nucleares buscaram escusar-se de sustentar suas posições em relação à obrigação de negociar o desarmamento nuclear no seu mérito. Tal postura foi interpretada por analistas como uma ausência de compromisso quanto à implementação e ao desenvolvimento dos instrumentos relevantes do direito internacional.

A frustração da República das Ilhas Marshall com a decisão da CIJ não deve prejudicar a avaliação pela opinião pública da

3 Vide a declaração da "International Association of Lawyers Against Nuclear Arms (IALANA)", entidade civil fundada em 1988 na Suécia com status consultivo junto às Nações Unidas, a respeito do arquivamento dos casos das Ilhas Marshall junto a Corte Internacional de Justiça (ICJ), no seguinte endereço: <http://lcnp.org/pubs/IALANA%202016/IALANAstatementICJRMIoutcome.pdf>.

pertinência e do valor da iniciativa de suas autoridades. Tal gesto terá contribuído para elevar a consciência da comunidade internacional não só em relação a uma experiência trágica, ligada ao seu passado sob a tutela das Nações Unidas, como também para a importância do cumprimento, pelas potências nucleares, da obrigação legal de negociar e alcançar uma eliminação global das armas nucleares. Ao fazê-lo, estimulam o debate sobre o tema.

O Voto Dissidente do juiz brasileiro

Membro da Corte Internacional de Justiça, o professor Antônio Augusto Cançado Trindade foi um dos juízes que se posicionaram em favor do conhecimento do mérito da questão, como pretendiam as Ilhas Marshall, e contrariamente à posição que prevaleceu no sentido de sua inadmissibilidade, por não se caracterizar disputa entre as partes perante a Corte, e da competência desta para considerá-la. Ao fazê-lo, construiu com seu Voto Dissidente um parecer que questiona o precedente formalista produzido, que "cria dificuldade para o próprio acesso à justiça, em uma matéria de preocupação para a humanidade como um todo." Em seguida, o juiz brasileiro examina com propriedade as resoluções da Assembleia Geral da ONU sobre desarmamento e que dão a medida não só do alcance do tema para a sobrevivência da civilização, como também para que se cumpra a obrigação de negociar e concluir novo tratado de proibição de armas nucleares, a exemplo do que se fez com armas bacteriológicas e químicas. Prossegue demonstrando como a obrigação de "desarmamento nuclear emergiu e cristalizou-se, no direito internacional tanto convencional como consuetudinário," e a contribuição das Nações Unidas nesse sentido.

O Voto Dissidente de Cançado Trindade se robustece com a evocação dos valores humanistas e dos fundamentos do sistema jurídico ocidental e também universal. Com base nos princípios e valores que daí emanam, desenvolve seu juízo crítico à estratégia

de dissuasão e ao interesse nacional quando estes se sobrepõem à segurança da humanidade. Recorda a *opinio juris communis* sobre a ilegalidade de todas as armas de destruição em massa. Após recorrer aos princípios da *recta ratio*, que decorrem da consciência humana e da relação entre o direito e a ética, e avaliar a contribuição das Conferências de Exame do TNP e da série de conferências sobre o impacto humanitário das armas nucleares, conclui que se trata de uma proibição do *jus cogens* e que, portanto, seria de esperar que a CIJ, como órgão judicial principal das Nações Unidas, tivesse em mente também considerações básicas de humanidade.

Em seu Voto Dissidente, o juiz brasileiro trata, de igual modo, sob a rubrica "ocorrências no mundo na atualidade", de episódios reveladores para o exame da matéria e seu impacto político para a consciência humana. Analisa também a repercussão do tema nas Nações Unidas, inclusive a aprovação, em 2016, pela Assembleia Geral da ONU, de resolução no sentido da convocação de uma Conferência para negociar um tratado de proibição de armas nucleares, com vistas a um mundo livre desses armamentos[4]. Diante da importância da matéria e da qualidade do Voto Dissidente, a Fundação Alexandre de Gusmão (Funag) convidou o professor Cançado Trindade a publicar a íntegra, no original em inglês, de seu Voto naquele processo conhecido como "O Caso das Obrigações de Desarmamento Nuclear (Ilhas Marshall *versus* Reino Unido e outros, 2016)", acompanhado de Nota Introdutória que facilitasse a compreensão e o estudo da matéria.

A justificativa para a publicação

As ações interpostas, em 24 de abril de 2014, pelas Ilhas Marshall perante a CIJ, tinham por fundamento histórico e

4 A resolução "Taking Forward Multilateral Nuclear Disarmament Negotiations" (71/258) foi adotada pela AGNU em 23 de dezembro de 2016 e prevê o início dessas negociações a partir de março.

moral o fato de haver o país servido, durante o período de tutela conferido pelas Nações Unidas aos EUA, como local de 67 testes de armamentos nucleares, conduzidos entre 1946 e 1958. Inicialmente, a demanda se dirigia a todos os Estados nucleares (Estados Unidos, Federação Russa, China, Reino Unido, França, Índia, Paquistão, Israel, Coreia do Norte), mas somente três deles seguiram seu curso (Índia, Reino Unido e Paquistão), em consequência da aceitação da cláusula facultativa da jurisdição obrigatória da Corte (artigo 36(2) do Estatuto da CIJ)[5]. O objetivo das demandas não era compensação financeira pelos danos causados e sim o reconhecimento de que as obrigações do artigo VI do Tratado de Não Proliferação de Armas Nucleares (TNP) não haviam sido cumpridas. Este dispositivo estabelece, como visto anteriormente, o compromisso das Partes no Tratado de "entabular, de boa-fé, negociações sobre medidas efetivas para a cessação em data próxima da corrida armamentista nuclear e para o desarmamento nuclear, e sobre um Tratado de desarmamento geral e completo, sob estrito e eficaz controle internacional".

Por que publicar o Voto Dissidente em formato de livro? Em primeiro lugar, porque incide ele sobre tema extremamente sério, pelo risco que impõe à vida, à sociedade, aos Estados, a regiões e ao planeta. No entanto, a incapacidade de resolvê-lo parece levar a atitudes de acomodação e indiferença diante do grave problema. À sociedade civil, inclusive à academia, cabe refletir sobre o dilema e a maneira de equacioná-lo, bem como sobre o cumprimento pelas autoridades competentes nacionais e internacionais de sua missão

5 Segundo o artigo 36 (2) do Estatuto da CIJ: Os Estados partes no presente Estatuto poderão, em qualquer momento, declarar que reconhecem como obrigatória, *ipso facto* e sem acordo especial, em relação a qualquer outro Estado que aceite a mesma obrigação, a jurisdição da Corte em todas as controvérsias de ordem jurídica que tenham por objeto: a) a interpretação de um tratado; b) qualquer ponto de direito internacional; c) a existência de qualquer fato que, se verificado, constituiria a violação de um compromisso internacional; d) a natureza ou a extensão da reparação devida pela ruptura de um compromisso internacional.

em conformidade com os tratados. Além das razões de natureza legal, o Voto Dissidente corresponde a uma reação ao conformismo e a certa tendência de banalizar os riscos potenciais e a ameaça do armamento nuclear. Ademais, reveste-se a matéria de alto interesse para a política externa brasileira e a política internacional, dadas suas implicações para a paz e a segurança global. Acresce ainda o fato de ser o autor do voto um dos grandes juristas brasileiros de projeção mundial, que se notabilizou por construir, a partir da prática jurídica, reflexão profunda e uma concepção humanística do direito internacional. É o primeiro jurista latino-americano a figurar numa das mais prestigiosas coleções de direito internacional público pela importância e o alcance de sua obra, em especial no campo dos direitos humanos[6].

A resposta à questão formulada no início do parágrafo anterior é ainda mais ampla, pois envolve argumentos de natureza política, jurídica e ética. De uma ou de outra maneira, tem a ver com a ordem internacional e o poder nas relações entre os Estados. Dada a complexidade da questão, a Funag encomendou o prefácio desta obra ao embaixador Sergio de Queiroz Duarte, um dos maiores especialistas no campo do Desarmamento Nuclear, tendo exercido, de 2007 a 2012, o cargo de Alto Representante das Nações Unidas para Assuntos de Desarmamento e Chefe do Escritório de Desarmamento da ONU, além de presidente da Conferência de Exame do TNP (2005) e da Junta de Governadores da AIEA (1999-2000). Anteriormente, Sergio Duarte já integrara, como Representante Alterno, a delegação do Brasil junto à Conferência do Desarmamento em Genebra. Colaborador antigo da Funag, publicou, recentemente, na coleção em "Em Poucas Palavras", o

6 CANÇADO TRINDADE, Antonio A. *Le Droit International pour la personne humaine*. Paris: Éditions A. Pedone, 2012, p. 45-368, esp. p. 61-90 (Doctrine(s)) para a conferência ministrada pelo autor na Universidade de Hiroshima, em 20.12.2004, sobre a ilegalidade de todas as armas de destruição em massa no direito internacional contemporâneo.

livro *Desarmamento e Temas Correlatos* (2014), em que analisa a questão do desarmamento da perspectiva do Brasil como parte das grandes causas globais que têm inspirado a ação de estadistas, governantes, diplomatas e organizações da sociedade civil.

Desarmamento nuclear é uma expressão histórica e moralmente incômoda para os países armados que buscaram em outros conceitos, como controle de armas e não proliferação nuclear, um eufemismo, uma maneira de compartilhar o ônus da obrigação moral e legal do desarmamento com outros países que pudessem eventualmente desenvolver capacidade de produção de artefato atômico para fins militares. É certo que quanto maior for o número de países com tal capacidade, cresce a probabilidade de multiplicação do armamento e o risco de seu uso. É certo também que tal hipótese aumenta o risco de o armamento e materiais letais caírem em mãos de grupos terroristas. Todavia, não se pode perder de vista o fato de que essa questão tem sua gênese no interesse das superpotências, EUA e a antiga União Soviética, de promover, a partir dos anos 50, iniciativas de controle de armamento e de não proliferação dos mesmos que culminaram, na década seguinte, na assinatura pelas três principais potências nucleares (EUA, URSS e Reino Unido), do Tratado de Não Proliferação de Armas Nucleares (TNP) (1968)[7].

O TNP entrou em vigor para os países signatários em 1970. Na expressão consagrada pelo embaixador João Augusto de Araújo Castro, o Tratado representaria uma tentativa de "congelamento

7 A questão referida neste parágrafo tem a ver com o conceito de desarmamento na sua acepção mais ampla. Começa com a preocupação, a partir de 1949 (determinada pela detonação do primeiro artefato da URSS), de contenção mútua, mas logo fica claro o risco da proliferação horizontal (aumento do número de Estados possuidores). O interesse das duas superpotências era, sobretudo, conter a proliferação horizontal, objetivo em parte atingido. O TNP foi assinado simultaneamente em 1968 por mais de 60 países e entrou em vigor em 1970, quando foi depositado o 40º instrumento de ratificação. Mesmo antes da primeira proposta formal dos EUA e URSS de um tratado de não proliferação (1965), países não nucleares, inclusive o Brasil, já haviam defendido na ONU instrumentos para evitar a proliferação além dos dois proliferadores originais.

do poder mundial", em favor das grandes potências, inclusive pelas restrições impostas ao desenvolvimento[8]. Estabelecia uma divisão arbitrária entre os países que até 1º de janeiro de 1967 houvessem detonado um artefato nuclear explosivo, de um lado, e todos os demais, de outro. Nos termos do Tratado, estas últimas se enquadram numa segunda categoria de países não nuclearmente armados. O objetivo era promover a renúncia da possibilidade de desenvolver armas nucleares e legitimar os detentores daqueles armamentos que poderiam manter seus arsenais amparados pelo direito internacional. Preocupava a Araújo Castro e ao governo brasileiro a aceitação de uma norma que fosse discriminatória, que ironicamente dividisse o mundo em países responsáveis, os armados, e irresponsáveis, os desarmados. E, sobretudo, o fato de recaírem sobre as últimas proibições que, por princípio, dificultariam, senão mesmo impediriam, seu acesso à tecnologia e sua capacidade de desenvolver-se. Ademais, tal dispositivo contraria o princípio vestfaliano da igualdade dos Estados perante o direito internacional, para cujo resgate na 2ª Conferência de Paz da Haia, de 1907, o Brasil, na pessoa de Rui Barbosa, na chefia da delegação brasileira, e Rio Branco, na da chancelaria, tanto ajudaram a promover.

Apesar do mérito dessa posição e de sua importância para a construção de um ordenamento internacional mais justo e coerente com os valores universais do multilateralismo, o governo brasileiro resolveu, em 1997, numa mudança de política, encorajada pela perspectiva das transformações em curso com a queda do Muro de Berlim, a dissolução da União Soviética e o fim

8 Segundo Araújo Castro, o TNP e a Carta da ONU são os instrumentos do "congelamento" do poder mundial, o primeiro por estabelecer para todo o sempre duas categorias de países (cinco possuidores legítimos e todos os demais não possuidores de armas nucleares) e a segunda por instituir o direito de veto no Conselho de Segurança, privativo dos mesmos cinco países. Essas características dos dois instrumentos multilaterais ferem o princípio da igualdade jurídica dos Estados, consagrado na própria Carta.

da bipolaridade no sistema internacional, solicitar autorização ao Congresso Nacional para aderir ao TNP. As seguintes razões foram oferecidas na Mensagem do Executivo: a) as mudanças nas relações internacionais, sobretudo, com o fim da Guerra Fria; b) as "transformações sofridas pelo TNP, que, de instrumento de congelamento de poder, se vem tornando mecanismo de progresso rumo ao desarmamento e à não proliferação"; c) a "mudança do cenário estratégico, com a superação da divisão entre duas alianças militares ancoradas na dissuasão nuclear e com a marcha inescapável da globalização"; d) o fato de firmar-se "nova convergência de valores e objetivos entre praticamente todos os membros da comunidade internacional, voltada para a garantia da segurança por meios não agressivos, pelo desarmamento e pela não proliferação de armas de destruição em massa"; e) a transformação pela Conferência de 1995 do TNP de acordo provisório (25 anos de duração) em um tratado permanente de prazo indefinido, com mecanismo de revisão a cada cinco anos; f) para que o Brasil pudesse influir no processo de revisão e adequá-lo às nossas preocupações deveria ser parte, com assento no Comitê Preparatório. A Mensagem ao Congresso concluía que ingressar no TNP "representa a disposição de prestar a contribuição que se espera de um país do porte do Brasil para concretizar os valores comuns da comunidade internacional nas áreas de não proliferação, desarmamento e usos pacíficos da energia nuclear"[9].

Em 18 de setembro de 1998, por ocasião da cerimônia de entrega do Instrumento de Adesão ao Tratado de Não Proliferação de Armas Nucleares, o Brasil afirmou, nas palavras do seu então chanceler, ser esse "o resultado de nosso firme compromisso com o uso da energia nuclear para propósitos exclusivamente pacíficos,

9 Na Mensagem ao Congresso, o governo brasileiro defendia ainda a ideia de que os novos fatores determinantes da influência internacional estariam ligados à estabilidade social e política, ao dinamismo econômico e social e a articulação diplomática; e não mais ao equilíbrio de poder nuclear.

conforme consagrado na Constituição brasileira[10]. Acreditamos que o Brasil tem um papel positivo a exercer no mundo... que deve ser proporcional aos nossos interesses globais". Citou o exemplo do que Brasil e Argentina lograram com a criação da Agência Brasileiro-Argentina de Contabilidade e Controle de Materiais Nucleares (ABACC), quando se substituiu a lógica da confrontação pela da cooperação. E cobrou dos países nuclearmente armados, que compartilham uma grande responsabilidade, o fato de que avanços de redução dos arsenais "ainda estão muito aquém do que é necessário para atingir o objetivo do desarmamento nuclear". Reiterou a crença de que desarmamento e não proliferação são conceitos indivisíveis e que a cooperação internacional nos usos pacíficos da energia é um dos fundamentos para um regime mais forte de não proliferação nuclear[11].

Após quase duas décadas desde a adesão ao TNP, a questão que se coloca é verificar como evoluiu a *contrapartida* que o Brasil e outros países vislumbravam obter dos países nucleares ao mudar sua posição histórica na expectativa de fortalecer sua voz na busca de um regime de desarmamento e não proliferação mais consequente e eficaz, capaz de melhor contribuir para a paz e a segurança internacional. O objetivo brasileiro era o da redução dos armamentos nucleares. No entanto, o resultado do balanço atual não parece animador, como demonstrado pelas razões apresentadas no Voto Dissidente do juiz Cançado Trindade e corroboradas pelas estatísticas disponíveis por entidades especializadas, como o Stockholm International Peace Research Institute (SIPRI). De acordo com o Anuário SIPRI de 2016 sobre

10 A Constituição do Brasil de 1988, em seu artigo 21, XXIII, *a* dispõe que: "a) toda atividade nuclear em território nacional somente será admitida para fins pacíficos e mediante aprovação do Congresso Nacional".

11 LAMPREIA, Luís Felipe. *Diplomacia Brasileira, Palavras, contextos e razões.* Rio de Janeiro: Lacerda & Editores , 1999, p. 392,393 e 394.

Armamento, Desarmamento e Segurança Internacional, embora o número total de ogivas nucleares no mundo esteja declinando, o ritmo das reduções parece ficar cada vez mais lento e nenhuma das partes fez cortes significativos em suas forças nucleares estratégicas desde 2011[12]. Ademais, tanto os EUA como a Rússia vêm ampliando extensos e custosos programas de modernização de seus sistemas de lançamento, de ogivas e de suas instalações industriais correspondentes. Segundo a mesma fonte, igual tendência se observa em outros países nucleares, muito embora a capacidade de verificação seja prejudicada por situações de "transparência inadequada"[13].

Apesar da retórica do então candidato à presidência dos EUA Barack Obama, cujo trecho do discurso acha-se transcrito na epígrafe, e também o que fez em Praga, em 2009, já como presidente, o arsenal nuclear americano se modernizou e se sofisticou mais do que foi reduzido durante os oito anos de sua gestão na Casa Branca[14]. Na capital tcheca, o presidente Obama advertia que:

> *a existência de milhares de armas nucleares é o mais perigoso legado da Guerra Fria.... Hoje, a Guerra Fria desapareceu, mas milhares dessas armas ainda não. Numa estranha mudança da história, a ameaça de uma guerra nuclear global diminuiu, porém o risco de um ataque nuclear aumentou. Mais nações adquiriram essas*

12 As duas Partes no Tratado START II vêm aparentemente realizando as reduções pactuadas, mas ainda não chegaram aos limites acordados nesse tratado. Não existe verificação independente de que tais reduções estejam realmente sendo feitas. Tampouco, e apesar de manifestações genéricas de apoio ao desarmamento nuclear, nenhum dos nove possuidores reconheceu formalmente a necessidade de medidas multilaterais concretas de desarmamento. Ao contrário, nos órgãos multilaterais que tratam do assunto, esses países têm-se recusado a aceitar obrigações vinculantes nesse sentido.

13 *SIPRI Yearbook 2016.*

14 Observe-se que os demais possuidores, em especial a Rússia, também têm feito esforços de "modernização" de seus arsenais nucleares. Alguns, como a França e o Reino Unido, estabeleceram unilateralmente limites quantitativos. Outros têm ampliado a quantidade e capacidade destrutiva de suas armas.

> *armas. Seu teste continua. O mercado negro de comércio de segredos e materiais nucleares abunda. A tecnologia da bomba se disseminou. Terroristas estão determinados a comprá-la, construí-la ou a roubá-la. Nossos esforços para conter esses perigos estão centrados no regime de não proliferação, mas enquanto mais pessoas e nações rompem as regras, poderemos chegar a uma situação insustentável*[15].

A eleição de Donald Trump para a presidência dos EUA e desafios como os da Coreia do Norte, Irã, Rússia e o terrorismo sectário não parecem acenar para uma perspectiva de redução do investimento crescente na modernização e na substituição dos armamentos estratégicos norte-americanos por outros ainda mais sofisticados e duradouros. Paralelamente, o desenvolvimento tecnológico e o avanço em sistemas ofensivos e defensivos, inclusive cibernéticos, poderão alterar as condições de segurança como as conhecemos hoje e os conceitos e doutrinas militares com impacto nos acordos internacionais. De todo modo, o grave desafio para a humanidade persiste na linha do discurso de Obama e do temor de uma nova corrida armamentista nuclear.

Em discurso proferido em 28 de abril de 2015, durante a Conferência de Exame das Partes do Tratado de Não Proliferação Nuclear (TNP), o então Representante Permanente do Brasil junto às Nações Unidas, embaixador Antonio de Aguiar Patriota, criticou a não implementação de importantes compromissos. Afirmou preocupar o Brasil a "falta de progresso real e irreversível

15 "The existence of thousands of nuclear weapons is the most dangerous legacy of the Cold War… Today, the Cold War has disappeared but thousands of those weapons have not. In a strange turn of history, the threat of global nuclear war has gone down, but the risk of a nuclear attack has gone up. More nations have acquired these weapons. Testing has continued. Black market trade in nuclear secrets and nuclear materials abound. The technology to build a bomb has spread. Terrorists are determined to buy, build or steal one. Our efforts to contain these dangers are centered on a global non-proliferation regime, but as more people and nations break the rules, we could reach the point where the center cannot hold."

em matéria de desarmamento". Declarou que o Brasil "não pode aceitar que o ônus do regime estabelecido pelo TNP continue a recair exclusivamente sobre os Estados não nuclearmente armados, com a sempre crescente imposição de demandas que vêm afetar apenas aqueles que já cumprem fielmente com suas obrigações no âmbito do Tratado. Tentativas de reforçar os compromissos em não proliferação, sem avanços concretos prévios em desarmamento nuclear, irão apenas erodir ainda mais o edifício do TNP." Concluiu afirmando que o "TNP encontra-se em um momento crítico. O Tratado não pode ser simplesmente uma ferramenta para administrar suas profundas desigualdades"[16].

Ao final da IX Conferência de Exame do TNP, o Governo brasileiro expressou sua frustração com a ausência de consenso para a adoção de um documento final substantivo. No ano do 70º aniversário dos bombardeios de Hiroshima e Nagasaki, o Brasil manifestou desapontamento pela falta de avanços na implementação do artigo VI do tratado, relativo aos compromissos de desarmamento nuclear. Lamentou a ausência de decisões que remeteriam a discussão do tema à Assembleia Geral das Nações Unidas, especialmente no que se refere a medidas efetivas conducentes à proibição e eliminação dos arsenais nucleares.

Em outubro de 2016, no âmbito da I Comissão, o Brasil copatrocinou, juntamente com África do Sul, Áustria, Chile, Indonésia, México, Nova Zelândia, entre outros, projeto de Resolução (A/C.1/71/L.41), denominado "Taking forward multilateral

16 Segundo Art. 2 do Decreto Legislativo no. 65, de 1998, que aprova o texto do TNP: "A adesão do Brasil ao presente Tratado está vinculada ao entendimento de que, nos termos do artigo VI, serão tomadas medidas efetivas visando à cessação, em data próxima, da corrida armamentista nuclear, com a completa eliminação de todas as armas atômicas".

A Estratégia Nacional de Defesa prevê, por sua vez, que: "O Brasil zelará por manter abertas as vias de acesso ao desenvolvimento de suas tecnologias de energia nuclear. Não aderirá a acréscimos ao Tratado de Não Proliferação de Armas Nucleares destinados a ampliar as restrições do Tratado sem que as potências nucleares tenham avançado, de forma significativa, na premissa central do Tratado: seu próprio desarmamento nuclear" p. 21.

nuclear disarmament negotiations", que convoca, em 2017, uma Conferência das Nações Unidas para negociar instrumento juridicamente vinculante de proibição das armas nucleares com vistas à completa eliminação desses armamentos. O projeto foi aprovado pela Assembleia Geral em 23 de dezembro de 2016, sob o número 71/258, com maioria superior a dois terços dos países-membros. A conferência deverá realizar-se no primeiro semestre de 2017. A sessão de organização está prevista para 16 de fevereiro, a 1ª sessão de 27 a 31 de março e a 2ª sessão de 15 de junho a 7 de julho.

O conhecimento de todos esses antecedentes tanto sobre a evolução da política do Brasil na matéria como também a situação atual dos armamentos e os programas de aperfeiçoamento desses arsenais permitirão ao leitor melhor compreender o desarmamento e a não proliferação e refletir sobre suas perspectivas, seja para os países nucleares, seja para aqueles que assumiram o compromisso de não produzir tais armas, de acordo com o TNP. Estou certo de que essa reflexão e a análise consequente serão enriquecidas pelas informações deste livro e, sobretudo, pelas razões expostas no Voto Dissidente do juiz brasileiro na corte de justiça da Haia na questão "Ilhas Marshall *versus* Reino Unido". A obra inaugura a Coleção Direito Internacional do acervo bibliográfico da Funag.

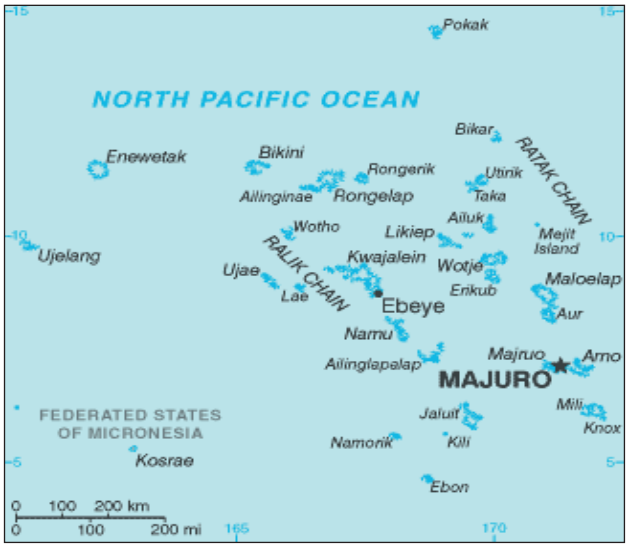
PREFÁCIO

*Sergio de Queiroz Duarte**

Introdução

O território da República das Ilhas Marshall, situado na região do oceano Pacífico denominada Micronésia, é composto por 29 atóis de coral, com mais de mil ilhas e ilhotas que ao longo da história, foram ocupadas sucessivamente por espanhóis, alemães e japoneses. Durante a Segunda Guerra Mundial, os Estados Unidos conquistaram as ilhas. Em 1947, as Nações Unidas declararam-nas "Território Estratégico" sob tutela norte-americana e os Estados Unidos comprometeram-se a "promover o progresso e autossuficiência de seus habitantes e para esse fim [...] protegê-los contra a perda de suas terras e recursos". Em 1986 as ilhas obtiveram plena soberania mediante um acordo de livre associação com aquele país. Em 1991 a República das Ilhas Marshall foi aceita como estado membro das Nações Unidas.

* Embaixador, ex-alto representante das Nações Unidas para Assuntos de Desarmamento.



Mapa do território da República das Ilhas Marshall

Ensaio nuclear *Castle Bravo* – Atol de Bikini – 1º março 1954

Ainda durante o período de tutela, entre 1946 e 1958, vários atóis, principalmente os de Bikini e Eniwetok, foram utilizados pelos Estados Unidos para realizar um total de 67 ensaios de armas nucleares na atmosfera. Seus habitantes foram transferidos para outros pontos do arquipélago. A mais potente série de ensaios foi a denominada *Castle*, entre 1º de março e 14 de maio de 1954, com um total de 48 megatons de potência. A primeira delas, de codinome Bravo, uma detonação termonuclear de 15 megatons, equivalente a mil vezes à da bomba lançada sobre Hiroshima[1], criou uma cratera de 45 metros de profundidade e mais de um quilômetro e meio de diâmetro. A chuva de partículas radioativas se espalhou por uma superfície de 70 quilômetros quadrados. A nuvem resultante desse ensaio liberou 30 vezes mais iodo radioativo do que os dos desastres de Fukushima e Chernobyl juntos.

Ao longo dos doze anos de duração dos 67 experimentos as populações das demais ilhas e atóis também sofreram graves danos e algumas foram completamente evacuadas pela Marinha norte-americana. Alimentos e água potável foram constantemente contaminados. As pessoas vomitavam, os cabelos começaram a cair. Pústulas e queimaduras se formaram em suas peles. A incidência de câncer aumentou desproporcionalmente, assim como a de deformações em recém-nascidos, e de doenças crônicas cardíacas, da tireoide, pulmões, ossos e aparelho digestivo. Centenas de toneladas de peixes e outros animais marinhos capturados por barcos pesqueiros sofreram contaminação e tiveram que ser destruídos.

A população de Bikini, que retornara em 1969, foi novamente evacuada em 1978, quando se verificou excessiva exposição à radiação. Habitantes que haviam sido transferidos para outras

1 A bomba lançada sobre Hiroshima tinha 15 quilotons. Um quiloton tem a potência explosiva de mil toneladas de TNT.

ilhas e posteriormente levados de volta seus lares tiveram que abandoná-los novamente em 1985. Até o momento, os trabalhos de limpeza radioativa e fixação de limites de contaminação, antes e depois da emancipação da República das Ilhas Marshall, não foram considerados satisfatórios pelo novo estado.

Segundo o Acordo de Livre Associação, foi instituído um fundo de 150 milhões de dólares como "compensação total e final" de todas as demandas judiciais contra o governo norte-americano. Uma cláusula proibia os habitantes do arquipélago de buscar futuras reparações judiciais dos Estados Unidos e extinguiu todas as demandas judiciais em curso. Em 1998, foi criado um Tribunal especial para dirimir demandas relacionadas com os ensaios nucleares. As somas pagas até o momento a título de compensação por danos pessoais e materiais causados pelos ensaios têm sido consideradas insuficientes pela população e pelo governo das Ilhas Marshall.

Ações judiciais recentes

Em 2014, a República das Ilhas Marshall iniciou duas ações judiciais: uma na Corte Internacional de Justiça (CIJ) na Haia, contra os nove países possuidores de armas nucleares[2] e outra em um tribunal federal norte-americano em São Francisco, contra o governo dos Estados Unidos. As demandas não buscavam compensação financeira e sim o reconhecimento de que as obrigações do artigo VI do Tratado de Não Proliferação de Armas Nucleares (TNP)[3] não haviam sido cumpridas pelos países acusados.

2 China, Coreia do Norte (RPDC), Estados Unidos, França, Índia, Israel, Paquistão, Reino Unido e Rússia.

3 Artigo VI: "Cada parte deste tratado compromete-se a entabular, de boa-fé, negociações sobre medidas efetivas para a cessação em data próxima da corrida armamentista nuclear e para o desarmamento nuclear, e sobre um tratado de desarmamento geral e completo, sob estrito e eficaz controle internacional."

Diversas organizações da sociedade civil apoiaram as ações judiciais e prestaram assistência técnica para a elaboração das demandas e para seu acompanhamento durante a tramitação nos tribunais. Os dois pleitos se basearam no texto do TNP e na opinião consultiva unânime da CIJ, emitida em 1996, de que "existe uma obrigação juridicamente vinculante de levar adiante de boa-fé e concluir negociações que levem ao desarmamento nuclear em todos os seus aspectos sob controle internacional estrito e eficaz". Ambas as ações têm também fulcro na chamada "iniciativa humanitária" que ganhou impulso na comunidade internacional a partir da Conferência de Exame do TNP em 2010.

Somente três dos nove possuidores de armas nucleares acusados – Paquistão, Índia e Reino Unido – reconhecem a jurisdição da Corte da Haia e por isso enviaram representantes ao tribunal. Os demais – China, Coreia do Norte (RDPC), Estados Unidos, França, Israel e Rússia – não se fizeram representar no julgamento. Paquistão, Índia, Israel e a RDPC não são partes do TNP.

A Corte examinou inicialmente a objeção preliminar levantada pelo Reino Unido, que alegou não existir controvérsia entre as partes e, portanto, a demanda seria inadmissível nos termos do Estatuto daquele tribunal. A conclusão da maioria dos juízes foi a de que a objeção deveria ser acolhida. Nessas condições, tornava-se desnecessário tratar das demais preliminares levantadas. Em consequência, o mérito da questão deixou de ser apreciado.

Vários juízes registraram opiniões e votos em separado. O Voto Dissidente do juiz brasileiro, Antônio Augusto Cançado Trindade, é o mais extenso e circunstanciado dentre as manifestações dos magistrados. Após examinar detalhadamente as sucessivas resoluções da Assembleia Geral e do Conselho de Segurança das Nações Unidas sobre temas de desarmamento e segurança

internacional, Cançado Trindade considera infundada a estratégia de dissuasão nuclear e debate a legalidade do armamento atômico e a obrigação do desarmamento nuclear, recordando o princípio da igualdade jurídica dos estados, a necessidade de uma abordagem centrada nas pessoas e o direito fundamental à vida. Afirma que na formação das normas de direito internacional consuetudinário, "reduziu-se a influência unilateral dos estados mais poderosos, impulsionando a atividade legisladora em prol do interesse público e na busca do bem comum da comunidade internacional como um todo". Para o jurista, um pequeno grupo de estados – como os possuidores de armas nucleares – não pode desprezar ou minimizar as reiteradas resoluções adotadas pela Assembleia Geral e pelo Conselho de Segurança simplesmente por haver votado contra elas, ou preferido abster-se. Uma vez adotadas, devem ser válidas para todos os estados membros. Trata-se de resoluções da própria Organização das Nações Unidas, não apenas da ampla maioria que votou a favor. Portanto, argumenta, possuem valor normativo.

O parágrafo final do voto do juiz Cançado Trindade merece ser transcrito em sua integridade:

> *Um mundo com arsenais de armas nucleares, como o nosso, está fadado a destruir seu passado, ameaça perigosamente o presente e não tem futuro. As armas nucleares preparam o caminho para a não existência. Em minha opinião, a Corte Internacional de Justiça, como principal órgão judiciário das Nações Unidas, deveria no presente julgamento haver demonstrado sensibilidade a esse respeito e deveria ter dado uma contribuição em um tema do mais profundo interesse da comunidade internacional vulnerável, e a bem dizer da humanidade como um todo.*

Impacto da demanda

Embora seis dentre os nove estados acusados tenham deixado de enviar representantes à Corte para esse julgamento, não há como negar a relevância do debate atualmente em curso nos órgãos multilaterais das Nações Unidas e organizações da sociedade civil sobre a legitimidade da posse indefinida no tempo e constante aperfeiçoamento do armamento nuclear, assim como da legalidade de seu uso, e sobre a necessidade de medidas urgentes e juridicamente vinculantes de desarmamento nuclear. As próprias divergências de opinião entre os juízes, constantes de suas declarações e votos em separado, demonstram a atualidade do tema. Durante os trabalhos da Corte, um dos pontos trazidos à consideração dos magistrados foi o grau de comprometimento dos países nucleares com o desarmamento expresso por seus votos e atitudes nos foros multilaterais. Não havendo tratado do mérito da questão, o tribunal não levou em conta elementos como o posicionamento desses países ao longo do tempo nas votações de resoluções da Assembleia Geral, sua cooperação e participação nos foros multilaterais ou o crescimento e/ou aperfeiçoamento dos arsenais, e tampouco suas políticas de defesa e segurança, que não contemplam a possibilidade de desarmamento e admitem o uso do armamento nuclear mesmo contra países que não o possuam.

Na opinião expressa no Voto Dissidente do juiz brasileiro, existe um entendimento comum a respeito do desarmamento nuclear, o que tornaria a legislação internacional (inclusive o TNP) parte do direito consuetudinário, obrigatório para todos os estados, mesmo que não sejam parte desse instrumento. Por isso, todos os estados, sem exceção, estariam obrigados a cumprir o disposto no artigo VI daquele instrumento. Os votos e opiniões divergentes de vários juízes em relação às conclusões da Corte sugerem novos rumos no tratamento multilateral da questão.

Dois dos juízes expressaram dúvidas sobre o resultado de ações judiciais em tribunais bilaterais e especularam sobre a extensão da competência das cortes internacionais. Seria interessante, por exemplo, examinar a hipótese de desdobramento multilateral de uma decisão da Corte da Haia na qual um único estado viesse a ser considerado como inadimplente em relação a obrigações constantes em tratados sobre temas de desarmamento e controle de armamentos[4].

A preocupação da comunidade internacional com os aspectos humanitários e ambientais decorrentes da existência e possibilidade de uso de armas de destruição em massa é antiga. A Carta das Nações Unidas não menciona o armamento nuclear, pois o advento da primeira detonação experimental ocorreu em 16 de julho de 1945, pouco mais de duas semanas após a adoção daquele instrumento, em 26 de junho do mesmo ano. A primeira Resolução da Assembleia Geral das Nações Unidas, em janeiro de 1946, porém, tratou dos problemas decorrentes da descoberta da energia nuclear e criou uma comissão encarregada, entre outras tarefas, de fazer propostas sobre a eliminação das "armas atômicas e outras armas adaptáveis à destruição em massa". Divergências decorrentes da desconfiança e hostilidade entre as duas principais potências impediram qualquer progresso multilateral em relação à eliminação do armamento nuclear. Aos poucos, medidas parciais foram sendo adotadas, todas visando evitar que outros estados viessem a adquirir armas nucleares. Mesmo assim, mais sete vieram a fazê-lo, além dos dois proliferadores originais. As outras

4 A proliferação de armas nucleares foi considerada uma ameaça à paz e à segurança internacionais pelo Conselho de Segurança da ONU, órgão primordialmente responsável pela manutenção da paz e da segurança. Pode-se argumentar que os atuais possuidores na verdade promoveram a proliferação ao dotar-se de armas nucleares e aumentar sua quantidade e ainda a promovem ao aperfeiçoá-las tecnologicamente, mesmo reduzindo seus arsenais. Em várias oportunidades, alguns países reconhecidos como "estados não nucleares" nos termos do TNP foram objeto de sanções aplicadas pelo Conselho de Segurança em virtude de suas atividades nucleares.

duas categorias de armas de destruição em massa – bacteriológicas e químicas – acabaram por ser banidas, respectivamente em 1972 e em 1997, por instrumentos internacionais hoje reconhecidos como parte do direito internacional consuetudinário. O uso de armas químicas tornou-se universalmente inaceitável devido a seus efeitos cruéis e indiscriminados. Por isso, com apoio dos estados membros da ONU, em 2013 o Secretário Geral das Nações Unidas designou uma comissão de peritos encarregada de levantar os fatos relativos a alegações de uso de armas químicas na Síria, embora esse país não fosse parte da Convenção que proibiu tais armas. Como resultado da pressão internacional, a Síria acabou por aderir ao instrumento.

Na última década tem crescido o interesse da comunidade internacional pelos aspectos humanitários relativos ao uso de armas nucleares. A Conferência de Exame do TNP em 2010 expressou unanimemente preocupação com "as catastróficas consequências humanitárias de qualquer uso de armas nucleares" e conclamou todos os estados a "cumprir a legislação internacional aplicável, inclusive o direito internacional humanitário". Na Conferência de Exame do TNP em 2015, surgiu o "compromisso humanitário" de "estigmatizar, proibir e eliminar" o armamento nuclear, apoiado por grande maioria dos estados. Três conferências internacionais, em 2013 e 2014, examinaram as consequências de detonações de armas nucleares sob o prisma das características específicas desses engenhos bélicos: não apenas sua capacidade de extinguir de forma cruel e indiscriminada a vida de numerosas populações mas também seus efeitos sobre o meio ambiente, a economia e o bem-estar das gerações futuras. A mais recente dessas conferências, realizada em Viena, concluiu que

> *o impacto de uma detonação nuclear, independentemente de sua causa, não ficará restrita às fronteiras nacionais e*

> *poderá ter consequências regionais e até mesmo globais, causando destruição, morte e deslocamentos, assim como prejuízos profundos e de longo prazo ao meio ambiente, saúde e bem-estar das populações, desenvolvimento socioeconômico e ordem social, e poderá inclusive ameaçar a sobrevivência da humanidade.*

O texto dos principais instrumentos multilaterais no campo do armamento nuclear igualmente evidenciam aquela preocupação. Já em 1963, o Tratado de Proibição Parcial de Ensaios Nucleares registrava a importância de evitar a contaminação do meio ambiente humano por substâncias radioativas e, em 1996, o Tratado de Proibição Abrangente desses ensaios (CTBT, na sigla em inglês) fazia menção à contribuição desse instrumento para a proteção do meio ambiente. Embora este último tratado não se encontre formalmente em vigor[5], criou um firme padrão de comportamento internacional que não admite a realização de explosões nucleares experimentais[6]. Desde 1992, nenhuma das duas principais potências realiza tais ensaios. Com exceção da RPDC, nenhum outro país levou a cabo testes de explosivos nucleares após 1998. A preocupação da comunidade internacional com os efeitos do uso de armamento nuclear está expressa em importantes textos multilaterais, como no preâmbulo do Tratado de Tlatelolco, de 1967, que menciona os "terríveis" e "indiscriminados efeitos" das armas nucleares, que constituem "um atentado à integridade da espécie humana", e no preâmbulo do TNP, de 1970, que fala na "devastação que atingiria toda a humanidade" em decorrência de uma guerra nuclear e na consequente necessidade de esforços para

5 Para a entrada em vigor do CTBT são necessárias as ratificações de oito Estados que na data da preparação destas notas ainda não o haviam feito: China, Egito, Estados Unidos, Índia, Irã, Israel, Paquistão e RPDC.

6 O CTBT não proíbe ensaios "subcríticos" (isto é, que não deflagrem reação em cadeia) e simulações computadorizadas em laboratório.

evitar o perigo de tal conflito e de medidas para salvaguardar a segurança dos povos.

É importante notar que a Corte da Haia admitiu que a República das Ilhas Marshall tem "motivos especiais de preocupação" quanto ao armamento nuclear. Ao reconhecer a existência de um especial interesse de um estado não possuidor de armas nucleares por esse tema, a Corte poderá ter aberto o caminho para que além dos atuais detentores dessas armas, também os estados real ou potencialmente afetados por seu uso – por desígnio ou acidente – venham a invocar razões relevantes em apoio a suas preocupações, ou a adoção de medidas para atendê-las. Em vista das possíveis consequências planetárias de uma detonação nuclear, qualquer estado poderá vir a considerar-se afetado por ela, independentemente do lugar em que ocorra. Não se pode excluir a possibilidade de que, no futuro, uma nova demanda baseada em princípios humanitários ou ambientais universalmente aceitos venha a ser favoravelmente acolhida.

O resultado das duas demandas iniciadas pelas Ilhas Marshall deixa clara, entretanto, a dificuldade de responsabilizar judicialmente os países nuclearmente armados pelo não cumprimento de obrigações de desarmamento e de obrigá-los por essa via a respeitar tais compromissos. Alguns comentaristas notam que a Corte Internacional de Justiça tem evitado pronunciar-se decisivamente sobre matéria concernente à segurança internacional, especialmente no que toca ao armamento nuclear em casos que envolvem interesses das principais potências. Acresce que o reconhecimento da jurisdição da Corte é facultativo.

Como era de se esperar, os principais meios de comunicação nos países nuclearmente armados, inclusive nas sociedades mais abertas, deram pouco relevo ao julgamento da Corte da Haia sobre a demanda das Ilhas Marshall. Mesmo assim, ficaram

evidenciadas para a opinião pública as contradições inerentes às posições adotadas pelas potências nucleares e seus aliados, que afirmam estar comprometidos com o objetivo do desarmamento nuclear mas não parecem demonstrar disposição real de atingi-lo. Ao contrário, opõem-se sistematicamente nos foros internacionais a quaisquer iniciativas tendentes à adoção de medidas concretas e juridicamente vinculantes de desarmamento e continuam a justificar a posse e possibilidade de uso de seu armamento atômico e a aperfeiçoar sua capacidade destrutiva. As reduções quantitativas efetuadas ao longo do tempo pelas duas principais potências por meio de acordos bilaterais, assim como as reduções unilaterais das forças nucleares feitas por alguns países, refletem mais a necessidade de economizar e otimizar recursos do que um verdadeiro comprometimento com a comunidade internacional para a consecução daquele objetivo. Na verdade, essas reduções aparecem como um fim em si mesmas e não contemplam a eliminação final do armamento nuclear. Até hoje, nenhuma arma nuclear foi jamais destruída ou desmantelada em virtude de acordo multilateral.

Ao contestar a legitimidade e legalidade da posse e uso de armas nucleares, as demandas judiciais da República das Ilhas Marshall demonstram a emergência de uma nova abordagem do complexo e espinhoso tema do desarmamento nuclear, às vésperas do início de um novo ciclo quinquenal de exame do Tratado de Não Proliferação de Armas Nucleares, com três conferências preparatórias anuais, a primeira das quais prevista para abril/maio de 2017. A próxima Conferência de Exame realizar-se-á em 2020. Além disso, na recente Sessão da Assembleia Geral das Nações Unidas, um grupo de países, inclusive o Brasil, propôs a negociação, também em 2017, de um instrumento juridicamente obrigatório para a proibição das armas nucleares, com vistas a sua completa eliminação. O resultado da votação dessa proposta mostra algumas

diferenças de percepção entre países nucleares e também entre aqueles que têm acordos com possuidores de armas nucleares que preveem o uso dessas armas em sua defesa. A proposta foi apoiada pelo voto afirmativo de 123 países, com 38 votos negativos, inclusive os de países nuclearmente armados (Estados Unidos, França, Israel, Reino Unido e Rússia) e 16 abstenções. China, Índia e Paquistão se abstiveram na votação, enquanto a RPDC votou favoravelmente. Algumas antigas repúblicas soviéticas, como Belarus e Quirguistão, igualmente se abstiveram. Idêntica atitude foi seguida por países europeus ocidentais como a Finlândia e a Suíça. É de notar-se a abstenção da Holanda, membro da OTAN. Apesar da reação inicial negativa daqueles 38 países, o resultado geral suscitou certo grau de otimismo entre os defensores do desarmamento nuclear e pode ser atribuído ao menos em parte à influência do movimento global em prol da eliminação das armas atômicas. A iniciativa de novos acordos no campo do desarmamento passou aos não possuidores de armas nucleares, enquanto os possuidores encontram-se agora na defensiva[7]. A participação na futura negociação estará aberta a todos os estados e organizações internacionais, assim como a representantes da sociedade civil. Pela primeira vez a negociação, no âmbito das Nações Unidas, de um instrumento internacional no campo do desarmamento e segurança a ser subscrito por estados contará com a participação e contribuição diretas de entidades não governamentais.

7 Os países nucleares, apoiados pelos aliados, sustentam o método denominado "passo a passo", que resultou na adoção de medidas multilaterais. Todas essas trataram da não proliferação e nenhuma de desarmamento propriamente dito. Há vinte anos a Conferência do Desarmamento, órgão negociador instituído em 1978, não consegue sequer adotar um plano de trabalho que lhe permita iniciar atividades substantivas. Para os nucleares, o próximo passo seria a negociação de um tratado de proibição de matéria físsil para fins militares. Muitos não nucleares consideram que essa medida, tal como proposta, seria redundante do ponto de vista da não proliferação e inócua do ponto de vista do desarmamento. A frustração decorrente do prolongado impasse explica a insistência de muitos países não possuidores e de organizações da sociedade civil em levar adiante a proposta de negociação da Convenção de proibição de armas nucleares na Assembleia Geral das Nações Unidas.

Será importante que, nessa tarefa pioneira, tanto os estados que advogam a necessidade de medidas concretas e urgentes de desarmamento nuclear e a deslegitimação do armamento nuclear quanto as organizações da sociedade civil impulsionadoras de movimentos internacionais evitem confrontações e recriminações desnecessárias e contraproducentes e utilizem seu poder de convencimento e persuasão a fim de lograr que as potências nucleares e seus aliados participem construtivamente do esforço de atingir a eliminação completa das armas atômicas. A universalidade dos acordos internacionais no campo do desarmamento e a absoluta confiança em seu cumprimento são requisitos essenciais para a sua consecução e permanência. Acordos discriminatórios estão fadados a alimentar divergências e dificilmente terão duração ilimitada. Nenhum pacto poderá ser bem-sucedido se não contemplar adequadamente os legítimos interesses de todas as partes.

ESTUDO DE CASO – NOTA INTRODUTÓRIA

O CASO DAS OBRIGAÇÕES DE DESARMAMENTO NUCLEAR (MARSHALL ISLANDS *VERSUS* REINO UNIDO ET ALII, 2016) E VOTO DISSIDENTE DO AUTOR, ANTÔNIO AUGUSTO CANÇADO TRINDADE

I. O caso das *Armas Nucleares* diante da CIJ

O caso das *Obrigações Referentes a Negociações Relativas à Cessação da Corrida das Armas Nucleares e ao Desarmamento Nuclear* (doravante, caso das *Armas Nucleares*) foi interposto pelas Ilhas Marshall perante a Corte Internacional de Justiça em 24 de abril de 2014. Originalmente, as Ilhas Marshall demandaram todos os estados nucleares (Estados Unidos, Federação Russa, China, Reino Unido, França, Índia, Paquistão, Israel, Coreia do Norte), mas somente três demandas prosseguiram (Índia, Reino Unido e Paquistão), com base na aceitação da cláusula facultativa da jurisdição obrigatória da Corte [artigo 36(2) do Estatuto da CIJ].

1. A sentença da CIJ

Os três demandados levantaram uma série de exceções preliminares quanto a jurisdição e admissibilidade. As audiências

públicas sobre exceções preliminares (com a presença do demandante, Ilhas Marshall, e de dois dos demandados, Reino Unido e Índia) tiveram lugar diante da CIJ de nove a 16 de março de 2016. Concentrando-me em uma destas demandas, opondo as Ilhas Marshall ao Reino Unido, passo a uma breve nota sobre o ocorrido. A CIJ, em sua sentença de 5 de outubro de 2016, iniciou por traçar um breve relato histórico do caso, particularmente em relação às atividades de desarmamento nuclear das Nações Unidas (pars. 15-21).

Após referir-se às outras demandas interpostas pelas Ilhas Marshall, a CIJ indicou, em relação ao *cas d´espèce*, que iria limitar-se à consideração da exceção preliminar do Reino Unido, segundo a qual as Ilhas Marshall não teriam demonstrado a existência, no momento de interpor a demanda, de uma controvérsia jurídica entre as partes litigantes (pars. 22-25). Segundo a CIJ, os dois discursos recentes proferidos pelas Ilhas Marshall (de 26 de setembro de 2013 na Reunião de Alto Nível da Assembleia Geral da ONU sobre Desarmamento Nuclear, e de 13 de fevereiro de 2014 na Conferência de Nayarit sobre o Impacto Humanitário das Armas Nucleares) não foram suficientes, a seu ver, para demonstrar a existência de uma controvérsia jurídica entre as Ilhas Marshall e o Reino Unido, em relação à obrigação, seja sob o artigo VI do Tratado de Não Proliferação de Armas Nucleares (TNP, de 1968), seja no correspondente direito internacional consuetudinário.

A CIJ, aplicando uma exigência alta (e sem precedentes) para demonstrar a existência de uma controvérsia jurídica, entendeu que não se comprovou que o Reino Unido estava ciente de uma controvérsia entre ele e as Ilhas Marshall (*awareness test*). A CIJ, ao rechaçar assim os argumentos das Ilhas Marshall, aceitou a primeira exceção preliminar do Reino Unido, e se declarou sem

jurisdição (competência) para examinar a demanda sob o artigo 36(2) de seu estatuto.

Assim sendo, considerou desnecessário abordar a demanda das Ilhas Marshall. Foi esta a primeira vez que a CIJ se declarou incompetente pela única razão, a seu ver, da ausência de uma controvérsia. A decisão sem precedentes da CIJ, quanto à falta de jurisdição por ausência de controvérsia jurídica, foi tomada por 8 votos a 8, com o voto de minerva de seu presidente. Na ocasião, apresentei meu extenso e contundente voto dissidente.

2. A dissidência do autor

Em meu Voto Dissidente, anexado à Sentença da CIJ de 5 de outubro de 2016, e composto de 21 partes, assinalei que a nova e alta exigência determinada pela CIJ para demonstrar a existência de uma controvérsia jurídica não tem precedentes na *jurisprudence constante* da Corte da Haia (CPJI e CIJ), e a contradiz desde seu início histórico. Esta nova exigência (*awareness test*) – acrescentei –, ademais de formalista e artificial, cria indevida e lamentavelmente uma dificuldade para o próprio acesso à justiça, em uma matéria de preocupação da humanidade como um todo.

Após demonstrada esta contradição, em meu Voto Dissidente passei a examinar as distintas séries de resoluções da Assembleia Geral da ONU, em que esta adverte para os perigos da corrida de armas nucleares para a humanidade e a sobrevivência da civilização. Trata-se de quatro séries de numerosas resoluções da Assembleia Geral, a saber: a) resoluções sobre a importância do desarmamento nuclear (1961-1981); b) resoluções sobre o congelamento de armas nucleares (1982-1992); c) resoluções de condenação de armas nucleares (1982-2015) e d) resoluções de seguimento do Parecer Consultivo de 1996 da CIJ (1996-2015).

Em seguida, ponderei que estas resoluções da Assembleia Geral conclamam *todos* os estados a cumprir prontamente com a obrigação de concluir um novo Tratado de Proibição de Armas Nucleares (a exemplo do já ocorrido com armas bacteriológicas e químicas), recordando, neste sentido, o Tratado da Antártida, os cinco Tratados de Zonas Desnuclearizadas (Tlatelolco, de 1967, Rarotonga, de 1985, Bangkok, de 1995, Pelindaba, de 1996, e Semipalatinsk, de 2006) e seus Protocolos respectivos, assim como o *status* da Mongólia de país desnuclearizado. Também examinei as resoluções do Conselho de Segurança da ONU sobre a obrigação de prosseguir às negociações de boa-fé atinentes ao desarmamento nuclear.

Com efeito, já em 1961 – recordei, a Assembleia Geral da ONU adotou [mediante a resolução 1653(XVI)] a "Declaração sobre a Proibição do Uso de Armas Nucleares e Termonucleares", de grande atualidade nos dias de hoje, 55 anos depois. Em minha percepção – prossegui em meu Voto Dissidente –, a obrigação de desarmamento nuclear emergiu e cristalizou-se no direito internacional tanto convencional como consuetudinário, e as Nações Unidas têm dado sua valiosa contribuição nesse sentido.

O fato de as Convenções de Proibição de Armas Bacteriológicas (1972) e de Armas Químicas (1993) já existirem há anos e a de Armas Nucleares ainda não, representa um absurdo jurídico. Os positivistas – acrescentei –, só conseguem visualizar o consentimento individual dos estados; justamente para ampliar o horizonte, na audiência pública diante da CIJ de 16 de março de 2016, permiti-me formular perguntas às partes litigantes presentes (Ilhas Marshall, Índia e Reino Unido) acerca da emergência da *opinio juris communis* pela adoção das séries de resoluções da Assembleia Geral da ONU; as partes forneceram suas respostas por escrito.

Após recordar, em meu Voto Dissidente, que, desde o início da era nuclear até o presente, os grandes pensadores mundiais têm se perguntado se a humanidade tem um futuro, afirmei que é imperativo prestar atenção ao respeito à vida e aos valores humanistas. Reiterei a posição que tenho sempre defendido no seio da CIJ no sentido de que a fonte *material* última do direito internacional é a consciência jurídica universal. Recordei, ademais, que a própria Carta das Nações Unidas mostra-se atenta aos povos e à salvaguarda de valores comuns a toda a humanidade; ademais, o notável ciclo de Conferências Mundiais das Nações Unidas da década de noventa (do qual participei) teve como denominador comum a preocupação com as condições de vida de todos os seres humanos em todas as partes.

Urgia, assim – adverti em meu Voto Dissidente –, que o raciocínio da CIJ em um caso como o presente transcendesse o enfoque puramente interestatal, e se concentrasse nos povos, e não em susceptibilidades interestatais, consoante uma visão necessariamente humanista. Alertei que nem mesmo o mecanismo interestatal do contencioso perante a CIJ pode pretender reduzir um caso, como o presente, a um raciocínio estritamente interestatal. De forma alguma; há que ter presente o princípio de humanidade, com a prevalência do *jus necessarium* sobre o *jus voluntarium*. Os princípios gerais do direito (*prima principia*) encontram-se nos próprios fundamentos de qualquer sistema jurídico – agreguei, e um caso como o presente revela que a *raison d´humanité* prevalece sobre a *raison d´État*.

Assim sendo, procedi, em meu Voto Dissidente, a uma crítica contundente da estratégia de dissuasão (*deterrence*), mediante a qual os poderes nucleares buscam justificar e impor seus chamados "interesses de segurança nacional", em detrimento da segurança da humanidade como um todo. Não se pode ignorar

a *opinio juris communis* sobre a ilegalidade de todas as armas de destruição massiva, inclusive as armas nucleares. Agreguei que, ao contrário do que pensam os positivistas, o direito e a ética estão inter-relacionados, e a humanidade como tal é também sujeito do direito internacional. As armas nucleares são uma manifestação contemporânea do mal, em sua trajetória perene que remonta ao Livro do *Gênesis*.

Os princípios da *recta ratio*, orientando a *lex praeceptiva*, emanam da consciência humana, afirmando a inter-relação ineludível entre o direito e a ética. Em meu Voto Dissidente, também examino a contribuição das Conferências de Revisão do TNP (1975--2015) à *opinio juris communis necessitatis,* sustentando a obrigação convencional e consuetudinária de desarmamento nuclear. Enfim, em meu Voto Dissidente, também examinei a contribuição da série de Conferências sobre o Impacto Humanitário das Armas Nucleares (Oslo em 2013; Nayarit no início de 2014; e Viena em fins de 2014), a saber, haver propiciado uma melhor compreensão dos efeitos devastadores, inclusive a médio e longo prazos, sobre as numerosas vítimas dos testes e detonações nucleares.

Trata-se, em suma, de uma proibição do *jus cogens*. Ao longo dos anos, os órgãos principais das Nações Unidas, tais como a Assembleia Geral, o Conselho de Segurança, e o Secretário-Geral, vêm dando contribuições consistentes e notáveis ao desarmamento nuclear. É de se esperar que a CIJ, como órgão judicial principal das Nações Unidas, também tenha em mente considerações básicas de humanidade, com sua incidência no exame de questões tanto de jurisdição e admissibilidade, como também de direito substantivo.

Um pequeno grupo de países – os nucleares – não pode continuar a fazer abstração ou minimizar as numerosas resoluções das Nações Unidas (*supra*), válidas para todos os estados membros da ONU, sobre a obrigação de desarmamento nuclear. Assim sendo,

meu Voto Dissidente assumiu uma posição diametralmente oposta à da maioria (dividida) da CIJ, com base em princípios e valores fundamentais. A CIJ, como órgão judicial principal das Nações Unidas – concluí em meu Voto Dissidente – deveria ter mostrado sensibilidade sobre a matéria, e dado assim sua contribuição ao desarmamento nuclear, matéria que constitui uma das maiores preocupações da comunidade internacional vulnerável, e na verdade da humanidade como um todo.

II. Ocorrências no mundo na atualidade

Durante o período em que os três casos das *Armas Nucleares* (Ilhas Marshall *versus* Índia, Reino Unido e Paquistão) estiveram pendentes conosco na Corte Internacional de Justiça (CIJ) – de 24 de abril de 2014 a 5 de outubro de 2016, alguns fatos pertinentes ocorreram no mundo, chamando a atenção, como que por uma conjunção dos astros. Estes fatos pareciam revelar que a dor de consciência por detonações nucleares vinha enfim à tona, tornando-se manifesta.

Por exemplo, já na proximidade das audiências públicas diante da CIJ (em dois desses três casos, Ilhas Marshall *versus* Índia e Reino Unido), o presidente da França (François Hollande), em visita à Polinésia francesa (no Pacífico Central), em fins de fevereiro de 2016, reconheceu os efeitos nocivos (na saúde humana e no meio ambiente) de três décadas de testes nucleares franceses (de 1966 a 1996) no arquipélago da Polinésia (um total de 193 testes nucleares), particularmente nos atóis de Moruroa e Fangataufa, assim como a necessidade de prover reparações adequadas às vítimas.

O presidente francês (F. Hollande) reconheceu o "débito nuclear" da França em relação à Polinésia francesa: sem os 193 testes nucleares aí conduzidos (1966-1996) – ponderou, "a França

não teria armas nucleares e, portanto, não teria a dissuasão [*deterrence*] nuclear"[1]. Em consequência destes testes nucleares, numerosas vítimas contraíram tipos distintos de câncer, e o meio ambiente se contaminou.

O presidente francês prometeu proceder a uma revisão do mecanismo de reparações (que vinham diminuindo ao longo dos anos, e beneficiando tão só pouquíssimas vítimas); prometeu aumentar as reparações e a assistência pública a um número muito maior de vítimas[2]. Para saldar a "dívida nuclear" da França com a Polinésia francesa, o presidente francês, em seu discurso de 22 de fevereiro de 2016, prometeu tomar as providências para aumentar as reparações devidas, e inclusive prestar serviços públicos médicos, de oncologia, por exemplo[3].

Outro episódio pertinente – que igualmente chamou a atenção –, ocorreu durante o período da tramitação dos três referidos casos das *Armas Nucleares*, dois meses após as audiências públicas diante da CIJ: tratou-se da primeira visita de um presidente em funções dos Estados Unidos (Barack Obama) a Hiroshima, que teve imediata repercussão no noticiário internacional, em 27 de maio de 2016.

O presidente norte-americano (B. Obama) caracterizou sua visita a Hiroshima não como uma apologia, mas como uma iniciativa para alertar para os perigos das armas nucleares[4], e para despertar a consciência para a necessidade de assegurar que os avanços no conhecimento científico se façam sempre acompanhar

1 "Hollande Acknowledges Impact of Nuclear Testing in the Pacific", *Agence France Presse*, 23.2.2016, p. 2; a primeira bomba de hidrogênio francesa foi lançada sobre Fangataufa em 1968.

2 "Hollande Acknowledges 'Consequences' of Nuclear Tests on Polynesia Trip", *France 24*, 23.2.2016, p. 1.

3 "En Polynésie, les effets des essais nucléaires reconnus", *Le Monde*, Paris, 24.2.2016, p. 10.

4 "In Hiroshima 71 Years after First Atomic Strike, Obama Calls for End of Nuclear Weapons", *The Washington Post*, 27.5.2016, p. 3.

de considerações éticas[5]. Ressaltou que o progresso tecnológico tem que se fazer acompanhar de "nosso próprio despertar moral" na atual era nuclear[6].

O presidente norte-americano não apresentou uma apologia, mas expressou simpatia ou solidariedade pelas vítimas e sobreviventes das bombas atômicas (em Hiroshima e Nagasaki), e advertiu contra as "consequências catastróficas das armas nucleares"[7]. Ademais, o presidente B. Obama ressaltou a necessidade de cultivar a memória dos bombardeios atômicos de Hiroshima e Nagasaki[8], e o sofrimento deles decorrente que tem se estendido por sucessivas gerações – assim como a importância de buscar "um mundo sem armas nucleares"[9].

Em sua recente visita a Hiroshima, o presidente norte-americano B. Obama reiterou alguns pontos (como o da "revolução moral") que já havia abordado em seu célebre discurso de Praga de 2009 (que lhe valeu o Prêmio Nobel da Paz). Mas na visita a Hiroshima poderia ter ido mais além: por exemplo, poderia ele, enfim, ter expressamente reconhecido a existência da *obrigação* de desarmamento nuclear e a responsabilidade por seu cumprimento[10]. Trata-se de uma obrigação de todos os estados, para assegurar a sobrevivência da humanidade[11]; afinal, há que

5 *Ibid*., pp. 1-2.

6 "At Hiroshima Memorial, Obama Says Nuclear Arms Require `Moral Revolution´", *The New York Times*, 27.5.2016, pp. 1-2).

7 S. Squassoni, "Obama´s Hiroshima Visit Strengthens His Call for Nuclear Disarmament", *The Guardian*, Londres, 27.5.2016, p. 1.

8 "Hiroshima Memory Must Never Fade, Obama Says on Historic Visit", *BBC*, 27.5.2016, p. 5.

9 "Obama Visits Hiroshima - U.S. President Pays Respect to A-Bomb Victims", *The Japan News / The Yomiuri Shimbun*, 27.5.2016, p. 2.

10 R. Falk, "On President Obama´s Visit to Hiroshima", 28 *Peace Review - Journal of Social Justice* (2016) n. 3, p. 278.

11 *Ibid*., p. 279.

buscar o desarmamento nuclear, e não somente o atual controle de armas, indo mais além do atual *status quo* nuclear[12].

Ainda outros fatos pertinentes ocorridos no mundo, no mesmo período da tramitação dos três casos das *Armas Nucleares* diante da CIJ, foram os preocupantes testes nucleares conduzidos pela Coreia do Norte. Foram prontamente criticados em discursos de sucessivas delegações nos órgãos da ONU (cf. *infra*), conclamando todos os países a laborar conjuntamente pelo desarmamento nuclear.

III. Repercussões nas Nações Unidas

Pouco depois de emitidas as três Sentenças da CIJ (de 5 de outubro de 2016) nos casos das *Armas Nucleares* (Ilhas Marshall *versus* Reino Unido, Índia e Paquistão), as repercussões do tratamento da matéria se fizeram sentir nas Nações Unidas, na mesma época da apresentação do *Relatório Anual* da CIJ, como pude testemunhar pessoalmente na sede da ONU em Nova York. Isto ocorreu não só quando da apresentação (na Assembleia Geral e no Conselho de Segurança) do referido *Relatório Anual* de 2015-2016 (dos dois últimos semestres), mas também dias depois, quando a I Comissão da Assembleia Geral procedeu a uma memorável decisão.

Foi esta desencadeada por um projeto de resolução, originalmente apresentado por um grupo de seis países (África do Sul, Áustria, Brasil, Irlanda, México e Nigéria). Em declaração de 8 de outubro de 2016, o secretário-geral da ONU (Ban Ki-moon) assinalou ter sido o primeiro dos secretários-gerais da ONU a visitar o local dos testes nucleares de Semipalatinsk, tendo sido "uma experiência muito comovente e muito aterrorizante" ter estado "no meio deste centro de testes nucleares" da antiga União Soviética; acrescentou ter sido também o primeiro secretário-

12 *Ibid.*, pp. 276-277.

-geral da ONU a participar na cerimônia no Memorial da Paz em Hiroshima[13].

Nos debates da I Comissão da Assembleia Geral, várias delegações urgiram a que as fortunas gastas com armas nucleares deveriam ser desviadas para a luta contra a pobreza e em prol do desenvolvimento[14]. Em oito reuniões durante mais de dez dias, mais de 150 delegações participaram nos debates da I Comissão, sobre um vasto conjunto de questões urgindo o desarmamento nuclear e considerando aspectos da segurança internacional[15]. Numerosas delegações se pronunciaram em favor da convocação de uma conferência (em 2017) para iniciar a consideração de uma convenção proibindo as armas nucleares, com a resistência e oposição dos estados nuclearizados[16].

Conclamou-se, ainda nos referidos debates, pela expansão das zonas desnuclearizadas (cf. *supra*), de modo a abarcar também o Oriente Médio[17]. Também se expressou preocupação com o que ocorre atualmente na Península da Coreia[18], em vista dos recentes testes nucleares da Coreia do Norte. Ao concluir os prolongados debates, a I Comissão da Assembleia Geral adotou o projeto de resolução (doc. A/C.1/71/1.41)[19], convocando uma Conferência das Nações Unidas para negociar um tratado de proibição de armas

13 ONU, doc. SG/SM/18189-DC/3664, de 8.10.2016, p. 2.

14 ONU, doc. GA/DIS/3550, de 10.10.2016, pp. 1-10.

15 ONU, doc. GA/DIS/3552, de 12.10.2016, pp. 1-2. Quanto à preocupação com o terrorismo nuclear, cf. ONU, doc. GA/DIS/3553, de 13.10.2016, pp. 1-8.

16 ONU, doc. GA/DIS/3554, de 14.10.2016, pp. 1-10.

17 ONU, doc. GA/DIS/3563, de 27.10.2016, pp. 1-19.

18 ONU, doc. GA/DIS/3552, de 12.10.2016, p. 2.

19 O referido documento, emitido originalmente em 14.10.2016, intitula-se "*Taking Forward Multilateral Nuclear Disarmament Negotiations*", pp. 1-4.

nucleares, rumo à sua "total eliminação", para "alcançar um mundo livre de armas nucleares[20].

O referido projeto de resolução foi aprovado pela I Comissão da Assembleia Geral das Nações Unidas aos 27 de outubro de 2016, por 123 votos a 38, e 16 abstenções. Logo após, a V Comissão da Assembleia Geral passou a considerar (início de novembro de 2016) as implicações orçamentárias da referida proposta, antes de o plenário da Assembleia Geral tomar sua decisão sobre a mesma[21]. Como se vê, as repercussões nas Nações Unidas do tratamento da temática do desarmamento nuclear têm sido consideráveis, e cabe manter a atenção aos próximos passos a serem tomados, em benefício da humanidade como um todo.

Haia, 11.12.2016.

A.A.C.T.

20 ONU, doc. A/C.1/71/1.41, pp. 3-4, preâmbulo e pars. 8 e 12.

21 ONU, doc. A/C.5/71/12, de 4.11.2016, pp. 1-4.

ANEXO DOCUMENTAL – CORTE INTERNACIONAL DE JUSTIÇA, CASO DAS *OBRIGAÇÕES REFERENTES A NEGOCIAÇÕES RELATIVAS À CESSAÇÃO DA CORRIDA DAS ARMAS NUCLEARES E AO DESARMAMENTO NUCLEAR* (SENTENÇA DE 5.10.2016): VOTO DISSIDENTE DO JUIZ ANTÔNIO AUGUSTO CANÇADO TRINDADE / DISSENTING OPINION OF JUDGE ANTÔNIO AUGUSTO CANÇADO TRINDADE

Dissenting opinion of Judge Cançado Trindade

Table of Contents

Paragraphs

I. *Prolegomena* 1-4

II. The Existence of a Dispute before the Hague Court 5

1. Objective Determination by the Court 5-15

2. Existence of a Dispute in the *Cas d'Espèce* (case Marshall Islands *versus* United Kingdom) 16-19

3. The Threshold for the Determination of the Existence of a Dispute 20-25

4. Contentions in the Case of Marshall Islands *versus* United Kingdom 26

5. General Assessment 27-30

III. U.N. General Assembly Resolutions and *Opinio Juris* 31

1. U.N. General Assembly Resolutions on Nuclear Weapons (1961-1981) 32-37

2. U.N. General Assembly Resolutions on Freeze of Nuclear Weapons (1982-1992) 38-40

3. U.N. General Assembly Resolutions on Nuclear Weapons as Breach of the U.N. Charter (Acknowledgment before the ICJ, 1995) 41-44

4. U.N. General Assembly Resolutions Condemning Nuclear Weapons (1982-2015) 45-50

5. U.N. General Assembly Resolutions Following up the ICJ's 1996 Advisory Opinion (1996-2015) 51-56

IV. U.N. Security Council Resolutions and *Opinio Juris* 57-63

V. The Saga of the United Nations in the Condemnation of Nuclear Weapons 64-77

VI. U.N. Resolutions and the Emergence of *Opinio Juris*: The Positions of the Contending Parties 78-83

VII. Questions from the Bench and Responses from the Parties 84-88

VIII. Human Wickedness: From the XXIst Century Back to the Book of *Genesis* 89-118

IX. The Attention of the United Nations Charter to Peoples 119-127

X. Impertinence of the So-Called *Monetary Gold* "Principle" 128-131

XI. The Fundamental Principle of the Juridical Equality of States 132-135

XII. Unfoundedness of the Strategy of "Deterrence" 136-146

XIII. The Illegality of Nuclear Weapons and the Obligation of Nuclear Disarmament

1. The Condemnation of All Weapons of Mass Destruction 147-152

2. The Prohibition of Nuclear Weapons: The Need of a People-Centred Approach 153-171

3. The Prohibition of Nuclear Weapons: The Fundamental Right to Life 172-185

4. The Absolute Prohibitions of *Jus Cogens* and the Humanization of International Law 186-189

5. Pitfalls of Legal Positivism: A Rebuttal of the So-Called *Lotus* "Principle" 190-196

XIV. Recourse to the "Martens Clause" as an Expression of the *Raison d'Humanité* 197-205

XV. Nuclear Disarmament: Jusnaturalism, the Humanist Conception and the Universality of International Law 206-216

XVI. The Principle of Humanity and the Universalist Approach: *Jus Necessarium* Transcending the Limitations of *Jus Voluntarium* 217-229

XVII. NPT Review Conferences 230-245

XVIII. The Establishment of Nuclear-Weapon-Free Zones 246-258

XIX. Conferences on the Humanitarian Impact of Nuclear Weapons (2013-2014) 259-261

1. First Conference on the Humanitarian Impact of Nuclear Weapons 262-266

2. Second Conference on the Humanitarian Impact of Nuclear Weapons 267-275

3. Third Conference on the Humanitarian Impact of Nuclear Weapons 276-287

4. Aftermath: The "Humanitarian Pledge" 288-295

XX. Final Considerations: *Opinio Juris Communis* Emanating from Conscience (*Recta Ratio*), Well Above the "Will" 296-310

XXI. Epilogue: A Recapitulation 311-327

I. Prolegomena

1. I regret not to be able to accompany the Court's majority in the Judgment of today, 05.10.2016 in the present case of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands *versus* United Kingdom), whereby it has found that the existence of a dispute between the parties has not been established before it, and that the Court has no jurisdiction to consider the Application lodged with it by the Marshall Islands, and cannot thus proceed to the merits of the case. I entirely disagree with the present Judgment. As my dissenting position covers all points addressed in it, in its reasoning as well as in its resolutory points, I feel obliged, in the faithful exercise of the international judicial function, to lay on the records the foundations of my own position thereon.

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

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

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

II. The Existence of a Dispute before the Hague Court

1. Objective Determination by the Court

5. May I start by addressing the issue of the existence of a dispute before the Hague Court. In the *jurisprudence constante* of the Hague Court (PCIJ and ICJ), a dispute exists when there is

"a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons"[1]. Whether there exists a dispute is a matter for "objective determination" by the Court; the "mere denial of the existence of a dispute does not prove its non-existence"[2]. The Court must examine if "the claim of one party is positively opposed by the other"[3]. The Court further states that "a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not be stated *expressis verbis*"[4].

6. Along the last decade, the Court has deemed it fit to insist on its own faculty to proceed to the "objective determination" of the dispute. Thus, in the case of *Armed Activities on the Territory of the Congo* (D.R. Congo *versus* Rwanda, Jurisdiction and Admissibility, Judgment of 03.02.2006), for example, the ICJ has recalled that, as long ago as 1924, the PCIJ stated that "a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests" (case of *Mavrommatis Palestine Concessions,* Judgment of 30.08.1924, p. 11). It then added that

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

> *In order to establish the existence of a dispute, "it must be shown that the claim of one party is positively opposed by the other" (South West Africa, Preliminary*

1 PCIJ, case of *Mavrommatis Palestine Concessions,* Judgment of 30.08.1924, p. 11.

2 ICJ, Advisory Opinion (of 30.03.1950) on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania,* p. 74.

3 ICJ, *South-West Africa* cases (Ethiopia and Liberia *versus* South Africa, Judgment on Preliminary Objections of 21.12.1962), p. 328; ICJ, case of *Armed Activities on the Territory of the Congo* (New Application — 2002, D.R. Congo *versus* Rwanda, Judgment on Jurisdiction and Admissibility of 03.02.2006), p. 40, para. 90.

4 ICJ, *Land and Maritime Boundary between Cameroon and Nigeria* (Judgment on Preliminary Objections, of 11.06.1998), p. 275, para. 89.

> *Objections, Judgment, I.C.J. Reports 1962, p. 328); and further, "Whether there exists an international dispute is a matter for objective determination" (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 74; East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 100, para. 22; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 17, para. 22; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 122-123, para. 21; Certain Property (Liechtenstein v. Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005, p. 18, para. 24) (para. 90).*

7. Shortly afterwards, in its Judgment on Preliminary Objections (of 18.11.2008) in the case of the *Application of the Convention against Genocide* (Croatia *versus* Serbia), the ICJ has again recalled that

> *[i]n numerous cases, the Court has reiterated the general rule which it applies in this regard, namely: "the jurisdiction of the Court must normally be assessed on the date of the filing of the act instituting proceedings" (to this effect, cf. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), p. 613,*

> *para. 26; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 26, para. 44). (...) [I]t is normally by reference to the date of the filing of the instrument instituting proceedings that it must be determined whether those conditions are met.*
>
> *(...) "What is at stake is legal certainty, respect for the principle of equality and the right of a State which has properly seised the Court to see its claims decided, when it has taken all the necessary precautions to submit the act instituting proceedings in time. (....) [T]he Court must in principle decide the question of jurisdiction on the basis of the conditions that existed at the time of the institution of the proceedings. However, it is to be recalled that the Court, like its predecessor, has also shown realism and flexibility in certain situations in which the conditions governing the Court's jurisdiction were not fully satisfied when proceedings were initiated but were subsequently satisfied, before the Court ruled on its jurisdiction" (paras. 79-81).*

8. More recently, in its Judgment on Preliminary Objections (of 01.04.2011) in the case of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination – CERD* (Georgia *versus* Russian Federation), the ICJ has seen it fit, once again, to stress:

> *The Court recalls its established case law on that matter, beginning with the frequently quoted statement by the Permanent Court of International Justice in the Mavrommatis Palestine Concessions case in 1924:*

"A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons". (Judgment n. 2, 1924, PCIJ, Series A, n. 2, p. 11). Whether there is a dispute in a given case is a matter for "objective determination" by the Court (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 74). "It must be shown that the claim of one party is positively opposed by the other" (South West Africa (Ethiopia and Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328; and, most recently, Armed Activities on the Territory of the Congo (New Application: 2002, D.R. Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 40, para. 90). The Court's determination must turn on an examination of the facts. The matter is one of substance, not of form. As the Court has recognized (for example, Land and Maritime Boundary between Cameroon and Nigeria, Cameroon v. Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 315, para. 89), the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for. While the existence of a dispute and the undertaking of negotiations are distinct as a matter of principle, the negotiations may help demonstrate the existence of the dispute and delineate its subject-matter. The dispute must in principle exist at the time the Application is submitted to the Court (Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, Libyan Arab Jamahiriya v.

> *United Kingdom, Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 25-26, paras. 42-44; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, Libyan Arab Jamahiriya v. United States of America, Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 130-131, paras. 42-44) (...) (para. 30).*

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

10. Now, in the present case of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, the three respondent States (India, United Kingdom and Pakistan), seek to rely on a requirement of prior notification of the claim, or the test of prior awareness of the claim of the applicant State (the Marshall Islands), for a dispute to exist under the ICJ's Statute or general international law. Yet, nowhere can such a requirement be found in the Court's *jurisprudence constante* as to the existence of a dispute: quite on the contrary, the ICJ has made clear that the position or the

5 Cf. paras. 50-105, and esp. paras. 31, 61 and 104-105, of the Court's Judgment of 01.04.2011.

attitude of a party can be established by inference[6]. Pursuant to the Court's approach, it is not necessary for the respondent to oppose previously the claim by an express statement, or to express acknowledgment of the existence of a dispute.

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

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

> *As to the first preliminary objection, for example, the Court spent 92 paragraphs to concede that, in its view, a legal dispute at last crystallized, on 10 August 2008 (para. 93), only after the outbreak of an open and declared war between Georgia and Russia! I find that truly extraordinary: the emergence of a legal dispute only after the outbreak of widespread violence and war! Are there disputes which are quintessentially and ontologically legal, devoid of any political ingredients or considerations? I do not think so. The same formalistic reasoning leads the Court, in 70 paragraphs, to uphold*

6 ICJ, *Land and Maritime Boundary between Cameroon and Nigeria* (Judgment on Preliminary Objections, of 11.06.1998), p. 315, para. 89: "a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. In the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party".

> *the second preliminary objection, on the basis of alleged (unfulfilled) "preconditions" of its own construction, in my view at variance with its own* jurisprudence constante *and with the more lucid international legal doctrine (para. 161).*

13. Half a decade later, I was hopeful that the Court would distance itself from the formalistic approach it adopted in the case of the *Application of the CERD Convention*. As it regrettably has not done so, I feel obliged to reiterate here my dissenting position on the issue, this time in the present case of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*. In effect, there is no general requirement of prior notice of the applicant State's intention to initiate proceedings before the ICJ[7]. It should not pass unnoticed that the *purpose* of the need of determination of the existence of a dispute (and its object) before the Court is to enable this latter to exercise jurisdiction properly: it is not intended to protect the respondent State, but rather and more precisely to safeguard the proper exercise of the Court's judicial function.

14. There is no requirement under general international law that the contending parties must first "exhaust" diplomatic negotiations before lodging a case with, and instituting proceedings before, the Court (as a precondition for the existence of the dispute). There is no such requirement in general international law, nor in the ICJ's Statute, nor in the Court's case-law. This is precisely what the ICJ held in its Judgment on Preliminary Objections (of 11.06.1998) in the case of *Land and Maritime Boundary between Cameroon and Nigeria*: it clearly stated that

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

> *Neither in the Charter nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court (para. 56).*

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

2. Existence of a Dispute in the *Cas d'Espèce* (case Marshall Islands *versus* United Kingdom)

16. In the present case opposing the Marshall Islands to the United Kingdom, there were two sustained and quite distinct courses of conduct of the two contending parties, evidencing their distinct legal positions (as to the duty of negotiations leading to nuclear disarmament in all its aspects under strict and effective international control), which suffice for the determination of the existence of a dispute. The Marshall Islands drew attention to the fact that the United Kingdom has consistently opposed the commencement of multilateral negotiations on nuclear disarmament[8], and has voted against General Assembly resolutions

8 Cf. *W[ritten Statement]* of the M.I., para. 40.

reaffirming the obligations recognized in the 1996 ICJ Advisory Opinion and calling for negotiations on nuclear disarmament[9].

17. There were thus opposing views of the contending parties as to their divergent voting records in respect of the aforementioned General Assembly resolutions[10]. The primary articulation of the Marshall Islands' claim was its declaration in the Conference of Nayarit on 14.02.2014, wherein the Marshall Islands contested the legality of the conduct of the nuclear-weapon States [NWS], (including the United Kingdom), under the NPT and customary international law. The fact that the Marshall Islands' declaration was addressed to a plurality of States (namely "all States possessing nuclear arsenals"), and not to the United Kingdom individually, in my perception does not affect the existence of a dispute.

18. States possessing nuclear weapons are a small and easily identifiable group of States – to which the United Kingdom belongs – of the international community. The Marshall Islands' declaration was made with sufficient clarity to enable all NWS, including the United Kingdom, to consider the existence of a dispute concerning the theme; the Marshall Islands' declaration clearly identified the legal basis of the claim and the conduct complained of. Likewise, the fact that the United Kingdom was not present at the Conference of Nayarit of 2014 does not prejudice the opposition of legal views between the Marshall Islands and the United Kingdom.

19. There is a consistent course of distinct conducts by the two contending parties. This is followed by a claim, as to the substance of the matter at issue. This is sufficient for a dispute

9 Cf. resolutions A/RES/68/32, A/RES/68/42, and A/RES/68/47 of 05.12.2013; A/RES/69/58, A/RES/69/43, and A/RES/69/48 of 02.12.2014; A/RES/70/34, A/RES/70/56, and A/RES/70/52 of 07.12.2015.

10 Response of the Marshall Islands to the questions addressed by Judge Cançado Trindade to both Parties, *in*: ICJ doc. CR 2016/13, para. 9.

to crystallize; nothing more is required. The United Kingdom's subsequent submissions before the ICJ confirm the opposition of legal views: suffice it to mention that the United Kingdom stated that the allegations brought by the Marshall Islands are "manifestly unfounded on the merits"[11]: this is a clear opposition to the Marshall Islands' claim. A dispute already existed on the date of filing of the Application in the *cas d'espèce*, and the subsequent arguments of the parties before the Court confirm that.

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

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

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

11 *Preliminary Objections* of the U.K., para. 5.

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

22. The view taken by the Court's majority in the present case contradicts the Hague Court's (PCIJ and ICJ) own earlier case-law, in which it has taken a much less formalistic approach to the establishment of the existence of a dispute. Early in its life, the PCIJ made clear that it did not attach much importance to "matters of form"[12]; it added that it could not "be hampered by a mere defect of form"[13]. The PCIJ further stated that "the manifestation of the existence of the dispute in a specific manner, as for instance by diplomatic negotiations, is not required. (...) [T]he Court considers that it cannot require that the dispute should have manifested itself in a formal way"[14].

23. The ICJ has, likewise, in its own case-law, avoided to take a very formalistic approach to the determination of the existence of a dispute[15]. May I recall, in this respect, *inter alia*, as notable

12 PCIJ, case of *Mavrommatis Palestine Concessions*, Judgment of 30.08.1924, p. 34.

13 PCIJ, case of *Certain German Interests in Polish Upper Silesia* case (Jurisdiction), Judgment of 25.08.1925, p. 14.

14 PCIJ, case of *Interpretation of Judgments ns. 7 and 8 — Chorzów Factory*, Judgment of 16.12.1927, pp. 10-11.

15 Cf., e.g., ICJ, Advisory Opinion (of 26.04.1988) on the *Applicability of the Obligation to Arbitrate under Section 21 of the U.N. Headquarters Agreement of 26.06.1947*, pp. 28-29, para. 38; ICJ, case of *Nicaragua versus United States* (Jurisdiction and Admissibility), Judgment of 26.11.1984, pp. 428-429, para. 83. Moreover, the critical date for the determination of the existence of a dispute is, "in principle" (as the ICJ says), the date on which the application is submitted to the Court (ICJ, case of *Questions Relation to the Obligation to Prosecute or Extradite*, Judgment of 20.07.2012, p. 20, para. 46; ICJ, case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, Preliminary Objections, Judgment of 17.03.2016, p. 25, para. 52); the ICJ's phraseology shows that this is not a strict rule, but rather one to be approached with flexibility.

examples, the Court's *obiter dicta* on the issue, in the cases of *East Timor* (Portugal *versus* Australia), of the *Application of the Convention against Genocide* (Bosnia *versus* Yugoslavia), and of *Certain Property* (Liechtenstein *versus* Germany). In those cases, the ICJ has considered that conduct post-dating the critical date (i.e., the date of the filing of the Application) supports a finding of the existence of a dispute between the parties. In the light of this approach taken by the ICJ itself in its earlier case-law, it is clear that a dispute exists in each of the present cases lodged with it by the Marshall Islands.

24. In the case of *East Timor* (1995), in response to Australia's preliminary objection that there was no dispute between itself and Portugal, the Court stated: "Portugal has, rightly or wrongly, formulated complaints of fact and law against Australia which the latter has denied. By virtue of this denial, there is a legal dispute"[16]. Shortly afterwards, in the case of the *Application of the Convention against Genocide* (Preliminary Objections, 1996), in response to Yugoslavia's preliminary objection that the Court did not have jurisdiction under Article IX of the Convention against Genocide because there was no dispute between the Parties, the Court, contrariwise, found that there was a dispute between them, on the basis that Yugoslavia had "wholly denied all of Bosnia and Herzegovina's allegations, whether at the stage of proceedings relating to the requests for the indication of provisional measures, or at the stage of the (...) proceedings relating to [...preliminary] objections"[17]. Accordingly, "by reason of the rejection by Yugoslavia

16 ICJ, case of *East Timor* (Portugal *versus* Australia), *I.C.J. Reports 1995*, p. 100, para. 22 (Judgment of 30.06.1995).

17 ICJ, case of the *Application of the Convention against Genocide* (Bosnia-Herzegovina *versus* Yugoslavia, Preliminary Objections, Judgment of 11.07.1996), *I.C.J. Reports 1996*, pp. 595 and 614-615, paras. 27-29.

of the complaints formulated against it"[18], the ICJ found that there was a dispute.

25. In the case of *Certain Property* (Preliminary Objections, 2005), as to Germany's preliminary objection that there was no dispute between the parties, the ICJ found that complaints of fact and law formulated by Liechtenstein were denied by Germany; accordingly, "[i]n conformity with well-established jurisprudence", – the ICJ concluded, – "by virtue of this denial", there was a legal dispute between Liechtenstein and Germany[19]. Now, in the present proceedings before the Court, in each of the three cases lodged with the ICJ by the Marshall Islands (against India, the United Kingdom and Pakistan), the respondent States have expressly denied the arguments of the Marshall Islands. May we now take note of the denials which, on the basis of the Court's aforementioned *jurisprudence constante*, evidence the existence of a dispute between the contending parties[20].

4. Contentions in the Case of Marshall Islands *versus* United Kingdom

26. The Marshall Islands argues that the United Kingdom has violated its obligations under Article VI of the NPT as well as its obligations under customary international law with regard to nuclear disarmament and the cessation of the nuclear arms race[21]. Although the United Kingdom's *Preliminary Objections* do not

18 *Ibid*., p. 615, para. 29.

19 ICJ, case of *Certain Property* (Liechtenstein *versus* Germany, Preliminary Objections, Judgment of 10.02.2005), *I.C.J. Reports 2005* p. 19, para. 25, citing the Court's Judgments in the cases of *East Timor*, *I.C.J. Reports 1995*, p. 100, para. 22; and of the *Application of the Convention against Genocide* (Preliminary Objections), *I.C.J. Reports 1996,* p. 615, para. 29.

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

21 *Application Instituting Proceedings* of the Marshall Islands, pp. 35-6, paras. 100-109.

address the merits of the dispute, there is one statement by the United Kingdom that reveals a dispute between the Parties:

> *The silence by the Marshall Islands vis-à-vis the UK on nuclear disarmament issues comes against a backdrop of both a progressive unilateral reduction by the UK of its own nuclear arsenal, (...), and of active UK engagement in efforts, inter alia, to secure and extend nuclear-weapon-free zones around the world. The UK is a party to the Protocols to the Treaty of Tlatelolco, the Treaty of Rarotonga and the Treaty of Pelindaba, addressing, respectively, nuclear-weapon-free zones in Latin America and the Caribbean, the South Pacific, and Africa. The UK has ratified the Protocol to the Treaty on a Nuclear-Weapon-Free Zone in Central Asia and continues to engage with the States Parties to the Treaty on the Southeast Asia Nuclear-Weapon-Free Zone. The UK signed the Comprehensive Nuclear Test Ban Treaty on the first day it was opened for signature and was, alongside France, the first nuclear-weapon State to become a party to it. Beyond this, the UK is leading efforts to develop verification technologies to ensure that any future nuclear disarmament treaty will apply under strict and effective international control.*
>
> *Against this background, the Marshall Islands' Application instituting proceedings against the UK alleging a breach inter alia of Article VI of the NPT, and of asserted parallel obligations of customary international law, came entirely out of the blue. The United Kingdom considers the allegations to be manifestly unfounded on the merits.*[22]

22 *Preliminary Objections* of the United Kingdom, pp. 2-3, paras. 4-5.

5. General Assessment

27. Always attentive and over-sensitive to the position of nuclear-weapon States [NWS] (cf. part XIII, *infra*), – such as the respondent States in the present cases of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (India, United Kingdom and Pakistan), – the Court, in the *cas d'espèce*, dismisses the statements made by the Marshall Islands in multilateral *fora* before the filing of the Application, as being, in its view, insufficient to determine the existence of a dispute. Moreover, the Court's split majority makes *tabula rasa* of the requirement that "in principle" the date for determining the existence of the dispute is the date of filing of the application (case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, Nicaragua *versus* Colombia, Preliminary Objections, Judgment of 17.03.2016, para. 52); as already seen, in its case-law the ICJ has taken into account conduct post-dating that critical date (cf. *supra*).

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

29. This attempt to heighten still further the threshold for the determination of the existence of a dispute (requiring further

factual precisions from the applicant) is, besides formalistic, artificial: it does not follow from the definition of a dispute in the Court's *jurisprudence constante*, as being "a conflict of legal views or of interests", as already seen (cf. *supra*). The Court's majority formalistically requires a specific reaction of the respondent State to the claim made by the applicant State (in applying the criterion of "awareness", amounting, in my perception, to an obstacle to access to justice), even in a situation where, as in the *cas d'espèce*, there are two consistent and distinct courses of conduct on the part of the contending parties.

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

III. U.N. General Assembly Resolutions and *Opinio Juris*

31. In the course of the proceedings in the present cases of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, both the applicant State (the Marshall Islands) and the respondent States (India, United Kingdom and Pakistan) addressed U.N. General Assembly resolutions on the matter of nuclear disarmament (cf. part VI, *infra*). This is the point that I purport to consider, in sequence, in the present Dissenting Opinion, namely, in addition to the

acknowledgment before the ICJ (1995) of the authority and legal value of General Assembly resolutions on nuclear weapons as breach of the U.N. Charter, the distinct series of: a) U.N. General Assembly resolutions on Nuclear Weapons (1961-1981); b) UN General Assembly Resolutions on Freeze of Nuclear Weapons (1982-1992); c) U.N. General Assembly Resolutions Condemning Nuclear Weapons (1982-2015); d) U.N. General Assembly Resolutions Following up the ICJ's 1996 Advisory Opinion (1996-2015).

1. U.N. General Assembly Resolutions on Nuclear Weapons (1961-1981)

32. The 1970s was the First Disarmament Decade: it was so declared by General Assembly resolution A/RES/2602 E (XXIV) of 16.12.1969, followed by two other resolutions of 1978 and 1980 on non-use of nuclear weapons and prevention of nuclear war[23]. The General Assembly specifically called upon States to intensify efforts for the cessation of the nuclear arms race, nuclear disarmament and the elimination of other weapons of mass destruction. Even before that, the ground-breaking General Assembly resolution 1653 (XVI), of 24.11.1961, advanced its *célèbre* "Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons" (cf. part V, *infra*). In 1979, when the First Disarmament Decade was coming to an end, the General Assembly, – disappointed that the objectives of the first Decade had not been realized, – declared the 1980s as a Second Disarmament Decade[24]. Likewise, the 1990s were subsequently declared the Third Disarmament Decade[25].

23 Namely, in sequence, General Assembly resolutions A/RES/33/71B of 14.12.1978, and A/RES/35/152D of 12.12.1980.

24 Cf. General Assembly resolutions A/RES/34/75 of 11.12.1979, and A/RES/35/46 of 03.12.1980.

25 Cf. General Assembly resolutions A/RES/43/78L of 07.12.1988, and A/RES/45/62 A of 04.12.1990.

33. In this first period under review (1961-1981), the U.N. General Assembly paid continuously special attention to disarmament issues and to nuclear disarmament in particular. May I refer to General Assembly resolutions

A/RES/2934 of 29.11.1972; A/RES/2936 of 29.11.1972; A/RES/3078 of 06.12.1973; A/RES/3257 of 09.12.1974; A/RES/3466 of 11.12.1975; A/RES/3478 of 11.12.1975; A/RES/31/66 of 10.12.1976; A/RES/32/78 of 12.12.1977; A/RES/33/71 of 14.12.1978; A/RES/33/72 of 14.12.1978; A/RES/33/91 of 16.12.1978; A/RES/34/83 of 11.12.1979; A/RES/34/84 of 11.12.1979; A/RES/34/85 of 11.12.1979; A/RES/34/86 of 11.12.1979; A/RES/35/152 of 12.12.1980; A/RES/35/155 of 12.12.1980; A/RES/35/156 of 12.12.1980; A/RES/36/81 of 09.12.1981; A/RES/36/84 of 09.12.1981; A/RES/36/92 of 09.12.1981; A/RES/36/94 of 09.12.1981; A/RES/36/95 of 09.12.1981; A/RES/36/97 of 09.12.1981; and A/RES/36/100 of 09.12.1981.

34. In 1978 and 1982, the U.N. General Assembly held two Special Sessions on Nuclear Disarmament (respectively, the 10th and 12th sessions), where the question of nuclear disarmament featured prominently amongst the themes discussed. In fact, it was stressed that the most immediate goal of disarmament is the elimination of the danger of a nuclear war. In a subsequent series of its resolutions (in the following period of 1982-2015), as we shall see, the General Assembly moved on straightforwardly to the condemnation of nuclear weapons (cf. *infra*).

35. In its resolutions adopted during the present period of 1972-1981, the General Assembly repeatedly drew attention to the dangers of the nuclear arms race for humankind and the survival of civilization and expressed apprehension concerning the harmful consequences of nuclear testing for the acceleration of such arms race. Thus, the General Assembly reiterated its

condemnation of all nuclear weapon tests, in whatever environment they may be conducted. It called upon States that had not yet done so to adhere to the 1963 Test Ban Treaty (banning nuclear tests in the atmosphere, in outer space and under water) and called for the conclusion of a comprehensive test ban treaty, which would ban nuclear weapons tests in all environments (e.g. underground as well). Pending the conclusion of such treaty, it urged NWS to suspend nuclear weapon tests in all environments.

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

37. At the 84th plenary meeting, following the 10th Special Session on Disarmament, the General Assembly declared that the use of nuclear weapons is a "violation of the Charter of the United Nations" and "a crime against humanity", and that the use of nuclear weapons should be prohibited, pending nuclear disarmament[26]. The General Assembly further noted the aspiration of non-nuclear-weapon States [NNWS] to prevent nuclear weapons from being stationed on their territories through the establishment of nuclear-weapon-free zones, and supported their efforts to conclude an international Convention strengthening the guarantees for their security against the use or threat of use of nuclear weapons. As part of the measures to facilitate the process of nuclear disarmament and the non-proliferation of nuclear

26 Cf. General Assembly resolutions A/RES/33/71B of 14.12.1978, and A/RES/35/152D of 12.12.1980.

weapons, it requested the Committee on Disarmament to consider the question of the cessation and prohibition of the production of fissionable material for weapons purposes.

2. U.N. General Assembly Resolutions on Freeze of Nuclear Weapons (1982-1992)

38. Every year in the successive period 1982-1992 (following up on the 10th and 12th Special Sessions on Nuclear Disarmament, held in 1978 and 1982, respectively), the General Assembly adopted resolutions also calling for a nuclear-weapons freeze. May I refer to General Assembly resolutions

A/RES/37/100A of 13.12.1982; A/RES/38/73E of 15.12.1983; A/RES/39/63C of 12.12.1984; A/RES/40/151C of 16.12.1985; A/RES/41/60E of 03.12.1986; A/RES/42/39B of 30.11.1987; A/RES/43/76B of 07.12.1988; A/RES/44/117D of 15.12.1989; A/RES/45/59D of 04.12.1990; A/RES/46/37C of 06.12.1991; and A/RES/47/53E of 09.12.1992.

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

40. Such nuclear-weapons freeze is not seen as an end in itself but as the most effective first step towards: a) halting any

further increase and qualitative improvement in the existing arsenals of nuclear weapons; and b) activating negotiations for the substantial reduction and qualitative limitation of nuclear weapons. From 1989 onwards, these resolutions also set out the structure and scope of the prospective joint declaration through which all nuclear-weapons States would agree on a nuclear-arms freeze. Such freeze would encompass: a) a comprehensive test ban; b) cessation of the manufacture of nuclear weapons; c) a ban on all further deployment of nuclear weapons; and d) cessation of the production of fissionable material for weapons purposes.

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

41. Two decades ago, when U.N. General Assembly resolutions condemning nuclear weapons were not as numerous as they are today, they were already regarded as authoritative in the views of States from distinct continents. This was made clear, e.g., by States which participated in the advisory proceedings of 30 October to 15 November 1995 before the ICJ, conducive to its Advisory Opinion of 08.07.1996 on the *Threat or Use of Nuclear Weapons*. On the occasion, the view was upheld that those General Assembly resolutions expressed a "general consensus" and had a relevant "legal value"[27]. Resolution 1653 (XVI), of 1961, e.g., was invoked as a "law-making" resolution of the General Assembly, in stating that the use of nuclear weapons is contrary to the letter and spirit, and aims, of the United Nations, and, as such, a "direct violation" of the U.N. Charter[28].

27 ICJ, doc. CR 95/25, of 03.11.1995, pp. 52-53 (statement of Mexico).

28 ICJ, doc. CR 95/22, of 30.10.1995, pp. 44-45 (statement of Australia).

42. It was further stated that, already towards the end of 1995, "numerous" General Assembly resolutions and declarations confirmed the illegality of the use of force, including nuclear weapons[29]. Some General Assembly resolutions (1653 (XVI), of 24.11.1961; 33/71B of 14.12.1978; 34/83G of 11.12.1979; 35/152D of 12.12.1980; 36/92I of 09.12.1981; 45/59B of 04.12.1990; 46/37D of 06.12.1991) were singled out for having significantly declared that the use of nuclear weapons would be a violation of the U.N. Charter itself[30]. The view was expressed that the series of General Assembly resolutions (starting with resolution 1653 (XVI), of 24.11.1961) amounted to "an authoritative interpretation" of humanitarian law treaties as well as the U.N. Charter[31].

43. In the advisory proceedings of 1995 before the ICJ, it was further recalled that General Assembly resolution 1653 (XVI) of 1961 was adopted in the form of a declaration, being thus "an assertion of the law", and, ever since, the General Assembly's authority to adopt such declaratory resolutions (in condemnation of nuclear weapons) was generally accepted; such resolutions declaring the use of nuclear weapons "unlawful" were regarded as ensuing from the exercise of an "inherent" power of the General Assembly[32]. The relevance of General Assembly resolutions has been reckoned by large groups of States[33].

44. Ever since the aforementioned acknowledgment of the authority and legal value of General Assembly resolutions in the course of the pleadings of late 1995 before the ICJ, those resolutions

29 ICJ, doc. CR 95/26, of 06.11.1995, pp. 23-24 (statement of Iran).

30 ICJ, doc. CR 95/28, of 09.11.1995, pp. 62-63 (statement of the Philippines).

31 ICJ, doc. CR 95/31, of 13.11.1995, p. 46 (statement of Samoa).

32 ICJ, doc. CR 95/27, of 07.11.1995, pp. 58-59 (statement of Malaysia).

33 Cf., e.g., ICJ, doc. CR 95/35, of 15.11.1995, p. 34, and cf. p. 22 (statement of Zimbabwe, on its initiative as Chair of the Non-Aligned Movement).

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

4. U.N. General Assembly Resolutions Condemning Nuclear Weapons (1982-2015)

45. In the period 1982-2015, there is a long series of U.N. General Assembly resolutions condemning nuclear weapons. May I refer to General Assembly resolutions

A/RES/37/100C of 09.12.1982; A/RES/38/73G of 15.12.1983;
A/RES/39/63H of 12.12.1984; A/RES/40/151F of 16.12.1985;
A/RES/41/60F of 03.12.1986; A/RES/42/39C of 30.11.1987;
A/RES/43/76E of 07.12.1988; A/RES/44/117C of 15.12.1989;
A/RES/45/59B of 04.12.1990; A/RES/46/37D of 06.12.1991;
A/RES/47/53C of 09.12.1992; A/RES/48/76B of 16.12.1993;
A/RES/49/76E of 15.12.1994; A/RES/50/71E of 12.12.1995;
A/RES/51/46D of 10.12.1996; A/RES/52/39C of 09.12.1997;
A/RES/53/78D of 04.12.1998; A/RES/54/55D of 01.12.1999;
A/RES/55/34G of 20.11.2000; A/RES/56/25B of 29.11.2001;
A/RES/57/94 of 22.11.2002; A/RES/58/64 of 08.12.2003;
A/RES/59/102 of 03.12.2004; A/RES/60/88 of 08.12.2005;
A/RES/61/97 of 06.12.2006; A/RES/62/51 of 05.12.2007;
A/RES/63/75 of 02.02.2008; A/RES/64/59 of 02.12.2009;
A/RES/65/80 of 08.12.2010; A/RES/66/57 of 02.12.2011;
A/RES/67/64 of 03.12.2012; A/RES/68/58 of 05.12.2013;
A/RES/69/69 of 02.12.2014; and A/RES/70/62 of 07.12.2015.

46. In those resolutions, the General Assembly warned against the threat by nuclear weapons to the survival of humankind. They

were preceded by two ground-breaking historical resolutions, namely, General Assembly resolution 1(I) of 24.01.1946, and General Assembly resolution 1653 (XVI), of 24.11.1961 (cf. *infra*). In this new and long series of resolutions condemning nuclear weapons (1982-2015), at the opening of their preambular paragraphs the General Assembly states, year after year, that it is

> Alarmed *by the threat to the survival of mankind and to the life-sustaining system posed by nuclear weapons and by their use, inherent in the concepts of deterrence,*
>
> Convinced *that nuclear disarmament is essential for the prevention of nuclear war and for the strengthening of international peace and security,*
>
> Further *convinced that a prohibition of the use or threat of use of nuclear weapons would be a step towards the complete elimination of nuclear weapons leading to general and complete disarmament under strict and effective international control.*

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

> *the use of nuclear weapons would be a violation of the Charter of the United Nations and a crime against humanity, as declared in its resolutions 1653 (XVI) of 24.11.1961, 33/71B of 14.12.1978, 34/83G of 11.12.1979, 35/152D of 12.12.1980 and 36/92I of 09.12.1981.*

48. Still in their preambular paragraphs, those General Assembly resolutions further *note with regret* the inability of the Conference on Disarmament to undertake negotiations with a view to achieving agreement on a nuclear disarmament Convention during each previous year. In their operative part,

those resolutions reiterate, year after year, the request that the Committee on Disarmament undertakes, on a priority basis, negotiations aiming at achieving agreement on an international Convention prohibiting the use or threat of use of nuclear weapons under any circumstances, taking as a basis the text of the draft Convention on the Prohibition of the Use of Nuclear Weapons.

49. From 1989 (44th session) onwards, those resolutions begin to note specifically that a multilateral agreement prohibiting the use or threat of use of nuclear weapons should strengthen international security and help to create the climate for negotiations leading to the complete elimination of nuclear weapons. Subsequently, those resolutions come to stress, in particular, that an international Convention would be a step towards the complete elimination of nuclear weapons, leading to general and complete disarmament, under strict and effective international control.

50. Clauses of the kind then evolve, from 1996 onwards[34], to refer expressly to a time framework, i.e., that an international Convention would be an important step in a phased programme towards the complete elimination of nuclear weapons, within a specific framework of time. More recent resolutions also expressly refer to the determination to achieve an international Convention prohibiting the development, production, stockpiling and use of nuclear weapons, leading to their ultimate destruction.

5. U.N. General Assembly Resolutions Following up the ICJ's 1996 Advisory Opinion (1996-2015)

51. Ever since the delivery, on 08.07.1996, of the ICJ's Advisory Opinion on *Nuclear Weapons* to date, the General Assembly has been adopting a series of resolutions (1996-2015), as its follow up. May I refer to General Assembly resolutions

34 Cf., e.g., *inter alia*, General Assembly resolution A/RES/50/71E, of 12.12.1995.

A/RES/51/45 of 10.12.1996; A/RES/52/38 of 09.12.1997; A/RES/53/77 of 04.12.1998; A/RES/54/54 of 01.12.1999; A/RES/55/33 of 20.11.2000; A/RES/56/24 of 29.11.2001; A/RES/57/85 of 22.11.2002; A/RES/58/46 of 08.12.2003; A/RES/59/83 of 03.12.2004; A/RES/60/76 of 08.12.2005; A/RES/61/83 of 06.12.2006; A/RES/62/39 of 05.12.2007; A/RES/63/49 of 02.12.2008; A/RES/64/55 of 02.12.2009; A/RES/65/76 of 08.12.2010; A/RES/66/46 of 02.12.2011; A/RES/67/33 of 03.12.2012; A/RES/68/42 of 05.12.2013; A/RES/69/43 of 02.12.2014; and A/RES/70/56 of 07.12.2015.

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

53. The General Assembly then recalls, again and again, that "the solemn obligations of States Parties, undertaken in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), particularly to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament" (4th preambular paragraph). They express the goal of achieving a legally binding prohibition on the development, production, testing, deployment, stockpiling, threat or use of nuclear weapons, and their destruction under "effective international control". They significantly call upon *all States* to fulfil promptly the obligation leading to an early conclusion of a Convention prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination[35].

54. Those resolutions (from 2003 onwards) express deep concern at the lack of progress made in the implementation of the "thirteen steps" agreed to, at the 2000 Review Conference, for the implementation of Article VI of the NPT. The aforementioned series of General Assembly resolutions include, from 2010 onwards, an additional (6th) preambular paragraph, expressing "deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons", and reaffirming, in this context, "the need for all States at all times to comply with applicable international law, including international humanitarian law". Those follow-up General Assembly resolutions further recognize "with satisfaction that the Antarctic Treaty, the Treaties of Tlatelolco, Rarotonga, Bangkok and Pelindaba, and the Treaty on a Nuclear-Weapon-Free Zone in Central Asia, as well as Mongolia's nuclear-weapon-free status, are gradually freeing the entire southern hemisphere and

35 Note that in earlier resolutions, the following year is explicitly referenced, i.e., States should commence negotiations in "the following year". This reference is removed in later resolutions.

adjacent areas covered by those treaties from nuclear weapons" (10th preambular paragraph).

55. More recent resolutions (from 2013 onwards) are significantly further expanded. They call upon all NWS to undertake concrete disarmament efforts, stressing that all States need to make special efforts to achieve and maintain a world without nuclear weapons. They also take note of the "Five-Point Proposal on Nuclear Disarmament" made by the U.N. Secretary-General (cf. part XVII, *infra*), and recognize the need for a multilaterally negotiated and legally binding instrument to assure that NNWS stand against the threat or use of nuclear weapons, pending the total elimination of nuclear weapons. In their operative part, the same series of General Assembly resolutions underline the ICJ's unanimous conclusion, in its 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons*, that "there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control" (para. 1).

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

absence of any references to a treaty or other specifically-imposed international obligation, this thus points towards a customary law obligation to negotiate and achieve nuclear disarmament.

IV. U.N. Security Council Resolutions and *Opinio Juris*

57. Like the U.N. General Assembly, the U.N. Security Council has also often dwelt upon the matter at issue. May I refer, *inter alia*, to Security Council resolutions S/23500, of 31.01.1992; S/RES/984, of 11.04.1995; S/RES/1540, of 28.04.2004; S/RES/1673, of 27.04.2006; S/RES/1810, of 25.04.2008; S/RES/1887, of 24.09.2009; and S/RES/1997, of 20.04.2011, — to which others can be added[36]. May I at first recall that, at a Security Council's meeting at the level of Heads of State and Government, held on 31.01.1992, the President of the U.N. Security Council made a statement on behalf of the members of the Security Council that called upon all member States to fulfil their obligations on matters of arms control and disarmament, and to prevent the proliferation of all weapons of mass destruction[37] (encompassing nuclear, chemical, and biological weapons).

58. The statement expressed the feeling prevailing at the time that the end of the Cold War "has raised hopes for a safer, more equitable and more humane world", giving now to the world "the best chance of achieving international peace and security since the foundation of the United Nations"[38]. The members of the Security Council then warned against the threat to international peace and

36 Cf. also Security Council resolutions S/RES/1695 of 15.07.2006; S/RES/1718 of 14.10.2006; S/RES/1874 of 12.06.2009; S/RES/1928 of 07.06.2010; S/RES/2094 of 07.03.2013; S/RES/2141 of 05.03.2014; S/RES/2159 of 09.06.2014; S/RES/2224 of 09.06.2015; S/RES/2270 of 02.03.2016. In preambular paragraphs of all these Security Council resolutions, the Security Council reaffirms, time and time again, that the proliferation of nuclear, chemical and biological weapons, and their means of delivery, constitutes a threat to international peace and security.

37 U.N. doc. S/23500, of 31.01.1992, pp. 1-5.

38 *Ibid*., pp. 2 and 5.

security of all weapons of mass destruction, and expressed their commitment to take appropriate action to prevent "the spread of technology related to the research for or production of such weapons"[39]. They further stressed the importance of "the integral role in the implementation" of the NPT of "fully effective IAEA safeguards", and of "effective export controls"; they added that they would take "appropriate measures in the case of any violations notified to them by the IAEA"[40].

59. The proliferation of all weapons of mass destruction is defined in the aforementioned Security Council statement, notably, as a threat to international peace and security, — a point which was to be referred to, in subsequent resolutions of the Security Council, to justify its action under Chapter VII of the U.N. Charter. In three of its subsequent resolutions, in a preambular paragraph (resolutions 1540, of 28.04.2004, para. 2; 1810, of 25.04.2008, para. 3; and 1887, of 24.09.2009, para. 2), the Security Council reaffirms the statement of its President (adopted on 31.01.1992), and, also in other resolutions, further asserts (also in preambular paragraphs) that the proliferation of nuclear, chemical and biological weapons is a threat to international peace and security[41] and that all States need to take measures to prevent such proliferation.

60. In resolution 1540/2004 of 28.04.2004, adopted by the Security Council acting under chapter VII of the U.N. Charter, it sets forth legally binding obligations on all U.N. member States to set up and enforce appropriate and effective measures against

39 *Ibid.*, p. 4.

40 *Ibid.*, p. 4.

41 Cf. e.g. Security Council resolutions 1540, of 28.04.2004; 1673, of 27.04.2006; 1810, of 25.04.2008; 1977, of 20.04.2011. And cf. also resolutions 1695, of 15.07.2006; 1718, of 14.10.2006; 1874, of 12.06.2009; 1928, of 07.06.2010; 2094, of 07.03.2013; 2141, of 05.03.2014; 2159, of 09.06.2014; 2224, of 09.06.2015; and 2270, of 02.03.2016.

the proliferation of nuclear, chemical, and biological weapons, – including the adoption of controls and a reporting procedure for U.N. member States to a Committee of the Security Council (sometimes referred to as the "1540 Committee"). Subsequent Security Council resolutions reaffirm resolution 1540/2004 and call upon U.N. member States to implement it.

61. The U.N. Security Council refers, in particular, in two of its resolutions (984/1995, of 11.04.1995; and 1887/2009 of 24.09.2009), to the obligation to pursue negotiations in good faith in relation to nuclear disarmament. In its preamble, Security Council resolution 984/1995 affirms the need for all States Parties to the NPT "to comply fully with all their obligations"; in its operative part, it further "[u]rges all States, as provided for in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, to pursue negotiations in good faith on effective measures relating to nuclear disarmament and on a treaty on general and complete disarmament under strict and effective international control which remains a universal goal" (para. 8). It should not pass unnoticed that Security Council resolution 984/1995 pre-dates the ICJ's 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons*.

62. And Security Council resolution 1887/2009 of 24.09.2009, in its operative part, again calls upon States Parties to the NPT "to comply fully with all their obligations and fulfil their commitments under the Treaty" (para. 2), and, in particular, "pursuant to Article VI of the Treaty, to undertake to pursue negotiations in good faith on effective measures relating to nuclear arms reduction and disarmament"; furthermore, it calls upon "all other States to join in this endeavour" (para. 5). It should not pass unnoticed that it is a general call, upon all U.N. member States, whether or not Parties to the NPT.

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

V. The Saga of the United Nations in the Condemnation of Nuclear Weapons

64. The U.N. resolutions (of the General Assembly and the Security Council) that I have just reviewed (*supra*) portray the United Nations' longstanding saga in the condemnation of nuclear weapons. This saga goes back to the birth and earlier years of the United Nations. In fact, nuclear weapons were not in the minds of the Delegates to the San Francisco Conference of June 1945, at the time when the United Nations Charter was adopted on 26.06.1945. The U.S. dropping of atomic bombs over Hiroshima and Nagasaki, heralding the nuclear age, occurred on 06 and 09 August 1945, respectively, over ten weeks before the U.N. Charter's entry into force, on 24.10.1945.

65. As soon as the United Nations Organization came into being, it promptly sought to equip itself to face the new challenges of the nuclear age: the General Assembly's very first resolution, – resolution 1(I) of 24.01.1946, – thus, established a Commission to deal with the matter, entrusted with submitting reports to the Security Council "in the interest of peace and security" (para. 2(a)),

as well as with making proposals for "control of atomic energy to the extent necessary to ensure its use only for peaceful purposes", and for "the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction" (para. 5(b)(c)).

66. One decade later, in 1956, the International Atomic Energy Agency (IAEA) was established. And half a decade later, in 1961, the General Assembly adopted a ground-breaking resolution: it would be proper here to recall the precise terms of the historical General Assembly resolution 1653 (XVI), of 24.11.1961, titled "Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons". That célèbre resolution 1653 (1961) remains contemporary today, and, 55 years later, continues to require close attention; in it, the General Assembly

> Mindful *of its responsibility under the Charter of the United Nations in the maintenance of international peace and security, as well as in the consideration of principles governing disarmament,*
>
> Gravely *concerned that, while negotiations on disarmament have not so far achieved satisfactory results, the armaments race, particularly in the nuclear and thermo-nuclear fields, has reached a dangerous stage requiring all possible precautionary measures to protect humanity and civilization from the hazard of nuclear and thermo-nuclear catastrophe,*
>
> Recalling *that the use of weapons of mass destruction, causing unnecessary human suffering, was in the past prohibited, as being contrary to the laws of humanity and to the principles of international law, by international declarations and binding agreements, such as the Declaration of St. Petersburg of 1868, the Declaration*

of the Brussels Conference of 1874, the Conventions of The Hague Peace Conferences of 1899 and 1907, and the Geneva Protocol of 1925, to which the majority of nations are still parties,

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

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

1. Declares *that:*

a. The use of nuclear and thermo-nuclear weapons is contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations;

b. The use of nuclear and thermo-nuclear weapons would exceed even the scope of war and cause indiscriminate suffering and destruction to mankind and civilization and, as such, is contrary to the rules of international law and to the laws of humanity;

c. The use of nuclear and thermo-nuclear weapons is a war directed not against an enemy or enemies

alone but also against mankind in general, since the peoples of the world not involved in such a war will be subjected to all the evils generated by the use of such weapons;

d. Any State using nuclear and thermo-nuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization;

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

67. Over half a century later, the lucid and poignant declaration contained in General Assembly resolution 1653 (1961) appears endowed with permanent topicality, as the whole international community remains still awaiting for the conclusion of the propounded general Convention on the prohibition of nuclear and thermo-nuclear weapons: nuclear disarmament remains still a goal to be achieved by the United Nations today, as it was in 1961. The Comprehensive Nuclear-Test-Ban Treaty (CTBT), adopted on 24.09.1996, has not yet entered into force, although 164 States have ratified it to date.

68. It is beyond the scope of the present Dissenting Opinion to dwell upon the reasons why, already for two decades, one

remains awaiting for the CTBT's entry into force42. Suffice it here to recall that the CTBT provides (Article XIV) that for it to enter into force, the 44 States specified in its Annex 2 need to ratify it43; a number of these States have not yet ratified the CTBT, including some NWS, like India and Pakistan. NWS have invoked distinct reasons for their positions conditioning nuclear disarmament (cf. *infra*). The entry into force of the CTBT has thus been delayed.

69. Recently, in a panel in Vienna (on 27.04.2016) in commemoration of the 20th anniversary of the CTBT, the U.N. Secretary-General (Ban Ki-moon) pondered that there have been advances in the matter, but there remains a long way to go, in the determination "to bring into force a legally binding prohibition against all nuclear tests". He recalled to have

> *repeatedly pointed to the toxic legacy that some 2,000 tests left on people and the environment in parts of Central Asia, North Africa, North America and the South Pacific. Nuclear testing poisons water, causes cancers, and pollutes the area with radioactive fall-out for generations and generations to come. We are here to honour the victims. The best tribute to them is action to ban and to stop nuclear testing. Their sufferings should teach the world to end this madness*[44].

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

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

44 U.N. doc. SG/SM/17709-DC/3628, of 27.04.2016, pp. 1-2.

He then called on the (eight) remaining CTBT Annex 2 States "to sign and ratify the Treaty without further delay", so as to strengthen its goal of universality; in this way, – he concluded, – "we can leave a safer world, free of nuclear tests, to our children and to succeeding generations of this world"[45].

70. To this one may add the unaccomplished endeavours of the U.N. General Assembly Special Sessions on Disarmament. Of the three Special Sessions held so far (in 1978, 10th Special Session; in 1982, 12th Special Session; and in 1988, 15th Special Session)46, the first one appears to have been the most significant one so far. The Final Document adopted unanimously (without a vote) by the 1st Special Session on Disarmament sets up a programme of action on disarmament and the corresponding mechanism in its current form. In the present case before the ICJ, the Marshall Islands refers to this document in its Memorial, singling out its relevance for the interpretation of Article VI of the NPT and the corresponding customary international law obligation of nuclear disarmament (paras. 129-132).

71. That Final Document of the first General Assembly Special Session on Disarmament (1978) addresses nuclear disarmament in its distinct aspects. In this respect, the General Assembly begins by observing that the accumulation of nuclear weapons constitutes a threat to the future of humankind (para. 1), in effect "the greatest danger" to humankind and to "the survival of civilization" (para. 47). It adds that the arms race, particularly in its nuclear aspect, is incompatible with the principles enshrined in the United Nations Charter (para. 12). In its view, the most

45 *Ibid.*, p. 2.

46 Ever since, several G.A. resolutions have called for a 4th Special Session on Disarmament, but it has not yet taken place.

effective guarantee against the dangers of nuclear war is the complete elimination of nuclear weapons (paras. 8 and 56)[47].

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

73. The Conference on Disarmament, – since 1979 the sole multilateral disarmament-negotiating forum of the international community, – has helped to negotiate multilateral arms-limitation and disarmament agreements[48]. It has focused its work on four main issues, namely: nuclear disarmament, prohibition of the production of fissile material for weapon use, prevention of arms race in outer space, and negative security assurances. Yet, since the adoption of the CTBT in 1996, the Conference on Disarmament has been largely deadlocked, in face of the invocation of divergent security interests, added to the understanding that nuclear weapons require mutuality; furthermore, the Rules of Procedure of the Conference provide that all decisions must be adopted by consensus. In sum, some States blame political factors for causing its long-standing stalemate, while others attribute it to outdated procedural rules.

74. After all, in historical perspective, some advances have been attained in the last decades in respect of other weapons of

47 And cf. also paras. 18 and 20.

48 E.g., the aforementioned NPT, CTBT, the Biological Weapons Convention, and the Chemical Weapons Convention, in addition to the seabed treaties, and the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.

mass destruction, as illustrated by the adoption of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (on 10.04.1972), as well as the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (on 13.01.1993); distinctly from the CTBT (*supra*), these two Conventions have already entered into force (on 26.03.1975, and on 29.04.1997, respectively).

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

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

Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament, opposing the Marshall Islands to India, Pakistan and the United Kingdom, respectively.

77. The aforementioned U.N. resolutions were in effect object of attention on the part of the contending parties before the Court (Marshall Islands, India, Pakistan and the United Kingdom). In the oral phase of their arguments, they were dealt with by the participating States (Marshall Islands, India and the United Kingdom), and, extensively so, in particular, by the Marshall Islands and India. The key point is the relation of those resolutions with the emergence of *opinio juris*, of relevance to the identification of a customary international law obligation in the present domain. May I turn, first, to the positions sustained by the contending parties, and then, to the questions I put to them in the public sitting of 16.03.2016 before the ICJ in the *cas d'espèce*, and the responses received from them.

VI. U.N. Resolutions and the Emergence of *Opinio Juris*: The Positions of the Contending Parties

78. In their written submissions and oral arguments before the Court in the present case(s) of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, the Marshall Islands addresses General Assembly resolutions on nuclear disarmament, in relation to the development of customary international law[49]; it also refers to Security Council resolutions[50]. Quoting the ICJ's Advisory Opinion of 1996, it contends (perhaps not as clearly as it could have done) that although General Assembly resolutions lack binding force,

49 ICJ, doc. CR 2016/1, of 07.03.2016, para. 7.

50 *Ibid*., para. 8.

they may "sometimes have normative value", and thus contribute to the emergence of an *opinio juris*[51].

79. In its written submissions and oral arguments before the Court, India addresses U.N. General Assembly resolutions on follow-up to the ICJ's Advisory Opinion of 1996, pointing out that it is the only nuclear weapon State that has co-sponsored and voted in favour of such resolutions[52]. India supports nuclear disarmament "in a time-bound, universal, non-discriminatory, phased and verifiable manner"[53]. And it criticizes the M.I. for not supporting the General Assembly follow-up resolutions in its own voting pattern (having voted against one of them, in favour once, and all other times abstained)[54].

80. In its *Preliminary Objections* (of 15.06.2015), the United Kingdom, after recalling the Marshall Islands' position on earlier U.N. General Assembly resolutions, in the sixties and seventies (paras. 21 and 98(c) and (h)), then refers to its own position thereon (paras. 84 and 99(c)). It also refers to U.N. Security Council resolutions (para. 92). It then recalls the Marshall Islands' arguments – e.g., that "the U.K. has always voted against" General Assembly resolutions on the follow-up of the ICJ Advisory Opinion of 1996, and of the U.N. High Level Meetings in 2013 and 2014 (paras. 98(e) and (h)), – in order to rebut them (paras. 99-103).

81. As for Pakistan, though it informed the Court of its decision not to participate in the oral phase of the present proceedings (letter of 02.03.2016), in the submissions in its *Counter-Memorial* it argues that the ICJ 1996 Advisory Opinion

51 *Ibid.*, para. 7.

52 ICJ, doc. CR 2016/4, of 10.03.2016, para. 1, p. 19.

53 *Counter-Memorial* of India, p. 9, para. 13.

54 *Ibid.*, p. 8, para. 12.

nowhere stated that the obligation under Article VI of the NPT was a general obligation or that it was opposable *erga omnes*; in its view, there was no *prima facie* evidence to this effect *erga omnes*[55]. As to the U.N. General Assembly resolutions following up the ICJ's 1996 Advisory Opinion, Pakistan notes that it has voted in favour of these resolutions from 1997 to 2015, and by contrast, – it adds, – the Marshall Islands abstained from voting in 2002 and 2003 and again from 2005 to 2012[56].

82. After recalling that it is not a Party to the NPT[57], Pakistan further argues that General Assembly resolutions do not have binding force and cannot thus, in its view, give rise to obligations enforceable against a State[58]. Pakistan concludes that the General Assembly resolutions do not support the proposition that there exists a customary international law obligation "rooted" in Article VI of the NPT. Rather, it is the NPT that underpins the Marshall Islands' claims[59].

83. In sum, the United Kingdom has voted against such resolutions, the Marshall Islands has abstained in most of them, India and Pakistan have voted in favour of them. Despite these distinct patterns of voting, in my view the U.N. General Assembly resolutions reviewed in the present Dissenting Opinion, taken altogether, are not at all deprived of their contribution to the conformation of *opinio juris* as to the formation of a customary international law obligation of nuclear denuclearization. After all, they are resolutions of the U.N. General Assembly itself (and not only of the large majority of U.N. member States which voted

55 *Counter-Memorial* of Pakistan., p. 8, para. 2.3.

56 *Ibid.*, p. 8, para. 2.4.

57 *Ibid.*, p. 14, para. 4.4; p. 30, para. 7.55.

58 *Ibid.*, p. 38, paras. 7.95-7.97.

59 *Ibid.*, p. 38, para. 7.97.

in their favour); they are resolutions of the United Nations Organization itself, addressing a matter of common concern of humankind as a whole (cf. part XX, *infra*).

VII. Questions from the Bench and Responses from the Parties

84. At the end of the public sittings before the Court in the present case of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands *versus* United Kingdom), I deemed it fit to put the following questions (on 16.03.2016, in the afternoon) to the contending parties:

> *I have questions to put to both contending parties, the Marshall Islands and the United Kingdom. My questions are the following:*
>
> *The Marshall Islands, in the course of the written submissions and oral arguments, and the United Kingdom, in its document on Preliminary Objections (of 15 June 2015), have both referred to U.N. General Assembly resolutions on nuclear disarmament. Parallel to the resolutions on the matter which go back to the early 70s (First Disarmament Decade), there have been two more recent series of General Assembly resolutions, namely: those condemning nuclear weapons, extending from 1982 to date, and those adopted as a follow-up to the 1996 ICJ Advisory Opinion on Nuclear Weapons, extending so far from 1997 to 2015. In relation to this last series of General Assembly resolutions, — referred to by the contending parties, — I would like to ask both the Marshall Islands and the United Kingdom whether, in*

> *their understanding, such General Assembly resolutions are constitutive of an expression of* opinio juris*, and, if so, what in their view is their relevance to the formation of a customary international law obligation to pursue negotiations leading to nuclear disarmament, and what is their incidence upon the question of the existence of a dispute between the parties*[60].

85. One week later (on 23.03.2016), the United Kingdom and the Marshall Islands submitted to the ICJ their written replies to my questions. In its response to them, the United Kingdom stated that resolutions adopted by international organizations may, in some circumstances, be evidence of customary international law or contribute to its development; however, they do not constitute an expression of customary international law in and of themselves. In the *cas d'espèce*, the United Kingdom deems it unnecessary to assess whether the General Assembly resolutions following up on the ICJ's 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons* constitute evidence of custom, as the obligation set forth in Article VI of the NPT is binding upon the United Kingdom anyway, irrespective of whether there is a corresponding obligation in customary international law[61].

86. The Marshall Islands, for its part, recalls the ICJ's 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons*, as well as a number of General Assembly resolutions upholding the obligation to pursue negotiations leading to nuclear disarmament, in support of its position as to the existence of a customary international law obligation to this end. It also refers to the ICJ's *obiter dictum* in the case of *Nicaragua versus United States*, to

60 ICJ, doc. CR 2016/9, of 16.09.2016, pp. 33-34.

61 ICJ, *Reply of the United Kingdom to the Questions Addressed by Judge Cançado Trindade to Both Parties*, doc. MIUK 2016/13, of 23.03.2016, pp. 1-2, para. 3.

the effect that "*opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions"[62].

87. In the perception of the Marshall Islands, the attitude of States towards General Assembly resolutions adopted in the period 1982-1995 indicates an emerging *opinio juris* on the obligation to conduct negotiations in good faith leading to general and complete nuclear disarmament. The Marshall Islands then states that the attitude of States to resolutions following up the 1996 ICJ's Advisory Opinion, – those affirming the existence of an obligation to pursue negotiations leading to nuclear disarmament, – constitutes an expression of *opinio juris*, in support of a customary international obligation to this end[63].

88. As to the incidence of General Assembly resolutions on the existence of a dispute in the *cas d'espèce*, the Marshall Islands contends that opposing attitudes of States to such resolutions may contribute to demonstrating the existence of a dispute[64]. As to the present case opposing the Marshall Islands to the United Kingdom, the Marshall Islands contends that the diverging voting records of the Marshall Islands and the United Kingdom are a clear indication of the opposing views of the parties concerning the obligations enshrined in Article VI of the NPT (and the corresponding obligation of customary international law)[65].

62 The Marshall Islands also cites the International Law Commission's Draft Conclusions on the *Identification of Customary International Law* (2015), which recognise the importance of the attitude of States towards General Assembly resolutions for establishing State practice and *opinio juris*. ICJ, *Reply of the Marshall Islands to the Questions Addressed by Judge Cançado Trindade to Both Parties*, doc. MIUK 2016/13, of 23.03.2016, pp. 2-3, paras. 2-5.

63 *Ibid.*, p. 4, para. 7.

64 *Ibid.*, p. 4, para. 8.

65 *Ibid.*, p. 4, para. 9.

VIII. Human Wickedness: From the XXIst Century Back to the Book of *Genesis*

89. Since the beginning of the nuclear age in August 1945, some of the great thinkers of the XXth century started inquiring whether humankind has a future. Indeed, this is a question which cannot be eluded. Thus, already in 1946, for example, deeply shocked by the U.S. atomic bombings of Hiroshima and Nagasaki (on 06 and 09 August 1945, respectively)[66], Mahatma Gandhi, in promptly expressing his worry about the future of human society, wrote, in the Journal *Harijan*, on 07.07.1946, that

> *So far as I can see, the atomic bomb has deadened the finest feeling that has sustained mankind for ages. There used to be the so-called laws of war which made it tolerable. Now we know the naked truth. War knows no law except that of might*[67].

90. And M. Gandhi, denouncing its brutality, added that the "atom bomb is the weapon of ultimate force and destruction", evidencing the "futility" of such violence; the development of the atom bomb "represents the most sinful and diabolical use of science"[68]. In the same Journal *Harijan*, M. Gandhi further wrote, on 29.09.1946, that non-violence is "the only thing the atom bomb cannot destroy"; and he further warned that "unless now the world adopts non-violence, it will spell certain suicide for mankind"[69].

66 Preceded by a nuclear test undertaken by the United States at Alamagordo, New Mexico, on 16.07.1945.

67 M. Gandhi, "Atom Bomb and Ahimsa", *Harijan* (07.07.1946), reproduced *in*: *Journalist Gandhi — Selected Writings of Gandhi* (org. S. Sharma), 1st ed., Mumbai, Ed. Gandhi Book Center, 1994, p. 104; also *cit. in*: P.F. Power, *Gandhi on World Affairs*, London, Allen & Unwin, 1961, pp. 63-64.

68 *Cit. in*: *What Mahatma Gandhi Said about the Atom Bomb* (org. Y.P. Anand), New Delhi, National Gandhi Museum, 1998, p. 5.

69 From the Journal *Harijan* (29.09.1946), *cit. in*: Faisal Devji, *The Impossible Indian — Gandhi and the Temptation of Violence*, London, Hurst & Co., 2012, p. 150.

91. Over a decade later, in the late fifties, Karl Jaspers, in his book *La bombe atomique et l'avenir de l'homme* (1958), regretted that the existence of nuclear weapons seemed to have been taken for granted, despite their capacity to destroy humankind and all life on the surface of earth[70]. One has thus to admit, – he added, – that "cette terre, qui est née d'une explosion de l'atome, soit anéantie aussi par les bombes atomiques"[71]. K. Jaspers further regretted that progress had occurred in technological knowledge, but there had been "no progress of ethics nor of reason". Human nature has not changed: "ou l'homme se transforme ou il disparaît"[72].

92. In the early sixties, for his part, Bertrand Russell, in his book *Has Man a Future?* (1961), likewise regretted that people seemed to have got used to the existence of nuclear weapons, in a world dominated by a "will towards death", prevailing over sanity[73]. Unfortunately, – he proceeded, – "love for power" has enticed States "to pursue irrational policies"; and he added:

> *Those who regard Genesis as authentic history, may take Cain as the first example: he may well have thought that, with Abel out of the way, he could rule over coming generations*[74].

To B. Russell, it is "in the hearts of men that the evil lies", it is in their minds that "the cure must be sought"[75]. He further regretted the discouraging results of disarmament Conferences, and even wrote that ICJ pronouncements on the issue should be

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

71 *Ibid*., p. 576.

72 *Ibid*., pp. 621 and 640.

73 B. Russell, *Has Man a Future?*, [London], Penguin Books, 1962 [reprint], pp. 27 and 37.

74 *Ibid*., p. 45.

75 *Ibid*., pp. 45-46, and cf. 69.

authoritative, and it was not "optional" for States "to respect or not international law"[76].

93. For his part, Karl Popper, at the end of his life, in his book (in the form of an interview) *The Lesson of This Century* (1997), in assembling his recollections of the XXth century, expressed the anguish, for example, at the time of the 1962 Cuban missiles crisis, with the finding that each of the 38 warheads at issue had three thousand times more power than the atomic bomb dropped over Hiroshima[77]. Once again, the constatation: human nature has not changed. K. Popper, like other great thinkers of the XXth century, regretted that no lessons seemed to have been learned from the past; this increased the concern they shared, in successive decades, with the future of humankind, in the presence of arsenals of nuclear weapons.

94. A contemporary writer, Max Gallo, in his recent novel *Caïn et Abel – Le premier crime*, has written that the presence of evil is within everyone; "le Mal est au coeur du Bien, et cette réalité ambiguë est le propre des affaires humaines"[78]. Writers of the past, – he went on, – "eux aussi – toi Dante, toi Dostoïevski, et ceux qui vous ont inspiré, Eschyle, Sophocle – attisent le brasier du châtiment et de la culpabilité"[79]. And he added:

> *Partout, Caïn poignarde ou étrangle Abel. (...) Et personne ne semble voir (...) la mort prochaine de toute humanité. Elle tient entre ses mains l'arme de sa destruction. Ce ne sont plus seulement des villes*

76 *Ibid.*, pp. 97 and 79.

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

78 M. Gallo, *Caïn et Abel – Le premier crime*, [Paris], Fayard, 2011, pp. 112 and 141.

79 *Ibid.*, p. 174.

> *entières qui seront incendiées, rasées: toute vie sera alors consumée, et la terre vitrifiée.*
>
> *Deux villes ont déjà connu ce sort, et l'ombre des corps de leurs habitants est à jamais encrustée dans la pierre sous l'effet d'une chaleur de lave solaire.*
>
> *(...) [P]artout Caïn poursuivra Abel. (...) Les villes vulnérables seront ensanglantées. Les tours les plus hautes seront détruites, leurs habitants ensevelis sous les décombres*[80].

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

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

> *il faut que nous nous rendions compte que la haine, la perte de temps, d'argent et d'habilité intellectuelle en vue de la création d'engins de destruction, la crainte du*

80 *Ibid.*, pp. 236-237.

> *mal que nous pouvons nous faire mutuellement, le risque quotidien et permanent de voir la fin de tout ce que l'homme a réalisé, sont le produit de la folie humaine. (...) C'est dans nos cœurs que réside le mal, c'est de nos cœurs qu'il doit être extirpé"*[81]. *["we must become aware that the hatred, the expenditure of time and money and intellectual hability upon weapons of destruction, the fear of what we may do to each other, and the imminent daily and hourly risk of an end to all that man has achieved, (...) all this is a product of human folly. (...) It is in our hearts that the evil lies, and it is from our hearts that it must be plucked out"*[82]*].*

97. Some other great thinkers of the 20th century (from distinct branches of knowledge), expressed their grave common concern with the increased human capacity of destruction coupled with the development of scientific-technological knowledge. Thus, the historian Arnold Toynbee (*A Study in History*, 1934-1954; and *Civilization on Trial*, 1948), regretted precisely the modern tragedy that human iniquity was not eliminated with the development of scientific-technological knowledge, but widely enlarged, without a concomitant advance at spiritual level[83]. And the increase in armaments and in the capacity of destruction, – he added, – became a symptom of the fall of civilizations[84].

81 B. Russell, *L'homme survivra-t-il?*, Paris, Éd. J. Didier, 1963, pp. 162-163.

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

83 Cf. A.J. Toynbee, *A Study in History*, Oxford, Oxford University Press, 1970 [3rd reprint], pp. 48-558, 559-701, 702-718 and 826-850; A.J. Toynbee, *Civilization on Trial*, Oxford/N.Y., Oxford University Press, 1948, pp. 3-263.

84 A.J. Toynbee, *Guerra e Civilização* [*War and Civilization*], Lisbon, Edit. Presença, 1963, pp. 29, 129 and 178.

98. For his part, the writer Hermann Hesse, in a posthumous book of essays (*Guerre et paix*, 1946), originally published shortly after the II world war, warned that with the mass killings, not only do we keep on killing ourselves, but also our present and perhaps also our future[85]. The worst destruction, – he added, – was the one organized by the State itself, with its corollary, "the philosophy of the State", accompanied by capital and industry[86]. The philosopher and theologian Jacques Maritain (*Oeuvres Complètes*, 1961-1967), in turn, wrote that the atrocities perpetrated in the XXth century had "une importance plus tragique pour la conscience humaine"[87]. In calling for an "integral humanism", he warned that the human person transcends the State, and the realisation of the common good is to be pursued keeping in mind human dignity[88]. In his criticism of the "realists", he stressed the imperatives of ethics and justice, and the importance of general principles of law, in the line of jusnaturalist thinking[89].

99. Another writer, the humanist Stefan Zweig, remained always concerned with the fate of humankind. He was impressed with the Scripture's legend of the Tower of Babel, having written an essay on it in 1916, and kept it in mind along the years, as shown in successive essays written in more than the two following

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

86 H. Hesse, *Guerre et Paix*, Paris, L'Arche Éd., 2003 [reed.], pp. 127 and 133.

87 J. Maritain, "Dieu et la permission du mal", *in Œuvres de Jacques Maritain — 1961-1967 (Jacques et Raissa Maritain — Oeuvres Complètes*), vol. XII, Fribourg/Paris, Éd. Universitaires/Éd. Saint-Paul, 1992, p. 17, and cf. p. 41.

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

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

decades[90], taking it as a symbol of the perennial yearning for a unified humanity. In his own words,

> *The history of tomorrow must be a history of all humanity and the conflicts between individual conflicts must be seen as redundant alongside the common good of the community. History must then be transformed from the current woeful State to a completely new position; (...) it must clearly contrast the old ideal of victory with the new one of unity and the old glorification of war with a new contempt for it. (...) [T]he only important thing is to push forward under the banner of a community of nations, the mentality of mankind (...)*[91].

100. Yet, in his dense and thoughtful intellectual autobiography (*Le monde d'hier*, 1944), written shortly before putting an end to his own life, Stefan Zweig expressed his deep concern with the fading away of conscience, disclosed by the fact that the world got used to the "dehumanisation, injustice and brutality, as never before in hundreds of centuries"[92]; persons had been transformed into simple objects[93]. Earlier on, – before the nuclear age, – his friend the psychologist Sigmund Freud, in a well-known essay (*Civilization and Its Discontents*, 1930), expressed his deep preoccupation with what he perceived as an impulse to barbarism and destruction, which could not be expelled from the human psyche[94]. In face of human hostility and the threat

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

91 *Ibid*., pp. 170 and 175.

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

93 *Ibid*., p. 490.

94 Sigmund Freud, *Civilization and Its Discontents* [1930], N.Y., Norton & Cia., 1962 [reed.], pp. 7-9, 26, 36-37 and 59-63.

of self-disintegration, – he added, – there is a consequent loss of happiness[95].

101. Another psychologist, Carl Jung, referring, in his book *Aspects du drame contemporain* (1948), to events of contemporary history of his epoch, warned against subsuming individuals under the State; in his view, collective evil and culpability contaminate everyone everywhere[96]. He further warned against the tragic dehumanization of others[97] and the psychic exteriorizations of mass movements (of the collective inconscient) conducive to destruction[98].

102. To the writer and theologian Albert Schweitzer (who wrote his *Kulturphilosophie* in 1923), the essence of civilization lies in the respect for life, to the benefit of each person and of humankind[99]. He rejected the "illness" of *Realpolitik*, having stated that good consists in the preservation and exaltation of life, and evil lies in its destruction; nowadays more than ever, — he added, — we need an "ethics of reverence for life", what requires responsibility[100]. He insisted, in his book *La civilisation et l'éthique* (1923), that respect for life started as from "une prise de conscience" of one's responsibility *vis-à-vis* the life of others[101].

103. Later on in his life, then in the nuclear age, in his series of lectures *Paix ou guerre atomique* (1958), A. Schweitzer

95 Cf. *ibid*., pp. 23 and 67-92.

96 C.G. Jung, *Aspects du drame contemporain*, Genève/Paris, Libr. de l'Univ. Georg/Éd. de la Colonne Vendôme, 1948, pp. 99 and 145.

97 *Ibid*., pp. 173 and 179.

98 *Ibid*., pp. 198-200, 208, 218-219 and 223.

99 A. Schweitzer, *Filosofia da Civilização* [1923], São Paulo, Edit. Unesp, 2011 [reed.], pp. 80, 304, 311 and 315.

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

101 M. Arnold, *Albert Schweitzer – La compassion et la raison*, Lyon, Éd. Olivétan, 2015, pp. 74-75 and 77.

called for an end to nuclear weapons, with their "destructions et anéantissements inimaginables"[102]. In his own words,

> *La guerre atomique ne connaît pas de vainqueurs, mais uniquement des vaincus. Chaque belligérant subit par les bombes et les projectiles atomiques de l'adversaire les mêmes dégâts qu'il lui inflige par les siens. Il en résulte un anéantissement continu (...). Il peut seulement dire: allons-nous nous suicider tous les deux par une extermination réciproque?*[103]

104. Well before them, by the turn of the 19th to the 20th century, the writer Leo Tolstoi warned (*The Slavery of Our Times*, 1900) against the undue use of the State monopoly of "organized violence", conforming a new form of slavery of the vulnerable ones[104]; he criticized the recruitment of personnel to be sent to war to kill defenseless persons, perpetrating acts of extreme violence[105]. On his turn, the physician Georges Duhamel warned (in his account *Civilisation* – 1914-1917) against the fact that war had become an industry of killing, with a "barbaric ideology", destroying civilization with its "lack of humanity"; yet, he still cherished the hope that the spirit of humanism could flourish from the ashes[106].

105. The historian of ideas Isaiah Berlin, for his part, warned (*The Proper Study of Mankind*) against the dangers of the *raison d'État*, and stressed the relevance of *values*, in the search

102 *Cit. in ibid.*, p. 111.

103 Extract from his book *Paix ou guerre atomique* (1958), reproduced in his posthumous book of essays: A. Schweitzer, *Respect de la vie* (org. B. Kaempf), Paris, Éd. Arfuyen/CIAL, 1990, p. 98.

104 L. Tolstoi, *La Esclavitud de Nuestro Tiempo* [1900], Barcelona, Littera, 2000 [reed.], pp. 86-87, 89, 91 and 97.

105 *Ibid.*, pp. 101, 103-104 and 121.

106 G. Duhamel, *Civilisation — 1914-1917*, Paris, Mercure de France, 1944, pp. 53 and 274-275; G. Duhamel, *Mémorial de la guerre blanche — 1938*, Paris, Mercure de France, 1945, pp. 41, 95, 100, 102 and 170.

of knowledge, of cultures, and of the *recta ratio*[107]. On his turn, the writer Erich Fromm upheld human life in insisting that there could only exist a truly "civilized" society if based on humanist values[108]. Towards the end of his life, in his book *The Anatomy of Human Destructivity* (1974), he warned against destruction and propounded the prevalence of love for life[109].

106. E. Fromm further warned that the devastation of wars (including the contemporary ones) have led to the loss of hope and to brutalization, amidst the tension of the co-existence or ambivalence between civilization and barbarism, which requires all our endeavours towards the revival of humanism[110]. Likewise, in our days, the philosopher Edgar Morin has also warned that the advances of scientific knowledge disclosed an ambivalence, in that they provided, on the one hand, the means to improve the knowledge of the world, and, on the other hand, with the production (and proliferation) of nuclear weapons, in addition to other weapons (biological and chemical) of mass destruction, the means to destroy the world[111].

107. Future has thus become unpredictable, and unknown, in face of the confrontation between the forces of life and the forces of death. Yet, – he added, – human beings are endowed with conscience, and are aware that civilizations, as well as the whole of

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

108 Cf. E. Fromm, *Las Cadenas de la Ilusión — Una Autobiografía Intelectual* [1962], Barcelona, Paidós, 2008 [reed.], pp. 78 and 234-239.

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

110 E. Fromm, *Las Cadenas de la Ilusión...*, *op. cit. supra* n. (108), pp. 240 and 250-251.

111 E. Morin, *Vers l'abîme?*, Paris, L'Herne, 2012, pp. 9, 24-25 and 40-41.

humankind, are mortal[112]. E. Morin further contended the tragic experiences lived in recent times should lead to the repentance of barbarism and the return to humanism; in effect, to think about, and resist to, barbarism, amounts to contributing to recreate humanism[113].

108. For his part, in the late eighties, in his book of essays *Silences et mémoires d'hommes* (1989), Elie Wiesel stressed the need of memory and attention to the world wherein we live, so as to combat the indifference to violence and evil[114]. Looking back to the Book of *Genesis*, he saw it fit to recall that "Caïn et Abel – les premiers enfants sur terre, – se découvrirent ennemis. Bien que frères, l'un devin l'assassin ou la victime de l'autre. L'enseignement que nous devrions en tirer? Deux hommes peuvent être frères et néanmoins désireux de s'entre-tuer. Et aussi: quiconque tue, tue son frère. Seulement cela, on l'apprend plus tard"[115].

109. Turning attention to the threat of nuclear weapons, E. Wiesel sharply criticized the already prevailing attitude of indifference to it: "le monde, aujourd'hui, nous paraît étonnamment indifférent vis-à-vis de la question nucléaire", – an attitude which he found ununderstandable[116]. And he added that

> *L´indifférence (...) peut elle aussi devenir contagieuse. (...) L'indifférence permet également de mesurer la progression du mal que mine la société. (...) Là encore, la mémoire seule peut nous réveiller. Si nous nous souvenons de ce qui s'est passé il y a quarante ans, nous avons*

112 *Ibid*., pp. 27, 30, 59, 85, 89, 126 and 181.

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

114 E. Wiesel, *Silences et mémoires d´hommes*, Paris, Éd. Seuil, 1989, pp. 166, 173 and 175.

115 *Ibid*., pp. 167-168.

116 *Ibid*., p. 174, and cf. p. 170.

> *une possibilité d'empêcher de nouvelles catastrophes. Sinon, nous risquons d'être les victimes de notre propre indifférence. Car si nous sommes indifférents aux leçons de notre passé, nous le serons aux espoirs inhérents à notre avenir. (...) Voici mon angoisse: si nous oublions, nous serons oubliés. (...) Si nous restons indifférents à notre sort, (...) il ne restera personne pour raconter notre histoire*[117].

110. In effect, already in the early XXth century, Henri Bergson, in his monograph *La conscience et la vie* (1911), devoted attention to the search for meaning in life: to him, to live with conscience is to remember the past (memory) in the present, and to anticipate the future[118]. In his own words,

> *Retenir ce qui n'est déjà plus, anticiper sur ce qui n'est pas encore, voilà donc la première fonction de la conscience. (...) [L]a conscience est un trait d'union entre ce qui a été et ce qui sera, un pont jeté entre le passé et l'avenir*[119].

111. Also in international legal doctrine, there have been those who have felt the need to move away from State voluntarism and acknowledge the prevalence of conscience over the "will". It is not my intention to dwell upon this point here, as I have dealt with it elsewhere[120]. For the purposes of the present Dissenting Opinion, suffice it to recall a couple of examples. The jurist Gustav Radbruch, at the end of his life, forcefully discarded legal positivism, always subservient to power and the established order,

117 *Ibid.*, pp. 175-176.

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

119 *Ibid.*, pp. 5-6.

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

and formulated his moving conversion and profession of faith in jusnaturalism[121]. His lucid message was preserved and has been projected in time[122], thanks to the devotion of his students and disciples of the School of Heidelberg.

112. There are further examples of doctrinal endeavours to put limits to State voluntarism, such as the jusnaturalist construction of, e.g., Alfred Verdross, – as from the *idée du droit*, – of an objective law finding expression in the general principles of law, preceding positive international law[123]; or else the conception of the *droit spontanée*, of Roberto Ago, upholding the spontaneous formation (emanating from human conscience, well beyond the "will" of individual States) of new rules of international law[124].

113. In the view of Albert de La Pradelle, the conception of the formation of international law on the strict basis of reciprocal rights and duties only of States is "extremely grave and dangerous"[125]. International law is a "droit de la communauté humaine", encompassing, besides States, also peoples and human beings; it is the "droit de toute l'humanité", on the foundations of which are the general principles of law[126]. To A. de La Pradelle, this

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

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

123 A. Verdross, *Derecho Internacional Público*, 5th ed., Madrid, Aguilar, 1969 [reprint], pp. 15-19.

124 R. Ago, "Nouvelles réflexions sur la codification du droit international", 92 *Revue générale de droit international public* (1988) p. 540, and cf. p. 541 on "la nature non volontaire de l'origine du droit coutumier".

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

126 *Ibid*., pp. 49-59, 149, 222 and 264.

"droit de l'humanité" is not static, but rather dynamic, attentive to human values, in the line of jusnaturalist thinking[127].

114. "Juridical conscience" is invoked in lucid criticisms of legal positivism[128]. Thus, in his monograph-plea (of 1964) against nuclear weapons, for example, Stefan Glaser sustained that customary international norms are those that, "according to universal conscience", ought to regulate the international community, for fulfilling common interest and responding to the demands of justice; and he added that

> *C'est sur cette conscience universelle que repose la principale caractéristique du droit international: la conviction que ses normes sont indispensables pour le bien commun explique leur reconnaissance en tant que règles obligatoires*[129].

115. This is the position that I also uphold; in my own understanding, it is the universal juridical conscience that is the ultimate material source of international law[130]. In my view, one cannot face the new challenges confronting the whole international community keeping in mind only State susceptibilities; such is the case with the obligation to render the world free of nuclear weapons, an imperative of *recta ratio* and not a derivative of the "will" of States. In effect, to keep hope alive it is necessary to bear always in mind humankind as a whole.

127 Cf. *ibid.*, pp. 412-413.

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

129 S. Glaser, *L'arme nucléaire à la lumière du droit international*, Paris, Pédone, 1964, p. 18.

130 Cf. A.A. Cançado Trindade, *op. cit. supra* (120), ch. VI, pp. 139-161.

116. For my part, within the ICJ, I have deemed it fit to ponder, in my Dissenting Opinion (paras. 488-489) in the case concerning the *Application of the Convention against Genocide* (Croatia *versus* Serbia, Judgment of 03.02.2015), that, from Homer's *Iliad* (late VIIIth or early VIIth century b.C.) to date, individuals, indoctrinated and conditioned for war and destruction, have become objects of the struggle for domination. I recalled that this has been lucidly warned by Simone Weil, in a penetrating essay (of 1934), to whom this ends up victimizing everyone, there occurring "the substitution of the ends by the means", transforming human life into a simple means, which can be sacrificed; individuals become unable to think, in face of the "social machine" of destruction of the spirit and fabrication of the inconscience[131].

117. The presence of evil has accompanied and marked human existence along the centuries. In the same aforementioned Dissenting Opinion in the case concerning the *Application of the Convention against Genocide* (2015), after drawing attention to "the ever-lasting presence of evil, which appears proper to the human condition, in all times", I added:

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

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

Despite the endeavours of human thinking, along history, it has not been able to rid humankind of it. Like the passing of time, the ever-lasting presence of evil is yet another mystery surrounding human beings, wherever and while they live. Whenever individuals purport to subject their fellow human beings to their 'will', placing this latter above conscience, evil is bound to manifest itself. In one of the most learned writings on the problem of evil, R.P. Sertillanges ponders that the awareness of evil and the anguish emanated therefrom have marked presence in all civilizations. The ensuing threat to the future of human kind has accounted for the continuous presence of that concern throughout the history of human thinking[132].

Religions were the first to dwell upon the problem of evil, which came also to be considered by philosophy, history, psychology, social sciences, and literature. Along the centuries, human thinking has always acknowledged the need to examine the problem of evil, its incidence in human relations, in the world wherein we live, without losing faith in human values[133]. *Despite the perennial quest of human thinking to find answers to the problem of evil, – going as far back as the Book of Job, or even further back, to the Genesis itself*[134], *– not even theology*

132 R.P. Sertillanges, *Le problème du mal — l'histoire*, Paris, Aubier, 1948, pp. 5-412.

133 *Ibid*., pp. 5-412.

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

has found an explanation for it, satisfactory to all" (paras. 472-474).

118. The Scripture's account of Cain and Abel (*Genesis*, ch. 4: 8-10) along the centuries came to be regarded as the aetiology of the fragmentation of humankind, as from the indifference of an individual to the fate of another. The increasing disregard for human life was fostered by growing, generalized and uncontrolled violence in search of domination. This was further aggravated by ideological manipulations, and even the dehumanization of the others, the ones to be victimized. The problem of evil continues to be studied, in face of the human capacity for extreme violence and self-destruction on a large scale[135]. The tragic message of the Book of *Genesis*, in my perception, seems perennial, as contemporary as ever, in the current nuclear age.

IX. The Attention of the United Nations Charter to Peoples

119. It should be kept in mind that the United Nations Charter was adopted on 26.06.1945 on behalf of "we, the peoples of the United Nations". In several provisions it expresses its concern with the living conditions of all peoples (preamble, Articles 55, 73(a), 76, 80), and calls for the promotion of, and universal respect for, human rights (Articles 55(c), 62(2), 68, 76(c)). It invokes the "principles of justice and international law" (Article 1(1), and refers to "justice and respect for the obligations arising from treaties and

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

other sources of international law" (preamble). It further states that the Statute of the ICJ, "the principal judicial organ of the United Nations", forms "an integral part" of the U.N. Charter itself (Article 92).

120. In the mid-fifties, Max Huber, a former Judge of the PCIJ, wrote that international law has to protect also values common to humankind, attentive to respect for life and human dignity, in the line of the jusnaturalist conception of *the jus gentium*; the U.N. Charter, in incorporating human rights into this *droit de l'humanité*, initiated a new era in the development of international law, in a way rescuing the idea of the *civitas maxima*, which marked presence already in the historical origins of the law of nations. The U.N. Charter's attention to peoples, its principled position for the protection of the human person, much transcend positive domestic law and politics[136].

121. The new vision advanced by the U.N. Charter, and espoused by the Law of the United Nations, has, in my perception, an incidence upon judicial settlement of international disputes. Thus, the fact that the ICJ's mechanism for the handling of contentious cases is an inter-State one, does not mean that its reasoning should also pursue a strictly inter-State dimension; that will depend on the nature and substance of the cases lodged with it. And there have been several cases lodged with the Court that required a reasoning going well beyond the inter-State dimension[137]. Such reasoning beyond the inter-State dimension

136 Max Huber, *La pensée et l'action de la Croix-Rouge*, Genève, CICR, 1954, pp. 26, 247, 270, 286 and 291.

137 Cf., e.g., the case of *Nottebohm* (1955, pertaining to double nationality); the cases of the *Trial of Pakistani Prisoners of War* (1973), of the *Hostages (U.S. Diplomatic and Consular Staff) in Teheran* case (1980); of the *Application of the Convention against Genocide* (Bosnia *versus* Serbia, 1996 and 2007); of the *Frontier Dispute between Burkina Faso and Mali* (1998); the triad of cases concerning consular assistance — namely, the cases *Breard* (Paraguay *versus* United States,1998), the case *LaGrand* (Germany *versus* United States, 2001), the case *Avena and Others* (Mexico *versus* United States, 2004); the cases of *Armed Activities in the Territory of Congo* (D.R. Congo *versus* Uganda, 2000, concerning

is faithful to the U.N. Charter, the ICJ being "the principal judicial organ of the United Nations" (Article 92).

122. Recently, in one of such cases, that of the *Application of the Convention against Genocide* (Croatia *versus* Serbia, 2015), in my extensive Dissenting Opinion appended thereto, I have deemed it fit, *inter alia*, to warn that

> *The present case concerning the Application of the Convention against Genocide (Croatia versus Serbia) provides yet another illustration of the pressing need to overcome and move away from the dogmatic and strict inter-State outlook, even more cogently. In effect, the 1948 Convention against Genocide, – adopted on the eve of the Universal Declaration of Human Rights, – is not State-centered, but rather people-centred. The Convention against Genocide cannot be properly interpreted and applied with a strict State-centered outlook, with attention turned to inter-State susceptibilities. Attention is to be kept on the justiciables, on the victims, – real and potential victims, – so as to impart justice under the Genocide Convention (para. 496).*

123. In a report in the early nineties, a former U.N. Secretary-General, calling for a "concerted effort" towards

grave violations of human rights and of International Humanitarian Law); of the *Land and Maritime Boundary between Cameroon and Nigeria* (1996); of *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium *versus* Senegal, 2009-2013, pertaining to the principle of universal jurisdiction under the U.N. Convention against Torture); of *A.S. Diallo* (Guinea *versus* D.R. Congo, 2010), on detention and expulsion of a foreigner), of the *Jurisdictional Immunities of the State* (Germany *versus* Italy, Greece intervening, 2010-2012); of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia *versus* Russian Federation, 2011); of the *Temple of Preah Vihear* (Cambodia *versus* Thailand, provisional measures, 2011); of the *Application of the Convention against Genocide* (Croatia *versus* Serbia, 2015). To those cases one can add the two most recent Advisory Opinions of the ICJ, on the *Declaration of Independence of Kosovo* (2010); and on a *Judgment of the ILO Administrative Tribunal upon a Complaint Filed against the IFAD* (2012).

complete disarmament, rightly pondered that "[d]ans le monde d'aujourd'hui, les nations ne peuvent plus se permettre de résoudre les problèmes par la force. (...) Le désarmement est l'un des moyens les plus importants de réduire la violence dans les relations entre États"[138]. There followed the cycle of World Conferences of the United Nations along the nineties, in a commendable endeavour of the United Nations *to go beyond and transcend the purely inter-State dimension*, imbued of a spirit of solidarity, so as to consider the challenges for the future of humankind.

124. Those U.N. World Conferences disclosed a growing awareness of the international community as a whole, and entered into a continuing universal dialogue between U.N. member States and entities of the civil societies, – which I well remember, having participated in it[139], – so as to devise the new international agenda in the search of common solutions for the new challenges affecting humankind as a whole. In focusing attention on vulnerable segments of the populations, the immediate concern has been with meeting basic human needs, that memorable cycle of World Conferences disclosed a common concern with the deterioration of living conditions, dramatically affecting increasingly greater segments of the population in many parts of the world nowadays[140].

125. The common denominator in those U.N. World Conferences – as I have pointed out on distinct occasions along the last two decades[141] – can be found in the recognition of the

138 B. Boutros-Ghali, *Nouvelles dimensions de la réglementation des armements et du désarmement dans la période de l'après-guerre froide — Rapport du Secrétaire Général*, N.Y., Nations Unies, 1993, pp. 21-22.

139 E.g., in the U.N. Conference on Environment and Development (Rio de Janeiro, 1992, in its World NGO Forum) and in the II World Conference on Human Rights (Vienna, 1993, in the same Forum and in its Drafting Committee).

140 A growing call was formed for the pursuance of social justice *among* and *within* nations.

141 A.A. Cançado Trindade, *A Proteção dos Vulneráveis como Legado da II Conferência Mundial de Direitos Humanos (1993-2013)*, Fortaleza/Brazil, IBDH/IIDH/SLADI, 2014, pp. 13-356; A.A. Cançado Trindade, "Sustainable Human Development and Conditions of Life as a Matter of Legitimate International

legitimacy of the concern of the international community as a whole with the conditions of living of all human beings everywhere. The placing of the well-being of peoples and human beings, of the improvement of their conditions of living, at the centre of the concerns of the international community, is remindful of the historical origins of the *droit des gens*[142].

126. At the end of the decade and the dawn of the new millennium, the United Nations Millennium Declaration (adopted by General Assembly's resolution 55/2, of 08.09.2000) stated the determination "to eliminate the dangers posed by weapons of mass destruction" (para. II(8)), and, noticeably,

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

127. In addition to our responsibilities to our individual societies, – the U.N. Millennium Declaration added, –

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

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

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

We reaffirm our commitment to the purposes and principles of the Charter of the United Nations, which have proved timeless and universal. Indeed, their relevance and capacity to inspire have increased, as nations and peoples have become increasingly interconnected and interdependent (paras. I(2-3)).

X. Impertinence of the So-Called *Monetary Gold* "Principle"

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

129. Attention has to be turned to the *nature* of the case at issue, which may well require a reasoning– as the *cas d'espèce* does – moving away from "a strict State-centred voluntarist perspective" and from the "exaltation of State consent", and seeking guidance

in fundamental principles (*prima principia*), such as the principle of humanity. This is what I pointed out in my extensive Dissenting Opinion in the case concerning the *Application of the Convention against Genocide* (Croatia *versus* Serbia, Judgment of 03.02.2015), where I pondered *inter alia* that such *prima principia* confer to the international legal order "its ineluctable axiological dimension"; they "conform its *substratum*, and convey the idea of an *objective* justice, in the line of jusnaturalist thinking" (para. 517).

130. That was not the first time I made such ponderation: I had done the same, in another extensive Dissenting Opinion (para. 213), in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination – CERD* (Georgia *versus* Russian Federation, Judgment of 01.04.2011). In my subsequent aforementioned Dissenting Opinion in the case concerning the *Application of the Convention against Genocide* I expressed my dissatisfaction that in a case pertaining to the interpretation and application of the Convention against Genocide, the ICJ even made recourse to the so-called *Monetary Gold* "principle"[143], which had no place in a case like that, and "which does not belong to the realm of the *prima principia*, being nothing more than a concession to State consent, within an outdated State voluntarist framework" (para. 519).

131. May I, in the present Dissenting Opinion, this time in the case of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, again leave on the records my dissatisfaction for the same reason. Once again, may I stress that the adjudication of a case like the present one shows the need to go beyond the strict inter-State outlook. The fact that the mechanism for the adjudication of contentious cases before the ICJ is an inter-State one, does not at all imply that the

143 Even if only to dismiss it (para. 116).

Court's reasoning should likewise be strictly inter State. In the present case concerning nuclear weapons and the obligation of nuclear disarmament, it is necessary to focus attention on peoples, rather than on inter-State susceptibilities. It is imperative to keep in mind the world population, in pursuance of a humanist outlook, in the light of the *principle of humanity*.

XI. The Fundamental Principle of the Juridical Equality of States

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

133. The present case of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* is surely not the first one before the ICJ that brings to the fore the relevance of the principle of the juridical equality of States. In the ICJ's Order (of Provisional Measures of Protection) of 03.03.2014, I have deemed it fit to point out, in my Separate

Opinion appended thereto, that the case concerning *Questions Relating to the Seizure and Detention of Certain Documents and Data*

> *bears witness of the relevance of the principle of the juridical equality of States. The prevalence of this fundamental principle has marked a longstanding presence in the realm of international law, ever since the times of the II Hague Peace Conference of 1907, and then of the drafting of the Statute of the Permanent Court of International Justice by the Advisory Committee of Jurists, in June-July 1920. Recourse was then made, by that Committee, inter alia, to general principles of law, as these latter embodied the objective idea of justice. A general principle such as that of the juridical equality of States, enshrined a quarter of a century later in the United Nations Charter (Article 2(1)), is ineluctably intermingled with the quest for justice.*
>
> *Subsequently, throughout the drafting of the 1970 U.N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (1964-1970), the need was felt to make it clear that stronger States cannot impose their will upon the weak, and that de facto inequalities among States cannot affect the weaker in the vindication of their rights. The principle of the juridical equality of States gave expression to this concern, embodying the idée de justice, emanated from the universal juridical conscience (paras. 44-45).*

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

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

Despite successive attempts to undermine it, the principle of juridical equality of States has remained, from the II Hague Peace Conference of 1907 to date, one of the basic pillars of International Law. It has withstood the onslaught of time, and shown itself salutary for the peaceful conduction of international relations, being ineluctably associated – as it stands – with the foundations of International Law. It has been very important for the international legal system itself, and has proven to be a cornerstone of international law in the United Nations era. In fact, the U.N. Charter gave it a new dimension, and the principle developments such as that of the system of collective security, within the ambit of the law of the United Nations"[144].

144 A.A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, *op. cit. supra* n. (120), pp. 84-85, and cf. pp. 62-63, 65 and 73.

135. By the turn of the century, the General Assembly's resolution 55/2, of 08.09.2000, adopted the United Nations Millennium Declaration, which *inter alia* upheld the "sovereign equality of all States", in conformity with "the principles of justice and international law" (para. I(4)). Half a decade later, the General Assembly's resolution 60/1, of 16.09.2005, adopted the *World Summit Outcome*, which *inter alia* expressed the determination "to establish a just and lasting peace all over the world in accordance with the purposes and principles of the [U.N.] Charter", as well as "to uphold the sovereign equality of all States" (para. I(5)). In stressing therein the "vital importance of an effective multilateral system" to face current challenges to international peace and security (paras. 6-7), the international community reiterated its profession of faith in the general principles of international law.

XII. Unfoundedness of the Strategy of "Deterrence"

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

137. In its 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons*, permeated with ambiguity, the ICJ gave undue weight to "the still strong adherence to the practice of deterrence" (paras. 67 and 73) by a few NWS, to the point of beholding in it an obstacle to the formation and consolidation of *opinio juris* and

a customary rule as to the illegality of nuclear weapons, leading to "a specific and express prohibition" of their use (para. 73). Here the Court assumed its usual positivist posture: in its view, the prohibition must be express, stated in positive law, even if those weapons are capable of destroying all life on earth, the whole of humankind...

138. The ICJ, in its Advisory Opinion of 1996, gave too much weight to the opposition of NWS as to the existence of an *opinio juris* on the unlawfulness of nuclear weapons. And this, despite the fact that, in their overwhelming majority, member States of the United Nations stand clearly against nuclear weapons, and in favour of nuclear disarmament. The 1996 Advisory Opinion, notwithstanding, appears unduly influenced by the lack of logic of "deterrence"[145]. One cannot conceive, – as the 1996 Advisory Opinion did, – of recourse to nuclear weapons by a hypothetical State in "self-defence" at the unbearable cost of the devastating effects and sufferings inflicted upon humankind as a whole, in an "escalade vers l'apocalypse"[146].

139. The infliction of such devastation and suffering is in flagrant breach of international law, – of the ILHR, IHL and the Law of the United Nations (cf. part XIII, *infra*). It is, furthermore, in flagrant breach of norms of *jus cogens*[147]. The strategy of "deterrence" seems to make abstraction of all that. The ICJ, as the International Court *of Justice*, should have given, on all occasions when it has been called upon to pronounce on nuclear weapons

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

146 Cf. *ibid*., p. 147, and cf. pp. 129, 133, 151, 160, 174-175, 197 and 199-200.

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

(in the exercise of its jurisdiction on contentious and advisory matters), far greater weight to the *raison d'humanité*[148], rather than to the *raison d'État* nourishing "deterrence". We have to keep in mind the human person and the peoples, for which States were created, instead of relying only on what one assumes to be the *raison d'État*. The *raison d'humanité*, in my understanding, prevails surely over considerations of *Realpolitik*.

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

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

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

that *opinio juris* discloses that the invocation of the absence of an express prohibition is nonsensical, in relying upon the destructive and suicidal strategy of "deterrence".

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

143. Two decades ago, in the advisory proceedings of late 1995 before the ICJ, conducive to its 1996 Advisory Opinion on *Threat or Use of Nuclear Weapons*, fierce criticisms were voiced of the strategy of "deterrence", keeping in mind the inhumane sufferings of victims of nuclear detonation, radiation and contamination[149]. Attention was drawn, on the occasion, to the "distortion of logic" in "deterrence", in trying to rely on so immensely destructive weapons to keep peace, and in further trying to persuade others "to accept that for the last 50 or so years this new and more dangerous and potentially genocidal level or armaments should be credited with keeping peace"[150].

144. In the aforementioned advisory proceedings, "nuclear deterrence" was dismissed as being "simply the maintenance of a

149 Cf., e.g., the testimonies of the Mayors of Hiroshima and Nagasaki, in part XIII, *infra*.

150 ICJ, doc. CR 95/35, of 15.11.1995, p. 32 (statement of Zimbabwe).

balance of fear"[151]; it was criticized as seeking to ground itself on a "highly questionable" premise, whereby a handful of NWS feel free to "arrogate to themselves" the faculty "to determine what is world peace and security, exclusive in the context of their own" national strategies and interests[152]. It was contended that nuclear weapons are in breach of international law by their own nature, as weapons of catastrophic mass destruction; "nuclear deterrence" wrongfully assumes that States and individuals act rationally, leaving the world "under the nuclear sword of Damocles", stimulating "the nuclear ambitions of their countries, thereby increasing overall instability", and also increasing the danger of their being used "intentionally or accidentally"[153].

145. The NWS, in persisting to rely on the strategy of "deterrence", seem to overlook the above-reviewed distinct series of U.N. General Assembly resolutions (cf. part III, *supra*) condemning nuclear weapons and calling for their elimination. The strategy of "deterrence" has come under strong criticism along the years, for the serious risks it carries with it, and for its indifference to the goal – supported by the United Nations, – of achieving a world free of nuclear weapons. Very recently, e.g., participants in the series of Conferences on Humanitarian Impact of Nuclear Weapons (2013-2014) have strongly criticized the strategy of nuclear "deterrence". In a statement sent to the 2014 Vienna Conference, for example, the U.N. Secretary-General warned against the dangers of nuclear "deterrence", undermining world stability (cf. part XIX, *infra*).

146. There is here, in effect, clearly formed, an *opinio juris communis* as to the illegality and prohibition of nuclear weapons.

151 ICJ, doc. CR 95/27, of 07.11.1995, p. 37 (statement of the Mayor of Nagasaki).

152 *Ibid*., p. 45, para. 14 (statement of Malaysia).

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

The use or threat of use of nuclear weapons being a clear breach of international law, of International Humanitarian Law and of the International Law of Human Rights, and of the U.N. Charter, renders unsustainable and unfounded any invocation of the strategy of "deterrence". In my view, a few States cannot keep on insisting on "national security interests" to arrogate to themselves indefinitely the prerogative to determine by themselves the conditions of world peace, and to impose them upon all others, the overwhelming majority of the international community. The survival of humankind cannot be made to depend on the "will" of a handful of privileged States. The universal juridical conscience stands well above the "will" of individual States.

XIII. The Illegality of Nuclear Weapons and the Obligation of Nuclear Disarmament

1. The Condemnation of All Weapons of Mass Destruction

147. Since the beginning of the nuclear age, it became clear that the effects of nuclear weapons (such as heat and radiation) cannot be limited to military targets only, being thus by nature indiscriminate and disproportionate in their long-term devastation, disclosing the utmost cruelty. The *opinio juris communis* as to the prohibition of nuclear weapons, and of all weapons of mass destruction, has gradually been formed, along the last decades[154]. If weapons less destructive than nuclear weapons have already been expressly prohibited (as is the case of biological and chemical weapons), it would be nonsensical to argue that,

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

those which have not, by positive conventional international law, like nuclear weapons, would not likewise be illicit; after all, they have far greater and long-lasting devastating effects, threatening the existence of the international community as a whole.

148. It may be recalled that, already in 1969, *all* weapons of mass destruction were condemned by the *Institut de Droit International* (I.D.I.). In the debates of its Edinburgh session on the matter, emphasis was placed on the need to respect the principle of distinction (between military and non-military objectives), and the terrifying effects of the use of nuclear weapons were pointed out, – the example of the atomic bombing of Hiroshima and Nagasaki having been expressly recalled[155]. In its resolution of September 1969 on the matter, the *Institut* began by restating, in the preamble, the *prohibition of recourse to force* in international law, and the duty of protection of civilian populations in any armed conflict; it further recalled the general principles of international law, customary rules and conventions, – supported by international case-law and practice, – which "clearly restrict" the extent to which the parties engaged in a conflict may harm the adversary, and warned against

> *the consequences which the indiscriminate conduct of hostilities and particularly the use of nuclear, chemical and bacteriological weapons, may involve for civilian populations and for mankind as a whole*[156].

149. In its operative part, the aforementioned resolution of the *Institut* stressed the importance of the principle of distinction (between military and non-military objectives) as a "fundamental principle of international law" and the pressing need to protect

155 Cf. *Annuaire de l'Institut de Droit International* – Session d'Edimbourg (1969)-II, pp. 49-50, 53, 55, 60, 62-63, 66, 88-90 and 99.

156 Text *in*: *Annuaire de l'Institut de Droit International* – Session d'Edimbourg (1969) II, pp. 375-376.

civilian populations in armed conflicts[157], and added, in paragraphs 4 and 7, that:

> *Existing international law prohibits all armed attacks on the civilian population as such, as well as on non-military objects, notably dwellings or other buildings sheltering the civilian population, so long as these are not used for military purposes (...).*
>
> *Existing international law prohibits the use of all weapons which, by their nature, affect indiscriminately both military objectives and non-military objects, or both armed forces and civilian populations. In particular, it prohibits the use of weapons the destructive effect of which is so great that it cannot be limited to specific military objectives or is otherwise uncontrollable (self-generating weapons), as well as of 'blind' weapons[158].*

150. For its part, the International Law Association (I.L.A.), in its more recent work (in 2014) on nuclear disarmament, after referring to Article VI of the NPT, was of the view that it was not only conventional, but also an evolving customary international obligation with an *erga omnes* character, affecting "the international community as a whole", and not only the States Parties to the NPT[159]. It also referred to the "world-wide public opinion" pointing to "the catastrophic consequences for humankind of any use or detonation of nuclear weapons", and added that reliance on nuclear weapons for "deterrence" was thus unsustainable[160].

157 Paras. 1-3, 5-6 and 8, *in ibid.*, pp. 376-377.

158 Text *in ibid.*, pp. 376-377.

159 International Law Association (I.L.A.), Committee: *Nuclear Weapons, Non-Proliferation and Contemporary International Law* (2nd Report: *Legal Aspects of Nuclear Disarmament*), I.L.A. Washington Conference, 2014, pp. 2-4.

160 *Ibid.*, pp. 5-6.

151. In its view, "nuclear" deterrence is not a global "umbrella", but rather a threat to international peace and security, and NWS are still far from implementing Article VI of the NPT[161]. To the International Law Association, the provisions of Article VI are not limited to States Parties to the NPT, "they are part of customary international law or at least evolving custom"; they are valid *erga omnes*, as they affect "the international community as a whole", and not only a group of States or a particular State[162]. Thus, as just seen, learned institutions in international law, such as the I.D.I. and the I.L.A., have also sustained the prohibition in international law of all weapons of mass destruction, starting with nuclear weapons, the most devastating of all.

152. A single use of nuclear weapons, irrespective of the circumstances, may today ultimately mean the end of humankind itself[163]. All weapons of mass destruction are illegal, and are prohibited: this is what ineluctably ensues from an international legal order of which the ultimate material source is the *universal juridical conscience*[164]. This is the position I have consistently sustained along the years, including in a lecture I delivered at the University of Hiroshima, Japan, on 20.12.2004[165]. I have done so in the line of jusnaturalist thinking, faithful to the lessons of the "founding fathers" of the law of nations, keeping in mind not

161 *Ibid*., pp. 8-9.

162 *Ibid*., p. 18.

163 Nagendra Singh, *Nuclear Weapons and International Law*, London, Stevens, 1959, p. 242.

164 A.A. Cançado Trindade, *International Law for Humankind - Towards a New Jus Gentium*, *op. cit. supra* n. (120), ch. VI ("The Material Source of International Law: Manifestations of the Universal Juridical Conscience"), pp. 139-161.

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

only States, but also peoples and individuals, and humankind as a whole.

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

153. In effect, the nuclear age itself, from its very beginning (the atomic blasts of Hiroshima and Nagasaki in August 1945) can be properly studied from a people-centred approach. There are moving testimonies and historical accounts of the devastating effects of nuclear weapons, from surviving victims and witnesses[166]. Yet, even with the eruption of the nuclear age, attention remained focused largely on State strategies: it took some time for them gradually to shift to the devastating effects of nuclear weapons on peoples.

154. As recalled in one of the historical accounts, only at the first Conference against Atomic and Hydrogen Bombs (1955), "the victims had their first opportunity, after ten years of silence, to make themselves heard", in that forum[167]. Along the last decades, there have been endeavours to shift attention from State strategies to the numerous victims and enormous damages caused by nuclear weapons, focusing on "human misery and human dignity"[168]. Recently, one significant initiative to this effect has been the series of Conferences on the Humanitarian Impact of Nuclear Weapons (2013-2014), which I shall survey later on in this Dissenting Opinion (cf. part XIX, *infra*).

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

167 Kenzaburo Oe, *Hiroshima Notes* [1965], N.Y./London, Marion Boyars, 1997 [reed.], pp. 72 and 159.

168 *Ibid*., pp. 149 and 162.

155. There has been a chorus of voices of those who have been personally victimized by nuclear weapons in distinct circumstances, – either in the atomic bombings of Hiroshima and Nagasaki (1945), or in nuclear testing (during the cold-war era) in regions such as Central Asia and the Pacific. Focusing on their intensive suffering (e.g., ensuing from radioactive contamination and forced displacement)[169], affecting successive generations, they have drawn attention to the humanitarian consequences of nuclear weapon detonations.

156. In addressing the issue of nuclear weapons, on four successive occasions (cf. *infra*), the ICJ appears, however, to have always suffered from inter-State myopia. Despite the clarity of the formidable threat that nuclear weapons represent, the treatment of the issue of their prohibition under international law has most regrettably remained permeated by ambiguities. The present case of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* is the third time that attempts were made, by means of the lodging of contentious cases with the ICJ, to obtain its pronouncement thereon. On two prior occasions – in the *Nuclear Tests* cases (1974 and 1995)[170], the Court assumed, in both of them, a rather evasive posture, avoiding to pronounce clearly on the substance of a matter pertaining to the very survival of humankind.

157. May I here briefly single out one aspect of those earlier contentious proceedings, given its significance in historical perspective. It should not pass unnoticed that, in the first *Nuclear Tests* case (Australia and New Zealand *versus* France), one of the applicant States contended, *inter alia*, that the nuclear testing

169 Cf. J. Borrie, "Humanitarian Reframing of Nuclear Weapons and the Logic of a Ban", 90 *International Affairs* (2014) p. 633, and cf. pp. 637, 643-644 and 646.

170 Cf. *I.C.J. Reports 1974*, pp. 63-455; and cf. *I.C.J. Reports 1995*, pp. 4-23, and the position of three dissenting Judges in *ibid.*, pp. 317-421.

undertaken by the French government in the South Pacific region violated not only the right of New Zealand that no radioactive material enter its territory, air space and territorial waters *and* those of other Pacific territories but *also* "the rights of all members of the international community, including New Zealand, that no nuclear tests that give rise to radioactive fall-out be conducted"[171].

158. For its part, the other applicant State contended that it was seeking protection to the life, health and well-being of Australia's population, in common with the populations of other States, against atmospheric nuclear tests by any State[172]. Thus, over three decades ago, the perspective of the *Applications Instituting Proceedings* of both New Zealand and Australia (of 1973) went clearly – and correctly so – beyond the purely inter-State dimension, as the problem at issue concerned the international community as a whole.

159. Both Australia and New Zealand insisted on the people-centred approach throughout the legal proceedings (written and oral phases). New Zealand, for example, in its *Memorial*, invoked the obligation *erga omnes* not to undertake nuclear testing "owed to the international community as a whole" (paras. 207-208), adding that non-compliance with it aroused "the keenest sense of alarm and antagonism among the peoples" and States of the region wherein the tests were conducted (para. 212). In its oral arguments in the public sitting of 10.07.1974 in the same *Nuclear Tests* case, New Zealand again invoked "the rights of all members of the international community", and the obligations *erga omnes* owed to the international community as a whole[173].

171 ICJ, *Application Instituting Proceedings* (of 09.05.1973), *Nuclear Tests* case (New Zealand *versus* France), pp. 8 and 15-16, cf. pp. 4-16.

172 ICJ, *Application Instituting Proceedings* (of 09.05.1973), *Nuclear Tests* case (Australia *versus* France), pp. 12 and 14, paras. 40, 47 and 49(1).

173 ICJ, *Pleadings, Oral Arguments, Documents — Nuclear Tests cases* (vol. II: New Zealand *versus* France, 1973-1974), pp. 256-257 and 264-266.

And Australia, for example, in its oral arguments in the public sitting of 08.07.1974, referring to the 1963 Partial Test Ban Treaty, underlined the concern of "the whole international community" for "the future of mankind" and the responsibility imposed by "the principles of international law" upon "all States to refrain from testing nuclear weapons in the atmosphere"[174].

160. The outcome of the *Nuclear Test* cases, however, was rather disappointing: even though the ICJ issued orders of Provisional Measures of Protection in the cases in June 1973 (requiring the respondent State to cease testing), subsequently, in its Judgments of 1974[175], in view of the announcement of France's voluntary discontinuance of its atmospheric tests, the ICJ found, yielding to State voluntarism, that the claims of Australia and New Zealand no longer had "any object" and that it was thus not called upon to give a decision thereon[176]. The dissenting Judges in the case rightly pointed out that the legal dispute between the contending parties, far from having ceased, still persisted, since what Australia and New Zealand sought was a declaratory judgment of the ICJ stating that atmospheric nuclear tests were contrary to international law[177].

174 ICJ, *Pleadings, Oral Arguments, Documents — Nuclear Tests cases* (vol. I: Australia *versus* France, 1973-1974), p. 503.

175 For a critical parallel between the 1973 Orders and the 1974 Judgments, cf. P. Lellouche, "The *Nuclear Tests* Cases: Judicial Silence *versus* Atomic Blasts", 16 *Harvard International Law Journal* (1975) pp. 615-627 and 635; and, for further criticisms, cf. *ibid*., pp. 614-637;

176 *I.C.J. Reports 1974*, pp. 272 and 478, respectively.

177 ICJ, *Nuclear Tests* case, Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock, *I.C.J. Reports 1974*, pp. 319-322, 367-369, 496, 500, 502-504, 514 and 520-521; and cf. Dissenting Opinion of Judge De Castro, *ibid*., pp. 386-390; and Dissenting Opinion of Judge Barwick, *ibid*., pp. 392-394, 404-405, 436-437 and 525-528. It was further pointed out that the ICJ should thus have dwelt upon the question of the existence of rules of *customary* international law prohibiting States from causing, through atmospheric nuclear tests, the deposit of radio-active fall-out on the territory of other States; ICJ, *Nuclear Tests* case, Separate Opinion of Judge Petrén, *I.C.J. Reports 1974*, pp. 303-306 and 488-489. It was the existence or otherwise of such customary rules that had to be determined, — a question which unfortunately was left largely unanswered by the Court in that case.

161. The reticent position of the ICJ in that case was even more regrettable if one recalls that the applicants, in referring to the "psychological injury" caused to the peoples of the South Pacific region through their "anxiety as to the possible effects of radioactive fall-out on the well-being of themselves and their descendants", as a result of the atmospheric nuclear tests, ironically invoked the notion of *erga omnes* obligations (as propounded by the ICJ itself in its *obiter dicta* in the *Barcelona Traction* case only four years earlier)[178]. As the ICJ reserved itself the right, in certain circumstances, to reopen the case decided in 1974, it did so two decades later, upon an application instituted by New Zealand *versus* France. But in its Order of 22.09.1995, the ICJ dismissed the complaint, as it did not fit into the *caveat* of the 1974 Judgment, which concerned atmospheric nuclear tests; here, the complaint was directed against the underground nuclear tests conducted by France since 1974[179].

162. The ICJ thus lost two historical opportunities, in both contentious cases (1974 and 1995), to clarify the key point at issue (nuclear tests). And now, with the decision it has just rendered today, 05.10.2016, it has lost a third occasion, this time to pronounce on the *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, at the request of the Marshall Islands. This time the Court has found that the existence of a legal dispute has not been established

178 As recalled in the Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock, *I.C.J. Reports 1974*, pp. 362, 368-369 and 520-521; as well as in the Dissenting Opinion of Judge Barwick, *ibid*., pp. 436-437.

179 Cf. *I.C.J. Reports 1995* pp. 288-308; once again, there were Dissenting Opinions (cf. *ibid*., pp. 317-421). Furthermore, petitions against the French nuclear tests in the atoll of Mururoa and in that of Fangataufa, in French Polinesia, were lodged with the European Commission of Human Rights (EComHR); cf. EComHR, case *N.N. Tauira and 18 Others versus France* (appl. n. 28204/95), decision of 04.12.1995, 83-A *Decisions and Reports* (1995) p. 130.

before it and that it has no jurisdiction to consider the Application lodged with it by the Marshall Islands on 24.04.2014.

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

164. In response to only one of the applications, that of the U.N. General Assembly[180], the Court, in the Advisory Opinion of 08.07.1996 on the *Threat or Use of Nuclear Weapons*, affirmed that neither customary international law nor conventional international law authorizes specifically the threat or use of nuclear weapons; neither one, nor the other, contains a complete and universal prohibition of the threat or use of nuclear weapons as such; it added that such threat or use which is contrary to Article 2(4) of the U.N. Charter and does not fulfil the requisites of its Article 51, is illicit; moreover, the conduct in armed conflicts should be compatible with the norms applicable in them, including those of International Humanitarian Law; it also affirmed the obligation to undertake in good will negotiations conducive to nuclear disarmament in all its aspects[181].

165. In the most controversial part of its Advisory Opinion (resolutory point 2E), the ICJ stated that the threat or use of nuclear

180 As the ICJ understood, as to the other application, that the WHO was not competent to deal with the question at issue, – despite the purposes of that U.N. specialized agency at issue and the devastating effects of nuclear weapons over human health and the environment...

181 *I.C.J. Reports 1996*, pp. 266-267.

weapons "would be generally contrary to the rules of international law applicable in armed conflict", mainly those of International Humanitarian Law; however, the Court added that, at the present stage of international law "it cannot conclude definitively if the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self defence in which the very survival of a State would be at stake"[182]. The Court therein limited itself to record the existence of a legal uncertainty.

166. In fact, it did not go further than that, and the Advisory Opinion was permeated with evasive ambiguities, not avoiding the shadow of the *non liquet*, in relation to a question which affects, more than each State individually, the whole of humankind. The Advisory Opinion made abstraction of the fact that International Humanitarian Law applies likewise in case of self-defence, always safeguarding the principles of distinction and proportionality (which nuclear weapons simply ignore)[183], and upholding the prohibition of infliction of unnecessary suffering.

167. The Advisory Opinion could and should have given greater weight to a point made before the ICJ in the oral arguments of November 1995, namely, that of the need of a people-centred approach in the present domain. Thus, it was stated, for example, that the "experience of the Marshallese people confirms that unnecessary suffering is an unavoidable consequence of the

182 *Ibid.*, p. 266.

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

detonation of nuclear weapons"[184]; the effects of nuclear weapons, by their nature, are widespread, adverse and indiscriminate, affecting also future generations[185]. It was further stated that the "horrifying evidence" of the use of atomic bombs in Hiroshima and Nagasaki, followed by the experience and the aftermath of the nuclear tests carried out in the region of the Pacific Island States in the 1950s and the 1960s, have alerted to "the much graver risks to which mankind is exposed by the use of nuclear weapons"[186].

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

169. Again, in the 1996 Opinion, it were the dissenting Judges, and not the Court's split majority, who drew attention to this[187], and to the relevance of the Martens clause in the present context[188] (cf. part XIV, *infra*). Moreover, the 1996 Opinion also

184 ICJ, doc. CR 95/32, of 14.11.1995, p. 22 (statement of the Marshall Islands).

185 *Ibid*., p. 23.

186 ICJ, doc. CR 95/32, of 14.11.1995, p. 31 (statement of Solomon Islands). Customary international law and general principles of international law have an incidence in this domain; *ibid*., pp. 36 and 39-40.

187 ICJ Advisory Opinion on *Threat or Use of Nuclear Weapons*, *I.C.J Reports 1996*, Dissenting Opinion of Judge Koroma, pp. 573-574 and 578.

188 Cf. *ibid*., Dissenting Opinions of Judge Shahabuddeen, pp. 386-387, 406, 408, 410-411 and 425; and of Judge Weeramantry, pp. 477-478, 481, 483, 486-487, 490-491, 494, 508 and 553-554.

minimized (para. 71) the resolutions of the U.N. General Assembly which affirm the illegality of nuclear weapons[189] and condemn their use as a violation of the U.N. Charter and as a crime against humanity. Instead, it took note of the "policy of deterrence", which led it to find that the members of the international community continued "profoundly divided" on the matter, rendering it rendered impossible to determine the existence of an *opinio juris* in this respect (para. 67).

170. It was not incumbent upon the Court to resort to the unfounded strategy of "deterrence" (cf. part XII, *supra*), devoid of any legal value for the determination of the formation of a customary international law obligation of prohibition of the use of nuclear weapons. The Court did not contribute on this matter. In unduly relying on "deterrence" (para. 73), it singled out a division, in its view "profound", between an extremely reduced group of nuclear powers on the one hand, and the vast majority of the countries of the world on the other; it ended up by favouring the former, by means of an inadmissible *non liquet*[190].

171. The Court, thus, lost yet another opportunity, – in the exercise of its advisory function as well, – to contribute to the consolidation of the *opinio juris communis* in condemnation of nuclear weapons. Its 1996 Advisory Opinion considered the survival of a hypothetical State (in its resolutory point 2E), rather than that of peoples and individuals, and ultimately of humankind

189 Notably, the ground-breaking General Assembly resolution 1653(XVI), of 24.11.1961.

190 A.A. Cançado Trindade, *International Law for Humankind - Towards a New Jus Gentium*, *op. cit. supra* n. (120), pp. 415-418; L. Condorelli, "Nuclear Weapons: A Weighty Matter for the International Court of Justice— *Jura Novit Curia*?", 316 *International Review of the Red Cross* (1997) pp. 9-20; M. Mohr, "Advisory Opinion of the International Court of Justice on the Legality of the Use of Nuclear Weapons under International Law — A Few Thoughts on Its Strengths and Weaknesses", 316 *International Review of the Red Cross* (1997) pp. 92-102. The Opinion is not conclusive and provides no guidance; J.-P. Queneudec, "E.T. à la C.I.J.: méditations d'un extra-terrestre sur deux avis consultatifs", 100 *Revue générale de Droit international public* (1996) 907-914, esp. p. 912.

as a whole. It seemed to have overlooked that the survival of a State cannot have primacy over the right to survival of humankind as a whole.

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

172. There is yet another related point to keep in mind. The ICJ's 1996 Advisory Opinion erroneously took IHL as *lex specialis* (para. 25), overstepping the ILHR, oblivious that the maxim *lex specialis derogat generalis*, thus understood, has no application in the present context: in face of the immense threat of nuclear weapons to human life on earth, both IHL and the ILHR apply in a converging way[191], so as to enhance the much-needed protection of human life. In any circumstances, the norms which best protect are the ones which apply, be them of IHL or of the ILHR, or any other branch of international protection of the human person (such as the International Law of Refugees – ILR). They are all equally important. Regrettably, the 1996 Advisory Opinion unduly minimized the international case-law and the whole doctrinal construction on the right to life in the ambit of the ILHR.

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

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

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

174. This has been done, in distinct continents, so as to seek to secure the most effective safeguard of the protected rights, in all circumstances (including in times of armed conflict). Contrary to what was held in the ICJ's 1996 Advisory Opinion, there is no *lex specialis* here, but rather a concerted endeavour to apply the relevant norms (be them of the ILHR or of IHL) that best protect human beings. This is particularly important when they find themselves in a situation of utmost vulnerability, – such as in the present context of threat or use of nuclear weapons. In their case-law, international human rights tribunals (like the ECtHR and the IACtHR) have focused attention on the imperative of securing protection, e.g., to the fundamental right to life, of persons in great vulnerability (potential victims)[192].

175. In the course of the proceedings before the ICJ in the present cases of *Obligations* Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament, the applicant State draws attention reiteratedly to the devastating effects upon human life of nuclear weapons detonations. Thus, in the case opposing the Marshall Islands to the United Kingdom, the applicant State draws attention, in its Memorial, to the destructive effects of nuclear weapons (testing) in space and time (pp. 12-14). In its oral arguments of 11.03.2016, the Marshall Islands addresses the "tragic losses to the Marshallese", the "dire health consequences suffered by the Marshallese following nuclear contamination, including extreme birth defects and cancers"[193].

192 Cf. A.A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford, Oxford University Press, 2012 [reprint], chs. II-III and VII, pp. 17-62 and 125-131.

193 ICJ, doc. CR 2016/5, of 11.03.2016, p. 9, para. 10.

176. In the case opposing the Marshall Islands to India, the applicant State, in its *Memorial*, refers to the grave "health and environmental consequences of nuclear testing" upon the Marshallese (pp. 5-6). In its oral arguments of 07.03.2016, the Marshall Islands stated:

> *The Marshall Islands has a unique and devastating history with nuclear weapons. While it was designated as a Trust Territory by the United Nations, no fewer than 67 atomic and thermonuclear weapons were deliberately exploded as 'tests' in the Marshall Islands, by the United States. (...) Several islands in my country were vaporized and others are estimated to remain uninhabitable for thousands of years. Many, many Marshallese died, suffered birth defects never before seen and battled cancers resulting from the contamination. Tragically the Marshall Islands thus bears eyewitness to the horrific and indiscriminate lethal capacity of these weapons, and the intergenerational and continuing effects that they perpetuate even 60 years later.*
>
> *One 'test' in particular, called the 'Bravo' test [in March 1954], was one thousand times stronger than the bombs dropped on Hiroshima and Nagasaki*[194].

177. And in the case opposing the Marshall Islands to Pakistan, the applicant State, in its *Memorial*, likewise addresses the serious "health and environmental consequences of nuclear testing" upon the Marshallese (pp. 5-6). In its oral arguments of 08.03.2016, the Marshall Islands recalls the 67 atomic and thermonuclear weapons "tests" that it had to endure (since it became a U.N. Trust Territory); it further recalls the reference, in the U.N. Charter, to

194 ICJ, doc. CR 2016/1, of 07.03.2016, p. 16, paras. 4-5.

nations "large and small" having "equal rights" (preamble), and to the assertion in its Article 2 that the United Nations is "based on the principle of the sovereign equality of all its Members"[195].

178. Two decades earlier, in the course of the advisory proceedings before the ICJ of late 1995 preceding the 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons*, the devastating effects upon human life of nuclear weapons detonations were likewise brought to the Court's attention. It is beyond the purposes of the present Dissenting Opinion to review all statements to this effect; suffice it here to recall two of the most moving statements, from the Mayors of Hiroshima and Nagasaki, who appeared before the Court as members of the Delegation of Japan. The Mayor of Hiroshima (Mr. Takashi Hiraoka) thus began his statement of 07.11.1995 before the ICJ:

> *I am here today representing Hiroshima citizens, who desire the abolition of nuclear weapons. More particularly, I represent the hundreds of thousands of victims whose lives were cut short, and survivors who are still suffering the effects of radiation, 50 years later. On their behalf, I am here to testify to the cruel, inhuman nature of nuclear weapons. (...)*
>
> *The development of the atomic bomb was the product of cooperation among politicians, military and scientists. The nuclear age began the moment the bombs were dropped on human beings.*
>
> *Their enormous destructive power reduced utterly innocent civilian populations to ashes. Women, the*

195 ICJ, doc. CR 2016/2, of 08.03.2016, p. 10, paras. 5-7.

elderly, and the newborn were bathed in deadly radiation and slaughtered[196].

179. After stressing that the mass killing was "utterly indiscriminate", he added that, even today, "thousands of people struggle daily with the curse of illness caused by that radiation", there being until then "no truly accurate casualty figures"[197]. The exposure in Hiroshima to high levels of radiation, – he proceeded, – "was the first in human history", generating leukemia, distinct kinds of cancer (of breast, lung, stomach, thyroid, and other), extending for "years or decades", with all the fear generated by such continuing killing "across years or decades"[198].

180. Even half a century later, – added the Mayor of Hiroshima, – "the effects of radiation on human bodies are not thoroughly understood. Medically, we do know that radiation destroys cells in the human body, which can lead to many forms of pathology"[199]. The victimized segments of the population have continued suffering "psychologically, physically, and socially from the atomic bomb's after-effects"[200]. He further stated that

> *The horror of nuclear weapons (. . .) derives (. . .) from the tremendous destructive power, but equally from radiation, the effects of which reach across generations. (. . .) What could be more cruel? Nuclear weapons are more cruel and inhumane than any weapon banned thus far by international law*[201].

196 ICJ, doc. CR 95/27, of 07.11.1995, pp. 22-23.

197 *Ibid.*, pp. 24-25.

198 *Ibid.*, pp. 25-27.

199 *Ibid.*, p. 25.

200 *Ibid.*, pp. 27-28.

201 *Ibid.*, p. 30.

181. After singling out the significance of U.N. General Assembly resolution 1653 (XVI) of 1961, the Mayor of Hiroshima warned that "[t]he stockpiles of nuclear weapons on earth today are enough to annihilate the entire human race several times over. These weapons are possessed on the assumption that they can be used"[202]. He concluded with a strong criticism of the strategy of "deterrence"; in his own words,

> *As long as nuclear weapons exist, the human race faces a real and present danger of self-extermination. The idea based on nuclear deterrence that nuclear war can be controlled and won exhibits a failure of human intelligence to comprehend the human tragedy and global environmental destruction brought about by nuclear war. (...) [O]nly through a treaty that clearly stipulates the abolition of nuclear weapons can the world step toward the future (...)*[203].

182. For his part, the Mayor of Nagasaki (Mr. Iccho Itoh), in his statement before the ICJ, also of 07.11.1995, likewise warned that "nuclear weapons bring enormous, indiscriminate devastation to civilian populations"; thus, five decades ago, in Hiroshima and Nagasaki, "a single aircraft dropped a single bomb and snuffed out the lives of 140.000 and 74.000 people, respectively. And that is not all. Even the people who were lucky enough to survive continue to this day to suffer from the late effects unique to nuclear weapons. In this way, nuclear weapons bring enormous, indiscriminate devastation to civilian populations"[204].

202 *Ibid.*, pp. 30-31.

203 *Ibid.*, p. 31.

204 ICJ, doc. CR 95/27, of 07.11.1995, p. 33.

183. He added that "the most fundamental difference between nuclear and conventional weapons is that the former release radioactive rays at the time of explosion", and the exposure to large doses of radiation generates a "high incidence of disease" and mortality (such as leukaemia and cancer). Descendants of atomic bomb survivors will have, amidst anxiety, "to be monitored for several generations to clarify the genetic impact"; "nuclear weapons are inhuman tools for mass slaughter and destruction", their use "violates international law"[205]. The Mayor of Nagasaki concluded with a strong criticism of "nuclear deterrence", characterizing it as "simply the maintenance of a balance of fear" (p. 37), always threatening peace, with its "psychology of suspicion and intimidation"; the Nagasaki survivors of the atomic bombing of 50 years ago, "continue to live in fear of late effects"[206].

184. Those testimonies before the ICJ, in the course of contentious proceedings (in 2016) as well as advisory proceedings (two decades earlier, in 1995), leave it quite clear that the threat or use (including "testing") of nuclear weapons entails an arbitrary deprivation of human life, and is in flagrant breach of the fundamental right to life. It is in manifest breach of the ILHR, of IHL, as well as the Law of the United Nations, and hand an incidence also on the ILR. There are, furthermore, in such grave breach, aggravating circumstances: the harm caused by radiation from nuclear weapons cannot be contained in space, nor can it be contained in time, it is a true inter-generational harm.

185. As pointed out in the pleadings before the ICJ of late 1995, the use of nuclear weapons thus violates the right to life (and the right to health) of "not only people currently living, but also of

205 *Ibid.*, pp. 36-37.

206 *Ibid.*, pp. 39.

the unborn, of those to be born, of subsequent generations"[207]. Is there anything quintessentially more cruel? To use nuclear weapons appears like condemning innocent persons to hell on earth, even *before* they are born. That seems to go even further than the Book of *Genesis*'s story of the original sin. In reaction to such extreme cruelty, the consciousness of the rights inherent to the human person has always marked a central presence in endeavours towards complete nuclear disarmament.

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

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

187. In addition to those converging trends (ILHR, IHL, ILR) of international protection of the rights of the human person, those prohibitions of *jus cogens* mark presence also in contemporary International Criminal Law (ICL), as well as in the *corpus juris gentium* of condemnation of all weapons of mass destruction. The absolute prohibitions of *jus cogens* nowadays encompass the threat or use of nuclear weapons, for all the human suffering they entail: in the case of their use, a suffering without limits in space or in time, and extending to succeeding generations.

207 ICJ, doc. CR 95/35, of 15.11.1995, p. 28 (statement of Zimbabwe).

188. I have been characterizing, along the years, the doctrinal and jurisprudential construction of international *jus cogens* as proper of the new *jus gentium* of our times, the International Law for Humankind. I have been sustaining, moreover, that, by definition, international *jus cogens* goes beyond the law of treaties, extending itself to the law of the international responsibility of the State, and to the whole *corpus juris* of contemporary International Law, and reaching, ultimately, any juridical act[208].

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

> *The fact that the concepts both of the* jus cogens*, and of the obligations (and rights)* erga omnes *ensuing therefrom, already integrate the conceptual universe of contemporary international law, the new* jus gentium *of our days, discloses the reassuring and necessary opening of this latter, in the last decades, to certain superior and fundamental values. This significant evolution of the recognition and assertion of norms of* jus cogens *and obligations* erga omnes *of protection is to be fostered, seeking to secure its full practical application, to the benefit of all human beings. In this way the universalist vision of the founding fathers of the* droit des gens *is being duly rescued. New conceptions of the kind impose themselves in our days, and, of their faithful observance, will depend to a large extent the future evolution of contemporary international law.*
>
> *This latter does not emanate from the inscrutable 'will' of the States, but rather, in my view, from human*

208 A.A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, *op. cit. supra* n. (120), ch. XII, pp. 291-326.

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

The current process of the necessary humanization *of international law stands in reaction to that state of affairs. It bears in mind the universality and unity of the human kind, which inspired, more than four and a half centuries ago, the historical process of formation of the* droit des gens. *In rescuing the universalist vision which marked the origins of the most lucid doctrine of international law, the aforementioned process of humanization contributes to the construction of the new* jus gentium *of the 21st century, oriented by the general principles of law. This process is enhanced by its own conceptual achievements, such as, to start with, the acknowledgement and recognition of* jus cogens *and the consequent obligations* erga omnes *of protection, followed by other concepts disclosing likewise a universalist perspective of the law of nations.*

(...) The emergence and assertion of jus cogens *in contemporary international law fulfill the necessity of a minimum of verticalization in the international legal order, erected upon pillars in which the juridical and the ethical are merged. The evolution of the concept of* jus cogens *transcends nowadays the ambit of both the law of treaties and the law of the international responsibility*

of the States, so as to reach general international law and the very foundations of the international legal order"[209].

5. Pitfalls of Legal Positivism: A Rebuttal of the So-Called *Lotus* "Principle"

190. A matter which concerns the whole of humankind, such as that of the existence of nuclear weapons, can no longer be appropriately dealt with from a purely inter-State outlook of international law, which is wholly surpassed in our days. After all, without humankind there is no State whatsoever; one cannot simply have in mind States, apparently overlooking humankind. In its 1996 Advisory Opinion, the ICJ took note of the treaties which nowadays prohibit, e.g., biological and chemical weapons[210], and weapons which cause excessive damages or have indiscriminate effects (para. 76)[211].

191. But the fact that nowadays, in 2016, there does not yet exist a similar general treaty, of specific prohibition of nuclear weapons, does not mean that these latter are permissible (in certain circumstances, even in self defence)[212]. In my understanding, it cannot be sustained, in a matter which concerns the future of humankind, that which is not expressly prohibited is thereby permitted (a classic postulate of positivism). This posture would

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

210 The Geneva Protocol of 1925, and the Conventions of 1972 and 1993 against Biological and Chemical Weapons, respectively.

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

212 The Roman-privatist influence — with its emphasis on the autonomy of the will had harmful consequences in traditional international law; in the public domain, quite on the contrary, conscience stands above the "will", also in the determination of competences.

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

192. Legal positivists, together with the so-called "realists" of *Realpolitik*, have always been sensitive to the established power, rather than to values. They overlook the time dimension, and are incapable to behold a universalist perspective. They are static, in time and space. Nowadays, in the second decade of the XXIst century, in an international legal order which purports to assert common superior values, amidst considerations of international *ordre public*, and basic considerations of humanity, it is precisely the reverse logic which is to prevail: *that which is not permitted, is prohibited*[213].

193. Even in the days of the *Lotus* case (1927), the view endorsed by the old PCIJ whereby under international law everything that was not expressly prohibited would thereby be permitted, was object of severe criticisms, not only of a compelling Dissenting Opinion in the case itself[214] but also on the part of expert writing of the time[215]. Such conception could only have flourished in an epoch "politically secure" in global terms, certainly quite different from that of the current nuclear age, in face of the recurrent threat of nuclear weapons and other weapons of mass

213 A.A. Cançado Trindade, *O Direito Internacional em um Mundo em Transformação*, Rio de Janeiro, Edit. Renovar, 2002, p. 1099.

214 Cf. Dissenting Opinion of Judge Loder, PCIJ, *Lotus* case (France *versus* Turkey), Series A, n. 10, Judgment of 07.09.1927, p. 34 (such conception was not in accordance with the "spirit of international law").

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

destruction, the growing vulnerability of territorial States and indeed of the world population, and the increasing complexity in the conduction of international relations. In our days, in face of such terrifying threat, it is the logic opposite to that of the Lotus case which imposes itself: all that is not expressly permitted is surely prohibited[216]. All weapons of mass destruction, including nuclear weapons, are illegal and prohibited under contemporary international law.

194. The case of *Shimoda and Others* (District Court of Tokyo, decision of 07.12.1963), with the dismissed claims of five injured survivors of the atomic bombings of Hiroshima and Nagasaki, stands as a grave illustration of the veracity of the maxim *summum jus, summa injuria*, when one proceeds on the basis of an allegedly absolute submission of the human person to a degenerated international legal order built on an exclusively inter-State basis. May I here reiterate what I wrote in 1981, regarding the *Shimoda and Others* case, namely,

> *(...) The whole arguments in the case reflect the insufficiencies of an international legal order being conceived and erected on the basis of an exclusive inter-State system, leaving individual human beings impotent in the absence of express treaty provisions granting them procedural status at international level. Even in such a matter directly affecting fundamental human rights, the arguments were conducted in the case in the classical lines of the conceptual apparatus of the so-called law on diplomatic protection, in a further*

216 A.A. Cançado Trindade, *O Direito Internacional em um Mundo em Transformação*, *op. cit. supra* n. (213), p. 1099.

illustration of international legal reasoning still being haunted by the old Vattelian fiction[217].

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

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

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

XIV. Recourse to the "Martens Clause" as an Expression of the *Raison d'Humanité.*

197. Even if there was a "gap" in the law of nations in relation to nuclear weapons, – which there is not,– it is possible to fill it by resorting to general principles of law. In its 1996 Advisory Opinion, the ICJ preferred to focus on self-defence of a hypothetical individual State, instead of developing the rationale of the *Martens clause*, the purpose of which is precisely that of filling gaps[218] in the light of the principles of the law of nations, the "laws of humanity" and the "dictates of public conscience" (terms of the wise premonition of Fyodor Fyodorovich von Martens[219], originally formulated in the I Hague Peace Conference of 1899).

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

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

219 Which was intended to extend juridically the protection to the civilians and combatants in all situations, even if not contemplated by the conventional norms.

expression to the *raison d'humanité* and imposing limits to the *raison d'État*[220].

199. It cannot be denied that nuclear weapons are intrinsically indiscriminate, incontrollable, that they cause severe and durable damage and in a wide scale in space and time, that they are prohibited by International Humanitarian Law (Articles 35, 48 and 51 of the Additional Protocol I of 1977 to the 1949 Geneva Conventions on International Humanitarian Law), and are inhuman as weapons of mass destruction[221]. Early in the present nuclear age, the four Geneva Conventions established the *grave violations* of international law (Convention I, Article 49(3); Convention II, Article 50(3); Convention III, Article 129(3); and Convention IV, Article 146(3)). Such *grave violations*, when involving nuclear weapons, victimize not only States, but all other subjects of international law as well, individuals and groups of individuals, peoples, and humankind as a whole.

200. The absence of conventional norms stating specifically that nuclear weapons are prohibited in all circumstances does not mean that they would be allowed in a given circumstance. Two decades ago, in the course of the advisory proceedings of late 1995 before the ICJ leading to its 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons*, some of the participating States drew attention to the incidence of the Martens clause in the present domain[222]. It was pointed out, on the occasion, that the argument that international instruments do not specifically contain an

220 A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. II, Porto Alegre/Brazil, S.A. Fabris Ed., 1999, pp. 497-509.

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

222 Cf. ICJ, doc. CR 95/31, of 13.11.1995, p. 45-46(statement of Samoa); ICJ, doc. CR 95/25, of 03.11.1995, p. 55 (statement of Mexico); ICJ, doc. CR 95/27, of 07.11.1995, p. 60 (statement of Malaysia).

express prohibition of use of nuclear weapons seems to overlook the Martens clause[223].

201. Also in rebuttal of that argument, – typical of legal positivism, in its futile search for an express prohibition, – it was further observed that the "principles of humanity" and the "dictates of public conscience", evoked by the Martens clause, permeate not only the law of armed conflict, but "the whole of international law"; they are essentially dynamic, pointing to conduct which may nowadays be condemned as inhumane by the international community[224], such as recourse to the threat or use of nuclear weapons. It was further stated, in the light of the Martens clause, that the "threat and use of nuclear weapons violate both customary international law and the dictates of public conscience"[225].

202. The Martens clause safeguards the integrity of Law (against the undue permissiveness of a *non liquet*) by invoking the principles of the law of nations, the "laws of humanity" and the "dictates of the public conscience". Thus, that absence of a conventional norm is not conclusive, and is by no means the end of the matter, – bearing in mind also customary international law. Such absence of a conventional provision expressly prohibiting nuclear weapons does not at all mean that they are legal or legitimate[226]. The evolution of international law[227] points, in

223 ICJ, doc. 95/26, of 06.11.1995, p. 32 (statement of Iran).

224 ICJ, doc. 95/22, of 30.10.1995, p. 39 (statement of Australia).

225 ICJ, doc. 95/35, of 15.11.1995, p. 33 (statement of Zimbabwe).

226 Stefan Glaser, *L'arme nucléaire à la lumière du Droit international*, Paris, Pédone, 1964, pp. 15, 21, 24-27, 32, 36-37, 41, 43-44 and 62-63, and cf. pp. 18 and 53.

227 If, in other epochs, the ICJ had likewise limited itself to verify a situation of "legal uncertainty" (which, anyway, does not apply in the present context), most likely it would not have issued its *célèbres* Advisory Opinions on *Reparations for Injuries* (1949), on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (1951), and on *Namibia* (1971), which have so much contributed to the evolution of international law.

our days, in my understanding, towards the construction of the International Law for humankind[228] and, within the framework of this latter, to the outlawing by general international law of all weapons of mass destruction.

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

204. The aforementioned evolution of international law, – of which the Martens clause is a significant manifestation, – has gradually moved from an international into a universal dimension, on the basis of fundamental values, and in the sense of an *objective justice*[229], which has always been present in jusnaturalist thinking. Human conscience stands above the "will" of individual States. This evolution has, in my perception, significantly contributed to the formation of an *opinio juris communis* in recent decades, in condemnation of nuclear weapons.

205. This *opinio juris communis* is clearly conformed in our days: the overwhelming majority of member States of the

228 Cf. A.A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, *op. cit. supra* n. (120), pp. 1-726.

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

United Nations, the NNWS, have been sustaining for years the series of General Assembly resolutions in condemnation of the use of nuclear weapons as illegal under general international law. To this we can add other developments, reviewed in the present Dissenting Opinion, such as, e.g., the NPT Review Conferences, the establishment of regional nuclear-weapon-free zones, and the Conferences on Humanitarian Impact of Nuclear Weapons (cf. parts XVII-XIX, *infra*).

XV. Nuclear Disarmament: Jusnaturalism, the Humanist Conception and the Universality of International Law

206. The existence of nuclear weapons, – maintained by the strategy of "deterrence" and "mutually assured destruction" ("MAD", as it became adequately called, since it was devised in the cold-war era), is the contemporary global tragedy of the nuclear age. Death, or self-destruction, haunts everyone everywhere, propelled by human madness. Human beings need protection from themselves, today more than ever[230], – and this brings our minds to other domains of human knowledge. Law by itself cannot provide answers to this challenge to humankind as a whole.

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

230 In another international jurisdiction, in my Separate Opinion in the IACtHR's case of the *Massacres of Ituango versus Colombia* (Judgment of 01.07.2006), I devoted part of my reflections to "human cruelty in its distinct manifestations in the execution of State policies" (part II, paras. 9-13).

breach of international law, of IHL and the ILHR, as well as of the Law of the United Nations.

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

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

210. Already in 1984, in its *general comment* n. 14 (on the right to life), the U.N. Human Rights Committee (HRC – under the Covenant on Civil and Political Rights), for example, began by warning that war and mass violence continue to be "a scourge of humanity", taking the lives of thousands of innocent human beings every year (para. 2). In successive sessions of the General Assembly, – it added, – representatives of States from all geographical regions have expressed their growing concern at the

development and proliferation of "increasingly awesome weapons of mass destruction" (para. 3). Associating itself with this concern, the HRC stated that

> *(...) It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. This threat is compounded by the danger that the actual use of such weapons may be brought about, not only in the event of war, but even through human or mechanical error or failure.*
>
> *Furthermore, the very existence and gravity of this threat generates a climate of suspicion and fear between States, which is in itself antagonistic to the promotion of universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations and the International Covenants on Human Rights.*
>
> *The production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity.*
>
> *The Committee, accordingly, in the interest of mankind, calls upon all States (...) to take urgent steps (...) to rid the world of this menace (paras. 4-7)*[231].

211. The absence in contemporary international law of a comprehensive conventional prohibition of nuclear weapons is

231 '*General Comment*' n. 14 (of 1984) of the HRC, text *in*: United Nations, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, doc. HRI/GEN/1/Rev.3, of 15.08.1997, pp. 18-19. The HRC, further stressing that the right to life is a fundamental right which does not admit any derogation not even in time of public emergency, related the current proliferation of weapons of mass destruction to "the supreme duty of States to prevent wars". Cf. also U.N. *Report of the Human Rights Committee, G.A.O.R.* — 40th Session (1985), suppl. n. 40 (A/40/40), p. 162.

incomprehensible. Contrary to what legal positivists think, law is not self-sufficient, it needs inputs from other branches of human knowledge for the realisation of justice. Contrary to what legal positivists think, norms and values go together, the former cannot prescind from the latter. Contrary to legal positivism, – may I add, – jusnaturalism, taking into account ethical considerations, pursues a universalist outlook (which legal positivists are incapable of doing), and beholds humankind as entitled to protection[232].

212. Humankind is subject of rights, in the realm of the new *jus gentium*[233]. As this cannot be visualized from the optics of the State, contemporary international law has reckoned the limits of the State as from the optics of humankind. Natural law thinking has always been attentive to justice, which much transcends positive law. The present case of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* has been lodged with the International Court *of Justice*, and not with an International Court of Positive Law. The contemporary tragedy of nuclear weapons cannot be addressed from the myopic outlook of positive law alone.

213. Nuclear weapons, and other weapons of mass destruction, have no ethics, have no ground on the law of nations (*le droit des gens*): they are in flagrant breach of its fundamental principles, and those of IHL, the ILHR, as well as the Law of the United Nations. They are a contemporary manifestation of evil,

232 A.A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, *op. cit. supra* n. (120), pp. 1-726. *Recta ratio* and universalism, present in the jusnaturalist thinking of the "founding fathers" of international law (F. de Vitoria, F. Suárez, H. Grotius, among others), go far back in time to the legacies of Cicero, in his characterization of *recta ratio* in the foundations of *jus gentium* itself, and of Thomas Aquinas, in his conception of *synderesis*, as predisposition of human reason to be guided by principles in the search of the common good; *ibid*., pp. 10-14.

233 *Ibid*., ch. XI, pp. 275-288; A.A. Cançado Trindade, "Quelques réflexions sur l'humanité comme sujet du droit international", *in Unité et diversité du Droit international – Écrits en l'honneur du Prof. P.-M. Dupuy* (eds. D. Alland, V. Chetail, O. de Frouville and J.E. Viñuales), Leiden, Nijhoff, 2014, pp. 157-173.

in its perennial trajectory going back to the Book of *Genesis* (cf. part VIII, *supra*). Jusnaturalist thinking, always open to ethical considerations, identifies and discards the disrupting effects of the strategy of "deterrence" of fear creation and infliction[234] (cf. part XII, *supra*). Humankind is victimized by this.

214. In effect, humankind has been, already for a long time, a *potential victim* of nuclear weapons. To establish such condition of potential victim, one does not need to wait for the actual destruction of life on earth. Humankind has, for the last decades, been suffering psychological harm caused by the existence itself of arsenals of nuclear weapons. And there are peoples, and segments of populations, who have been *actual victims* of the vast and harmful effects of nuclear tests. The existence of *actual and potential victims* is acknowledged in international case-law in the domain of the International Law of Human Rights[235]. To address this danger from a strict inter-State outlook is to miss the point, to blind oneself. States were created and exist for human beings, and not *vice-versa*.

215. The NPT has a universalist vocation, and counts on everyone, as shown by its three basic principled pillars together. In effect, as soon as it was adopted, the 1968 NPT came to be seen as

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

235 For an early study on this issue, cf. A.A. Cançado Trindade, "Co-Existence and Co-Ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de l'Académie de Droit International de La Haye* (1987), ch. XI, pp. 271-283. And for subsequent developments on the notion of *potential victims*, cf. A.A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford, Oxford University Press, 2012 [reprint], ch. VII, pp. 125-131.

having been devised and concluded on the basis of those principled pillars, namely: non-proliferation of nuclear weapons (preamble and Articles I-III), peaceful use of nuclear energy (preamble and Articles IV-V), and nuclear disarmament (preamble and Article VI)[236]. The antecedents of the NPT go back to the work of the U.N. General Assembly in 1953[237]. The NPT's three-pillar framework came to be reckoned as the "grand bargain" between its parties, NWS and NNWS. But soon it became a constant point of debate between NWS and NNWS parties to the NPT. In effect, the "grand bargain" came to be seen as "asymmetrical"[238], and NNWS began to criticize the very slow pace of achieving nuclear disarmament as one of the three basic principled pillars of the NPT (Article VI)[239].

216. Under the NPT, each State is required to do its due. NWS are no exception to that, if the NPT is not to become dead letter. To achieve the three interrelated goals (non-proliferation of nuclear weapons, peaceful use of nuclear energy, and nuclear disarmament) is a duty of each and every State towards humankind as a whole. It is a universal duty of conventional and customary international law in the nuclear age. There is an *opinio juris communis* to this effect, sedimented along the recent decades, and evidenced in the successive establishment, in distinct continents,

236 Articles VIII-XI, in turn, are procedural in nature.

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

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

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

of nuclear-weapon-free zones, and nowadays in the Conferences on the Humanitarian Impact of Nuclear Weapons (cf. parts XVIII-XIX, *infra*).

XVI. The Principle of Humanity and the Universalist Approach: *Jus Necessarium* Transcending the Limitations of *Jus Voluntarium*

217. In my understanding, there is no point in keeping attached to an outdated and reductionist inter-State outlook, particularly in view of the revival of the conception of the law of nations (*droit des gens*) encompassing humankind as a whole, as foreseen and propounded by the "founding fathers" of international law[240] (in the XVIth-XVIIth centuries). It would be nonsensical to try to cling to the unduly reductionist inter-State outlook in the international adjudication of a case concerning the contending parties and affecting all States, all peoples and humankind as a whole.

218. An artificial, if not fossilized, strictly inter-State mechanism of dispute-settlement cannot pretend to entail or require a (likewise) entirely inadequate and groundless inter-State reasoning. The law of nations cannot be interpreted and applied in a mechanical way, as from an exclusively inter-State paradigm. To start with, the humane ends of States cannot be overlooked. In relation to nuclear weapons, the *potential victims* are the human beings and peoples, beyond their respective States, for whom these latter were created and exist.

219. As I had the occasion to point out in another international jurisdiction, the law of nations (*droit des gens*), since its historical origins in the XVIth century, was seen as comprising not only

240 A.A. Cançado Trindade, *Évolution du Droit international au droit des gens — L´accès des particuliers à la justice internationale: le regard d'un juge*, Paris, Pédone, 2008, pp. 1-187.

States (emerging as they were), but also peoples, the human person (individually and in groups), and humankind as a whole[241]. The strictly inter-State outlook was devised much later on, as from the Vattelian reductionism of the mid-XVIIIth century, which became *en vogue* by the end of the XIXth century and beginning of the XXth century, with the well-known disastrous consequences – the successive atrocities victimizing human beings and peoples in distinct regions of world, – along the whole XXth century[242]. In the present nuclear age, extending for the last seven decades, humankind as a whole is threatened.

220. Within the ICJ as well, I have had also the occasion to stress the need to go beyond the inter-State outlook. Thus, in my Dissenting Opinion in the recent case of the *Application of the Convention against Genocide* (Croatia *versus* Serbia, Judgment of 03.02.2015), I have pointed out, *inter alia*, that the 1948 Convention against Genocide is not State-centric, but is rather oriented towards groups of persons, towards the victims, whom it seeks to protect (paras. 59 and 529). The humanist vision of the international legal order pursues an outlook centred on the peoples, keeping in mind the humane ends of States.

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

> *Humaneness came to the fore even more forcefully in the treatment of persons* in situation of vulnerability, or even defencelessness, *such as those deprived of their personal freedom, for whatever reason. The* jus gentium, *when it emerged as amounting to the law*

241 IACtHR, case of the *Community Moiwana versus Suriname* (Judgment of 15.06.2005), Separate Opinion of Judge Cançado Trindade, paras. 6-7.

242 *Ibid.*, paras. 6-7.

> *of nations, came then to be conceived by its 'founding fathers' (F. de Vitoria, A. Gentili, F. Suárez, H. Grotius, S. Pufendorf, C. Wolff) as regulating the international community constituted by human beings socially organized in the (emerging) States and co-extensive with humankind, thus conforming the necessary law of the* societas gentium.
>
> *The* jus gentium*, thus conceived, was inspired by the principle of humanity* lato sensu*. Human conscience prevails over the will of individual States. Respect for the human person is to the benefit of the common good. This humanist vision of the international legal order pursued – as it does nowadays – a* people-centered outlook*, keeping in mind the* humane ends of the State*. The precious legacy of natural law thinking, evoking the right human reason* (recta ratio)*, has never faded away; (paras. 73-74).*

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

222. This is the position I have always taken, within the ICJ and, earlier on, the IACtHR. For example, in the ICJ's Advisory Opinion on *Judgment n. 2867 of the ILO Administrative Tribunal upon a Complaint Filed against IFAD* (of 01.02.2012), I devoted one entire part (n. XI) of my Separate Opinion to the erosion – as I perceive it – of the inter-State outlook of adjudication by the ICJ (paras. 76-81). I warned likewise in my Separate Opinion (paras. 21-23) in the case of *Whaling in the Antarctic* (Australia *versus*

Japan, Order of 06.02.2013, on New Zealand's intervention), as well as in my recent Separate Opinion (paras. 16-21 and 28-41) in the case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua *versus* Colombia, Preliminary Objections, Judgment of 17.03. 2016).

223. Earlier on, within the IACtHR, I took the same position: for example, *inter alia*, in my Concurring Opinions in both the Advisory Opinion n. 16, on the *Right to Information on Consular Assistance in the Framework of the Due Process of Law* (of 01.10.1999), and the Advisory Opinion n. 18, on the *Juridical Condition and Rights of Undocumented Migrants* (of 17.09.2003), of the IACtHR, I deemed it fit to point out, – going beyond the strict inter-State dimension, – that, if non-compliance with Article 36(1) (b) of the 1963 Vienna Convention on Consular Relations takes place, it occurs to the detriment not only of a State Party but also of the human beings at issue. Such pioneering jurisprudential construction, in the line of jusnaturalist thinking, rested upon the evolving concepts of *jus cogens* and obligations *erga omnes* of protection[243].

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

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

of the obligation of nuclear disarmament. The universal juridical conscience prevails over the "will" of individual States.

225. The "founding fathers" of the law of nations (such as, *inter alii*, F. de Vitoria, F. Suárez and H. Grotius) had in mind humankind as a whole. They conceived a universal *jus gentium* for the *totus orbis*, securing the unity of the *societas gentium*; based on a *lex praeceptiva*, the *jus gentium* was apprehended by the *recta ratio*, and conformed a true *jus necessarium*, much transcending the limitations of the *jus voluntarium*. Law ultimately emanates from the common conscience of what is juridically necessary (*opinio juris communis necessitatis*)[244]. The contribution of the "founding fathers" of *jus gentium* found inspiration largely in the scholastic philosophy of natural law (in particular in the stoic and Thomist conception of *recta ratio* and justice), which recognized the human being as endowed with intrinsic dignity).

226. Moreover, in face of the unity of the human kind, they conceived a truly *universal* law of nations, applicable to all – States as well as peoples and individuals – everywhere (*totus orbis*). In thus contributing to the emergence of the *jus humanae societatis*, thinkers like F. de Vitoria and D. de Soto, among others, permeated their lessons with the humanist thinking that preceded them. Four and a half centuries later, their lessons remain contemporary, endowed with perennial validity and aptitude to face, e.g., the contemporary and dangerous problem of the existing arsenals of nuclear weapons. Those thinkers went well beyond the "will" of States, and rested upon the much safer foundation of human conscience (*recta ratio* and justice).

227. The conventional and customary obligation of nuclear disarmament brings to the fore another aspect: the issue of the

244 A.A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, *op. cit. supra* n. (120), pp. 137-138.

validity of international legal norms is, after all, metajuridical. International law cannot simply remain indifferent to values, general principles of law and ethical considerations; it has, to start with, to identify what is *necessary*, – such as a world free of nuclear weapons, – in order to secure the survival of humankind. This *idée du droit* precedes positive international law, and is in line with jusnaturalist thinking.

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

229. It is clear to human conscience that those weapons, which can destroy the whole of humankind, are unlawful and prohibited. They are in clear breach of *jus cogens*. And *jus cogens* was reckoned by human conscience well before it was incorporated into the two Vienna Conventions on the Law of Treaties (of 1969 and 1986). As I had the occasion to warn, three decades ago, at the 1986 U.N. Conference on the Law of Treaties between States and International Organizations or between International Organizations, *jus cogens* is "incompatible with the voluntarist conception of international law, because that conception failed to explain the formation of rules of general international law"[245].

245 U.N., *United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations — Official Records*, vol. I (statement by the Representative of Brazil, A.A. Cançado Trindade, of 12.03.1986), pp. 187-188, para. 18.

XVII. NPT Review Conferences

230. In fact, in the course of the written phase of the proceedings before the Court in the present case of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, both the Marshall Islands[246] and the United Kingdom[247] addressed, in their distinct arguments, the series of NPT Review Conferences. For its part, India also addressed the Review Conferences[248], in particular to leave on the records its position on the matter, as explained in a statement made on 09.05.2000.

231. Likewise, in the course of the oral phase of the present proceedings before the Court in *cas d'espèce*, the applicant State, the Marshall Islands, referred to the NPT Review Conferences in its oral arguments in two of the three cases it lodged with the Court against India[249], and the United Kingdom[250]; references to the Review Conferences were also made, for their part, in their oral arguments, by the two respondent States which participated in the public sittings before the Court, namely, India[251] and the United Kingdom[252]. Those Review Conferences conform the factual context of the *cas d'espèce*, and cannot pass unnoticed. May I thus proceed to a brief review of them.

246 *Application Instituting Proceedings*, p. 24, para. 66; and *Memorial*, pp. 29, 56-60, 61, 63, 68-69, 71 and 73, paras. 50, 123-128, 130, 136, 150, 153, 154, 161-162 and 168; and *Statement of Observations on [U.K.'s] Preliminary Objections*, pp. 15 and 47, paras. 32 and 126.

247 *Preliminary Objections*, pp. 1-2, 10 and 23, paras. 2-3, 21 and 50.

248 *Counter-Memorial*, p. 15, para. 23 n. 49, and Annex 23.

249 ICJ. doc. CR 2016/1, of 07.03.2016, pp. 26-27 and 50, paras. 9 and 17 (M.I.); ICJ. doc. CR 2016/6, of 14.03.2016, p. 32, para. 10 (M.I.).

250 ICJ. doc. CR 2016/5, of 11.03.2016, p. 47, para. 8 (M.I.).

251 ICJ. doc. CR 2016/4, of 10.03.2016, p. 14, para. 3 (India).

252 ICJ. doc. CR 2016/7, of 09.03.2016, pp. 14-16 and 18-19, paras. 20, 22, 24, 32 and 37 (United Kingdom).

232. The NPT Review Conferences, held every five years, started in 1975. The following three Conferences of the kind were held, respectively, in 1980, 1985 and 1990, respectively[253]. The fifth of such Conferences took place in 1995, the same year that the Marshall Islands became a party to the NPT (on 30.01.1995). In one of its decisions, the 1995 NPT Conference singled out the vital role of the NPT in preventing the proliferation of nuclear weapons, and warned that the proliferation of nuclear weapons would seriously increase the danger of nuclear war[254]. For their part, NWS reaffirmed their commitment, under Article VI of the NPT, to pursue in good faith negotiations on effective measures relating to nuclear disarmament.

233. The 1995 Review Conference prolonged indefinitely the NPT, and adopted its decision on "Principles and Objectives for Nuclear Non-Proliferation and Disarmament". Yet, in its *report*, the Main Committee I (charged with the implementation of the provisions of the NPT) observed with regret that Article VI and preambular paragraphs 8-12 of the NPT had not been wholly fulfilled[255], with the number of nuclear weapons then existing being greater than the one existing when the NPT entered into force; it further regretted "the continuing lack of progress" on relevant items of the Conference on Disarmament, and urged a commitment on the part of NWS on "no-first use and non-use of nuclear weapons with immediate effect"[256].

234. Between the fifth and the sixth Review Conferences, India and Pakistan carried out nuclear tests in 1998. For its part, on

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

254 Decision 2, NPT/CONF.1995/32 (Part I), Annex, p. 2.

255 *Final Document*, part II, p. 257, paras. 3-3*ter*., and cf. pp. 258 and 260, paras. 4 and 9.

256 *Ibid*., pp. 271-273, paras. 36-39.

several occasions, the Movement of Non-Aligned Countries called for "urgent" measures of nuclear disarmament[257]. To this effect, the 2000 Review Conference agreed to a document containing the "13 Practical Steps" in order to meet the commitments of States Parties under Article VI of the NPT[258]. The "13 Practical Steps" stress the relevance and urgency of ratifications of the CTBT so as to achieve its entry into force, and of setting up a moratorium on nuclear-weapon tests pending such entry into force. Furthermore, they call for the commencement of negotiations on a treaty banning the production of fissile material for nuclear weapons and also call upon NWS to accomplish the total elimination of nuclear arsenals[259].

235. At the 2005 Review Conference, no substantive decision was adopted, amidst continuing disappointment at the lack of progress on implementation of Article VI of the NPT, particularly in view of the "13 Practical Steps" agreed to at the 2000 Review Conference. Concerns were expressed that new nuclear weapon systems were being developed, and strategic doctrines were being adopted lowering the threshold for the use of nuclear weapons; moreover, regret was also expressed that States whose ratification was needed for the CTBT's entry into force had not yet ratified the CTBT[260].

236. Between the 2005 and the 2010 Review Conferences, there were warnings that the NPT was "now in danger" and "under

257 NPT/CONF.2000/4, paras. 12-13.

258 *Final Document*, vol. 1, part I, pp. 14-15.

259 The "13 Practical Steps", moreover, affirm that the principle of irreversibility should apply to all nuclear disarmament and reduction measures. At last, the 13 practical steps reaffirm the objective of general and complete disarmament under effective international control, and stress the importance of both regular reports on the implementation of NPT's Article VI obligations, and the further development of verification capabilities.

260 NPT/CONF.2005/57, part I, and cf. report on the 2005 Review Conference *in*: 30 *U.N. Disarmament Yearbook* (2005) ch. I, p. 23.

strain", as the process of disarmament had "stagnated" and needed to be "revived" in order to prevent the spread of weapons of mass destruction. The concerns addressed what was regarded as the unsatisfactory stalemate in the Conference on Disarmament in Geneva, which had been "unable to adopt an agenda for almost a decade" to identify substantive issues to be discussed and negotiated in the Conference[261].

237. The "Five-Point Proposal on Nuclear Disarmament", announced by the Secretary-General in an address of 24.10.2008[262], began by urging all NPT States Parties, in particular the NWS, to fulfil their obligations under the Treaty "to undertake negotiations on effective measures leading to nuclear disarmament" (para. 1)[263]. It called upon the permanent members of the Security Council to commence discussions on security issues in the nuclear disarmament process, including by giving NNWS assurances against the use or threat of use of nuclear weapons (para. 5). It stressed the need of "new efforts to bring the CTBT into force", and encouraged NWS to ratify all the Protocols to the Treaties which established Nuclear-Weapon-Free Zones (para. 6). Moreover, it also stressed "the need for greater transparency" in relation to arsenals of nuclear weapons and disarmament achievements (para. 7). And it further called for the elimination also of other types of weapons of mass destruction (para. 8).

238. The "Five-Point Proposal on Nuclear Disarmament" was reiterated by the U.N. Secretary-General in two subsequent

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

262 Cf. U.N. Secretary-General (Ban Ki-moon), Address (at a conference at the East-West Institute): "The United Nations and Security in a Nuclear-Weapon-Free World", *in U.N. News Centre*, of 24.10.2008, pp. 1-3.

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

addresses in the following three years[264]. In one of them, before the Security Council on 24.09.2009, he stressed the need of an "early entry into force" of the CTBT, and pondered that "disarmament and non-proliferation must proceed together"; he urged "a divided international community" to start moving ahead towards achieving "a nuclear-weapon-free world", and, at last, he expressed his hope in the forthcoming 2010 NPT Review Conference[265].

239. Both the 2000 and the 2010 Review Conferences made an interpretation of nuclear disarmament under Article VI of the NPT as a "positive disarmament obligation", in line with the *dictum* in the ICJ's 1996 Advisory Opinion of nuclear disarmament in good faith as an obligation of result[266]. The 2010 Review Conference expressed its deep concern that there remained the continued risk for humankind put by the possibility that nuclear weapons could be used, and the catastrophic humanitarian consequences that would result therefrom.

240. The 2010 Review Conference, keeping in mind the 1995 decision on "Principles and Objectives for Nuclear Non-Proliferation and Disarmament" as well as the 2000 agreement on the "13 Practical Steps", affirmed the vital importance of the universality of the NPT[267], and, furthermore, took note of the "Five-Point Proposal on Nuclear Disarmament" of the U.N. Secretary-General, of 2008. For the first time in the present series of Review Conferences, the *Final Document* of the 2010 Review Conference recognized "the

264 On two other occasions, namely, during a Security Council Summit on Nuclear Non-Proliferation on 24.09.2009, and at a Conference organized by the East-West Institute on 24.10.2011.

265 U.N. Secretary-General (Ban Ki-moon), "Opening Remarks to the Security Council Summit on Nuclear Non-Proliferation and Nuclear Disarmament", *in U.N. News Centre*, of 24.09.2009, pp. 1-2.

266 D.H. Joyner, "The Legal Meaning and Implications of Article VI of the Non-Proliferation Treaty", *in*: *Nuclear Weapons and International Law* (eds. G. Nystuen, S. Casey-Maslen and A.G. Bersagel), Cambridge, Cambridge University Press, 2014, pp. 413 and 417.

267 NPT/CONF.2010/50, vol. I, pp. 12-14 and 19-20.

catastrophic humanitarian consequences that would result from the use of nuclear weapons"[268].

241. The Final Document welcomed the creation of successive nuclear-weapon-free zones[269], and, in its conclusions, it endorsed the "legitimate interest" of NNWS to receive "unequivocal and legally binding security assurances" from NWS on the matter at issue; it asserted and recognized that "the total elimination of nuclear weapons is the only absolute guarantee against the use or threat of use of nuclear weapons"[270]. The aforementioned Final Document reiterated the 2010 Review Conference's "deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons", and "the need for all States at all times to comply with applicable international law, including international humanitarian law"[271]. This key message of the 2010 Review Conference triggered the initiative, three years later, of the new series of Conferences on Humanitarian Impact of Nuclear Weapons (cf. *infra*).

242. The "historic acknowledgement" of "the catastrophic humanitarian consequences of any use of nuclear weapons" was duly singled out by the ICRC, in its statement in the more recent 2015 Review Conference[272]; the ICRC pointed out that that new series of Conferences (2013-2014, in Oslo, Nayarit and Vienna) has given the international community "a much clearer grasp" of the effects of nuclear detonations on peoples around the world. It then warned that, 45 years after the NPT's entry into

268 Cf. *2010 Review Conference — Final Document*, vol. I, doc. NPT/CONF.2010/50, of 18.06.2010, p. 12, para. 80.

269 Cf. *ibid*., p. 15, para. 99.

270 *Ibid*., p. 21, point (i).

271 *Ibid*., p. 19, point (v).

272 ICRC, "Eliminating Nuclear Weapons", *Statement — 2015 Review Conference of the Parties to the NPT*, of 01.05.2015, p. 1.

force, "there has been little or no concrete progress" in fulfilling the goal of elimination of nuclear weapons. As nuclear weapons remain the only weapons of mass destruction not prohibited by a treaty, "filling this gap is a humanitarian imperative", as the "immediate risks of intentional or accidental nuclear detonations" are "too high and the dangers too real"[273].

243. The 2015 Review Conference displayed frustration over the very slow pace of action on nuclear disarmament, in addition to current nuclear modernization programs and reiteration of dangerous nuclear strategies, apparently oblivious of the catastrophic humanitarian consequences of nuclear weapons. At the 2015 Review Conference, the Main Committee I, charged with addressing Article VI of the NPT, stressed the importance of "the ultimate goal" of elimination of nuclear weapons, so as to achieve "general and complete disarmament under effective international control"[274].

244. The 2015 Review Conference reaffirmed that "the total elimination of nuclear weapons is the only absolute guarantee against the use or threat of use of nuclear weapons, including the risk of their unauthorized, unintentional or accidental detonation"[275]. It expressed its "deep concern" that, during the period 2010-2015, the Conference on Disarmament did not commence negotiations of an instrument on such nuclear disarmament[276], and then stressed the "urgency for the Conference on Disarmament" to achieve "an internationally legally binding

273 *Ibid.*, pp. 2-3.

274 *2015 Review Conference — Working Paper of the Chair of Main Committee* I, doc. NPT/CONF.2015/MC.I/WP.1, of 18.05.2015, p. 3, para. 17.

275 *Ibid.*, p. 5, para. 27.

276 *Ibid.*, p. 5, para. 35.

instrument" to that effect", so as "to assure" NNWS against the use or threat of use of nuclear weapons by all NWS[277].

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

> *understandings and concerns pertaining to the catastrophic humanitarian consequences of any nuclear weapon detonation underpin and should compel urgent efforts by all States leading to a world without nuclear weapons. The Conference affirms that, pending the realization of this objective, it is in the interest of the very survival of humanity that nuclear weapons never be used again*[278].

XVIII. The Establishment of Nuclear-Weapon-Free Zones

246. In addition to the aforementioned NPT Review Conferences, the *opinio juris communis* on the illegality of nuclear weapons finds expression also in the establishment, along the last half century, of nuclear-weapon-free zones, which has responded to the needs and aspirations of humankind, so as to rid the world of the threat of nuclear weapons. The establishment of those zones has, in effect, given expression to the growing disapproval of nuclear weapons by the international community as a whole. There are, in effect, references to nuclear-weapon-free zones in the arguments, in the written phase of the present proceedings, of the

277 *Ibid.*, p. 6, para. 43.

278 *Ibid.*, p. 7, paras. 45-46(1).

Marshall Islands[279] and of the United Kingdom[280] in the present case *of Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*.

247. I originally come from the part of the world, Latin America, which, together with the Caribbean, form the first region of the world to have prohibited nuclear weapons, and to have proclaimed itself as a nuclear-weapon-free zone. The pioneering initiative in this domain, of Latin America and the Caribbean[281], resulted in the adoption of the 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean and its two Additional Protocols. Its reach transcended Latin America and the Caribbean, as evidenced by its two Additional Protocols[282], and the obligations set forth in its legal regime were wide in scope:

> *Le régime consacré dans le Traité n'est pas simplement celui de non-prolifération: c'est un régime d'absence totale d'armes nucléaires, ce qui veut dire que ces armes seront interdites à perpétuité dans les territoires auxquels s'applique le Traité, quel que soit l'État sous le contrôle duquel pourraient se trouver ces terribles instruments de destruction massive*[283].

248. By the time of the creation of that first nuclear-weapon-free zone by the 1967 Treaty of Tlatelolco, it was pointed out

279 *Application Instituting Proceedings* of the M.I., p. 26, para. 73; and *Memorial* of the M.I., pp. 40, 53 and 56, paras. 84, 117 and 122.

280 *Preliminary Objections* of the U.K., p. 2, para. 4.

281 On the initial moves in the U.N. to this effect, by Brazil (in 1962) and Mexico (taking up the leading role from 1963 onwards), cf. Naciones Unidas, *Las Zonas Libres de Armas Nucleares en el Siglo XXI*, *op. cit. infra* n. (286), pp. 116, 20 and 139.

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

283 A. García Robles, "Mesures de désarmement dans des zones particulières: le Traité visant l'interdiction des armes nucléaires en Amérique Latine", 133 *Recueil des Cours de l'Académie de Droit International de La Haye [RCADI]* (1971) p. 103, and cf. p. 71.

that it came as a response to humanity's concern with its own future (given the threat of nuclear weapons), and in particular with "the survival of the humankind"[284]. That initiative[285] was followed by four others of the kind, in distinct regions of the world, conducive to the adoption of the 1985 South Pacific (Rarotonga) Nuclear-Free Zone Treaty, the 1995 Southeast Asia (Bangkok) Nuclear-Weapon-Free Zone Treaty, the 1996 African (Pelindaba) Nuclear Weapon-Free Zone Treaty[286], as well as the 2006 Central Asian (Semipalatinsk) Nuclear-Weapon-Free Zone Treaty. Basic considerations of humanity have surely been taken into account for the establishment of those nuclear-weapon-free zones.

249. In fact, besides the Treaty of Tlatelolco, also the Rarotonga, Bangkok, Pelindaba, and Semipalatinsk Treaties purport to extend the obligations enshrined therein, by means of their respective Protocols, not only to the States of the regions at issue, but also to nuclear States[287], as well as States which are internationally responsible, *de jure* or *de facto*, for territories located in the respective regions. The verification of compliance with the obligations regularly engages the IAEA[288]. Each of the five aforementioned treaties (Tlatelolco, Rarotonga, Bangkok, Pelindaba and Semipalatinsk) creating nuclear-weapon-free zones has distinctive features, as to the kinds and extent of obligations

284 *Ibid*., p. 99, and cf. p. 102.

285 Which was originally prompted by a reaction to the *Cuban missiles crisis* of 1962.

286 Naciones Unidas, *Las Zonas Libres de Armas Nucleares en el Siglo XXI*, N.Y./Geneva, U.N.-OPANAL/UNIDIR, 1997, pp. 9, 25, 39 and 153.

287 Those Protocols contain the undertaking not only not to use nuclear weapons, but also not to threaten their use; cf. M. Roscini, *op. cit. infra* (n. 295), pp. 617-618.

288 The Treaty of Tlatelolco has in addition counted on its own regional organism to that end, the Organism for the Prohibition of Nuclear Weapons in Latin America (OPANAL).

and methods of verification[289], but they share the common ultimate goal of preserving humankind from the threat or use of nuclear weapons.

250. The second nuclear-weapon-free zone, established by the Treaty of Rarotonga (1985), with its three Protocols, came as a response[290] to long-sustained regional aspirations, and increasing frustration of the populations of the countries of the South Pacific with incursions of NWS in the region[291]. The Rarotonga Treaty encouraged the negotiation of a similar zone, – by means of the 1995 Bangkok Treaty, – in the neighbouring region of Southeast Asia, and confirmed the "continued relevance of zonal approaches" to the goal of disarmament and the safeguard of humankind from the menace of nuclear weapons[292].

251. The third of those treaties, that of Bangkok, of 1995 (with its Protocol), was prompted by the initiative of the Association of South-East Asian Nations (ASEAN) to insulate the region from the policies and rivalries of the nuclear powers. The Bangkok Treaty, besides covering the land territories of all ten Southeast Asian States, is the first treaty of the kind also to encompass their territorial sea, 200-mile exclusive economic zone and continental shelf[293]. The fourth such treaty, that of Pelindaba, of 1996, in its turn, was prompted by the continent's reaction to nuclear tests

289 Cf., in general, M. Roscini, *Le Zone Denuclearizzate*, Torino, Giappichelli Ed., 2003, pp. 1-410; J. Goldblat, "Zones exemptes d'armes nucléaires: une vue d'ensemble", *in Le droit international des armes nucléaires* (Journée d'études, ed. S. Sur), Paris, Pédone, 1998, pp. 35-55.

290 Upon the initiative of Australia.

291 M. Hamel-Green, "The South Pacific — The Treaty of Rarotonga", *in Nuclear Weapons-Free Zones* (ed. R. Thakur), London/N.Y., MacMillan/St. Martin's Press, 1998, p. 59, and cf. p. 62.

292 *Ibid*., pp. 77 and 71.

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

in the region (as from the French nuclear tests in the Sahara in 1961), and the aspiration – deeply-rooted in African thinking – to keep nuclear weapons out of the region[294]. The Pelindaba Treaty (with its three Protocols) appears to have served the purpose to eradicate nuclear weapons from the African continent.

252. The fifth such treaty, that of Semipalatinsk, of 2006, contains, like the other treaties creating nuclear weapon-free zones (*supra*), the basic prohibitions to manufacture, acquire, possess, station or control nuclear explosive devices within the zones[295]. The five treaties at issue, though containing loopholes (e.g., with regard to the transit of nuclear weapons)[296], have as common denominator the practical value of arrangements that transcend the non-proliferation of nuclear weapons[297].

253. Each of the five treaties (of Tlatelolco, Rarotonga, Bangkok, Pelindaba and Semipalatinsk) reflects the characteristics of each of the five regions, and they all pursue the same cause. The establishment of the nuclear weapon-free zones has been fulfilling the needs and aspirations of peoples living under the fear of nuclear victimization[298]. Their purpose is being served, also

294 Naciones Unidas, *Las Zonas Libres de Armas Nucleares en el Siglo XXI*, *op. cit. supra* n. (286), pp. 60-61; and cf. J. O. Ihonvbere, "Africa — The Treaty of Pelindaba", *in Nuclear Weapons-Free Zones*, *op. cit. supra* n. (291), pp. 98-99 and 109. And, for a general study, cf. O. Adeniji, *The Treaty of Pelindaba on the African Nuclear-Weapon-Free Zone*, Geneva, UNIDIR, 2002, pp. 1-169.

295 M. Roscini, "Something Old, Something New: The 2006 Semipalatinsk Treaty on a Nuclear Weapon-Free Zone in Central Asia", 7 *Chinese Journal of International Law* (2008) p. 597.

296 As to their shortcomings, cf., e.g., J. Goldblat, "The Nuclear Non-Proliferation Régime: Assessment and Prospects", 256 *Recueil des Cours de l'Académie de Droit International de La Haye* (1995) pp. 137-138; M. Roscini, *op. cit. supra* n. (295), pp. 603-604.

297 J. Enkhsaikhan, "Nuclear-Weapon-Free Zones: Prospects and Problems", 20 *Disarmament — Periodic Review by the United Nations* (1997) n. 1, p. 74.

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

in withholding or containing nuclear ambitions, to the ultimate benefit of humankind as a whole.

254. Nowadays, the five aforementioned nuclear weapon-free zones are firmly established in densely populated areas, covering most (almost all) of the landmass of the southern hemisphere land areas (while excluding most sea areas)[299]. The adoption of the 1967 Tlatelolco Treaty, the 1985 Rarotonga Treaty, the 1995 Bangkok Treaty, the 1996 Pelindaba Treaty, and the 2006 Semipalatinsk Treaty, have disclosed the shortcomings and artificiality of the posture of the so-called political "realists"[300], which insisted on the suicidal strategy of nuclear "deterrence", in their characteristic subservience to power politics.

255. The substantial *Final Report* of 1999 of the U.N. Disarmament Commission underlined the relevance of nuclear-weapon-free zones and of their contribution to the achievement of nuclear disarmament[301], "expressing and promoting common values" and constituting "important complementary" instruments to the NPT and the "international regime for the prohibition" of any nuclear-weapon explosions[302]. Drawing attention to the central role of the United Nations in the field of disarmament[303], the aforementioned *Report* added:

> *Nuclear-weapon-free zones have ceased to be exceptional in the global strategic environment. To date, 107 States*

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

300 Cf. Naciones Unidas, *Las Zonas Libres de Armas Nucleares en el Siglo XXI*, *op. cit. supra* n. (286), pp. 27, 33-38 and 134.

301 U.N., *Report of the Disarmament Commission — General Assembly Official Records* (54th Session, supplement n. 42), U.N. doc. A/54/42, of 06.05.1999,Annex I, pp. 6-7, paras. 1, 6 and 9.

302 *Ibid*., p. 7, paras. 10-11 and 13.

303 *Ibid*., Annex II, p. 11 3rd preambular paragraph.

> *have signed or become parties to treaties establishing existing nuclear-weapon-free zones. With the addition of Antarctica, which was demilitarized pursuant to the Antarctic Treaty, nuclear-weapon-free zones now cover more than 50 per cent of the Earth's land mass. (...)*
>
> *The establishment of further nuclear-weapon-free zones reaffirms the commitment of the States that belong to such zones to honour their legal obligations deriving from other international instruments in force in the area of nuclear non-proliferation and disarmament to which they are parties*[304].

256. Moreover, the 1999 *Final Report* of the U.N. Disarmament Commission further stated that, for their part, NWS should fully comply with their obligations, under the ratified Protocols to the Treaties of treaties on nuclear-weapon-free zones, "not to use or threaten to use nuclear weapons"[305]. It went on to encourage member States of those zones "to share experiences" with States of other regions, so as "to establish further nuclear-weapon-free zones"[306]. It concluded that the international community, by means of "the creation of nuclear-weapon-free zones around the globe", should aim at "general and complete disarmament under strict and effective international control, so that future generations can live in a more stable and peaceful atmosphere"[307].

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

304 *Ibid.*, Annex I, p. 7, para. 5; and p. 8, para. 28.

305 *Ibid.*, p. 9, para. 36.

306 *Ibid.*, p. 9, para. 41.

307 *Ibid.*, p. 9, para. 45.

destruction, in outer space, on the seabed, on the ocean floor and in the subsoil beyond the outer limit of the territorial seabed zone, – "denuclearized" by the Treaties of Antarctica (1959), Outer Space (1967) and the Deep Sea Bed (1971), respectively, to which can be added the Treaty on the Moon and Other Celestial Bodies (1979), established a complete demilitarization thereon[308].

258. The fact that the international community counts today on five nuclear-weapon-free zones, in relation to which States that possess nuclear weapons do have a particular responsibility, reveals an undeniable advance of right reason, of the *recta ratio* in the foundations of contemporary international law. Moreover, the initiative of nuclear-weapon-free zones keeps on clearly gaining ground. In recent years, proposals are being examined for the setting up of new denuclearized zones of the kind[309], as well as of the so-called single-State zone (e.g., Mongolia)[310]. That initiative further reflects the increasing disapproval, by the international community as a whole, of nuclear weapons, which, in view of their hugely destructive capability, constitute an affront to right reason (*recta ratio*).

XIX. Conferences on the Humanitarian Impact of Nuclear Weapons (2013-2014)

259. In the course of the proceedings in the present case of *Obligations Concerning Negotiations Relating to Cessation of the*

308 Cf. G. Venturini, "Control and Verification of Multilateral Treaties on Disarmament and Non-Proliferation of Weapons of Mass Destruction", 17 *University of California Davis Journal of International Law and Policy* (2011) pp. 359-360.

309 E.g., in Central and Eastern Europe, in the Middle East, in Central and North-East and South Asia, and in the whole of the southern hemisphere.

310 Cf. A. Acharya and S. Ogunbanwo, *op. cit. supra* n. (293), p. 443; J. Enkhsaikhan, *op. cit. supra* n. (297), pp. 79-80. Mongolia in effect declared its territory as a nuclear-weapon-free zone (in 1992), and in February 2000 adopted national legislation defining its status as a nuclear-weapon-free State. This was acknowledged by U.N. General Assembly resolution 55/33S of 20.11.2000.

Nuclear Arms Race and to Nuclear Disarmament, several references were made to the more recent series of Conferences on the Humanitarian Impact of Nuclear Weapons (2013-2014), and in particular to the statement made therein (in the second of those Conferences) by the Marshall Islands, asserting that NWS should fulfill their obligation, "long overdue", of negotiation to achieve complete nuclear disarmament (cf. *infra*). The Marshall Islands promptly referred to its own statement in the Nayarit Conference (2014) in its *Memorial* in the *cas d'espèce*, as well as in its oral arguments before the ICJ.

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

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

1. First Conference on the Humanitarian Impact of Nuclear Weapons

262. The first Conference on the Humanitarian Impact of Nuclear Weapons took place in Oslo, Norway, on 04-05 March 2013, having counted on the participation of Delegations representing 127 States, United Nations agencies, the International Committee of the Red Cross (ICRC), the Red Cross and the Red Crescent movement, international organizations, and civil society entities. It should not pass unnoticed that only two of the NWS, India and Pakistan, were present at this Conference (and only India made a statement)[311]. On the other hand, neither the Marshall Islands, nor the permanent members of the U.N. Security Council, attended it.

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

264. Attention was drawn, e.g., to the nuclear testing's impact during the cold-war period, in particular to the detonation of not less than 456 nuclear bombs in the four decades (between 1949 and 1989) in the testing ground of Semipalatinsk, in eastern Kazakhstan. It was reported (by UNDP) that, according to the Kazakh authorities, up to 1.5 million people were affected by fall-out from the blasts at Semipalatinsk; the nuclear test site was shut down in mid-1991. Other aspects were examined, all

311 *In*: https://www.regjeringen.no/globalassets/upload/ud/vedlegg/hum/hum_india.pdf.

from a humanitarian outlook[312]. References were made, e.g., to General Assembly resolutions (such as resolution 63/279, of 25.04.2009), on humanitarian rehabilitation of the region. Such a humanitarian approach proved necessary, as the "historical experience from the use and testing of nuclear weapons has demonstrated their devastating immediate and long-term effects"[313].

265. The key conclusions of the Oslo Conference, as highlighted by Norway's Minister of Foreign Affairs in his closing statement[314], can be summarized as follows. First, it is unlikely that any state or international body (such as U.N. relief agencies and the ICRC) could address the immediate humanitarian emergency caused by a nuclear weapon detonation in an adequate manner and provide sufficient assistance to those affected. Thus, the ICRC called for the abolition of nuclear weapons as the only effective preventive measure, and several participating States stressed that elimination of nuclear weapons is the only way to prevent their use; some States called for a ban on those weapons.

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

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

313 Norway/Ministry of Foreign Affairs, *Chair´s Summary — Humanitarian Impact of Nuclear Weapons*, Oslo, 05.03.2013, p. 2.

314 *In*: https://www.regjeringen.no/en/aktuelt/nuclear_summary/id716343/.

in significant ways, in a trans-frontier dimension, regionally as well as globally.

2. Second Conference on the Humanitarian Impact of Nuclear Weapons

267. The second Conference on the Humanitarian Impact of Nuclear Weapons took place in Nayarit, Mexico, on 13-14 February 2014, having counted on the participation of Delegations representing 146 States. The Marshall Islands, India and Pakistan attended it, whereas the United Kingdom did not. In addition to States, other participants included the ICRC, the Red Cross and the Red Crescent movement, international organizations, and civil society entities. During the Nayarit Conference, the Delegate of the Marshall Islands stated that NWS States were failing to fulfill their obligations, under Article VI of the NPT and customary international law, to commence and conclude multilateral negotiations on nuclear disarmament; in his words:

> *the Marshall Islands is convinced that multilateral negotiations on achieving and sustaining a world free of nuclear weapons are long overdue. Indeed we believe that states possessing nuclear arsenals are failing to fulfill their legal obligations in this regard. Immediate commencement and conclusion of such negotiations is required by legal obligation of nuclear disarmament resting upon each and every state under Article VI of the Non Proliferation Treaty and customary international law. It also would achieve the objective of nuclear disarmament long and consistently set by the United Nations, and fulfill our responsibilities to*

> *present and future generations while honouring the past ones*[315].

268. Earlier on, the Minister of Foreign Affairs of the Marshall Islands stated, at the U.N. High-Level Meeting on Nuclear Disarmament, on 26.09.2013, that the Marshall Islands "has a unique and compelling reason" to urge nuclear disarmament, namely,

> *The Marshall Islands, during its time as a UN Trust Territory, experienced 67 large-scale tests of nuclear weapons. At the time of testing, and at every possible occasion in the intervening years, the Marshall Islands has informed UN members of the devastating impacts of these tests – of the deliberate use of our people as unwilling scientific experiments, of ongoing health impacts inherited through generations, of our displaced populations who still live in exile or who were resettled under unsafe circumstances, and then had to be removed. Even today, science remains a moving target and our exiled local communities are still struggling with resettlement.*
>
> *(...) Perhaps we [the Marshallese] have one of the most important stories to tell regarding the need to avert the use of nuclear weapons, and a compelling story to spur greater efforts for nuclear disarmament (pp. 1-2)*[316].

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

316 *In*: http://www.un.org/en/ga/68/meetings/nucleardisarmament/pdf/MH_en.pdf. And the Marshall Islands' Minister of Foreign Affairs (Ph. Muller) added that "It should be our collective goal as the United Nations to not only stop the spread of nuclear weapons, but also to pursue the peace and security of a world without them. Further, the Republic of the Marshall Islands has recently ratified the Comprehensive Test Ban Treaty and urges other member states to work towards bringing this important agreement into force.

The Marshall Islands is not the only nation in the Pacific to be touched by the devastation of nuclear weapon testing. (...) We express again our eventual aspirations to join with our Pacific neighbours

269. The Marshall Islands' statement in the 2014 Nayarit Conference was thus one of a few statements in which the Marshall Islands has articulated its claim, whereon they rely in the *cas d'espèce*, *inter alia*, to substantiate the existence of a dispute, including with the United Kingdom, which was not present at the Conference[317]. The Nayarit Conference participants also heard the poignant testimonies of five *Hibakusha*, – survivors of the atomic bombings of Hiroshima and Nagasaki, – who presented their accounts of the overwhelming devastation inflicted on those cities and their inhabitants by the atomic blasts (including the victims' burning alive, and carbonized or vaporized, as well as the long-term effects of radiation, killing survivors along seven decades).

270. They stressed the "moral imperative" of abolition of nuclear weapons, as humanity and nuclear weapons cannot coexist. A group of Delegations of no less than 20 States called expressly for a ban of nuclear weapons, already long overdue; this was the sword of Damocles hanging over everyone's heads. The "mere existence" of nuclear weapons was regarded as "absurd"; attention was also drawn to the 2013 U.N. General Assembly High-Level Meeting on Disarmament, and to the obligations under international law, including those deriving from the NPT as well as common Article 1 of the Geneva Conventions on IHL[318].

in supporting a Pacific free of nuclear weapons in a manner consistent with international security" (pp. 1-2).

317 *Memorial* of the M.I. in Marshall Islands *versus* United Kingdom, para. 99.

318 Mexico/Gobierno de la República, *Chair's Summary — Second Conference on the Humanitarian Impact of Nuclear Weapons*, Mexico, 14.02.2014, pp. 2-3.

271. Furthermore, an association of over 60 entities of the civil society, from more than 50 countries, stated[319] that their own engagement was essential, as responsibilities fell on everyone to prevent the use of nuclear weapons; and prevention required the prohibition and ban of nuclear weapons, in the same way as those of biological and chemical weapons, landmines, and cluster munitions. Both the association, and the *Hibakusha*, condemned the dangerous strategy of nuclear "deterrence".

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

273. Delegations of over 50 States from every region of the world made statements unequivocally calling for the total elimination of nuclear weapons and the achievement of a world free of nuclear weapons. At least 20 Delegations of participating States in the Conference (*supra*) expressed the view that the way forward would be a ban on nuclear weapons. Others were equally clear in their calls for a Convention on the elimination of nuclear weapons or a new legally binding instrument[320].

319 On behalf of the International Campaign to Abolish Nuclear Weapons (ICAN), a coalition of over 350 entities in 90 countries.

320 For example, for its part, India favoured a step-by-step approach towards the elimination of nuclear weapons, ultimately leading to "a universal, non-discriminatory Convention on prohibition and elimination of nuclear weapons"; cf. www.reachingcriticalwill.org/images/documents/Disarmament-fora/nayarit-2014/statements/India.pdf.

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

275. Thirdly, for the Chairman of the Conference, a ban on nuclear weapons would be the first step towards their elimination; such a ban would also rectify the anomaly that nuclear weapons are the only weapons of mass destruction that are not subject to an explicit legal prohibition. He added that achieving a world free of nuclear weapons is consistent with States' obligations under international law, including under the NPT and common Article 1 to the Geneva Conventions on IHL. He at last called for the development of new international standards on nuclear weapons, including a legally binding instrument, to be concluded by the 70th anniversary of the atomic bombings of Hiroshima and Nagasaki[321].

3. Third Conference on the Humanitarian Impact of Nuclear Weapons

276. The third Conference on the Humanitarian Impact of Nuclear Weapons took place in Vienna, Austria, on 08-09 December 2014, having carried forward the momentum created by the previous Conference in Mexico. It counted on the participation of Delegations of 158 States, as well as the U.N., the

321 Cf.http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nayarit-2014/chairs-summary.pdf.

ICRC, the Red Cross and Red Crescent movement, civil society entities and representatives of the academic world. For the first time, of the NWS, the United Kingdom attended the Conference; Delegates from India, Pakistan, and the Marshall Islands were present as well.

277. Once again, the Conference participants heard the testimonies of survivors, the *Hibakusha*. Speaking of the "hell on earth" experienced in Hiroshima and Nagasaki; the "indiscriminate massacre of the atomic bombing" showed "the illegality and ultimate evil of nuclear weapons"[322]. In its statement, the Marshall Islands, addressing the testing in the region of 67 atomic and hydrogen bombs, between 1946 and 1958, — the strongest one having been the Bravo test (of 01.03.1954) of a hydrogen bomb, 1000 times more powerful than the atomic bomb dropped over Hiroshima, – referred to their harmful impacts, such as the birth of "monster-like babies", the continuous suffering from "thyroid cancer, liver cancer and all types of radiogenic cancerous illnesses", extending over the years[323].

278. For its part, the ICRC stated that nuclear weapons ignore the principle of proportionality, and stand in breach of IHL (both conventional and customary) by causing unnecessary suffering to civilians; it expressed "significant concerns about the eventual spread of radiation to civilian areas and the radiological contamination of the environment" and everyone[324]. The ICRC further observed that, after "decades of focusing on nuclear weapons primarily in technical-military terms and as symbols of power", a fundamental and reassuring change has occurred,

322 Cf. *Vienna Conference on the Humanitarian Impact of Nuclear Weapons (08-09 December 2014)*, Vienna, Austria's Federal Ministry for Europe, Integration and Foreign Affairs, 2015, p. 19.

323 *Ibid*., p. 34.

324 *Ibid*., p. 58.

as debates on the matter now shift attention to what those weapons "would mean for people and the environment, indeed for humanity"[325].

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

> *Upholding doctrines of nuclear deterrence does not counter proliferation, but it makes the weapons more desirable. Growing ranks of nuclear-armed States does not ensure global stability, but instead undermines it. (...) The more we understand about the humanitarian impacts, the more it becomes clear that we must pursue disarmament as an urgent imperative*[326].

280. The Vienna Conference contributed to a deeper understanding of the consequences and risks of a nuclear detonation, having focused to a larger extent on the legal framework (and gaps therein) with regard to nuclear weapons[327]. It was reckoned that the impact of nuclear weapons detonation, irrespective of the cause, would go well beyond national borders, and could have regional and even global consequences, causing destruction, death, diseases and displacement on a very large scale, as well as profound and long-term damage to the environment, climate, human health and well-being, socioeconomic development

325 *Ibid.*, p. 17.

326 Statement reproduced *in ibid.*, p. 16.

327 Cf. *ibid.* pp. 1-88.

and social order. They could, in sum, threaten the very survival of humankind. It was acknowledged that the scope, scale and interrelationship of the humanitarian consequences caused by nuclear weapon detonation are catastrophic, and more complex than commonly understood; these consequences can be large scale and potentially irreversible.

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

282. As the general report of the Vienna Conference observed, the three Conferences on the Humanitarian Impact of Nuclear Weapons (of Oslo, Nayarit and then Vienna), have contributed to a "deeper understanding" of the "actual risks" posed by nuclear weapons, and the "unspeakable suffering", devastating effects, and "catastrophic humanitarian consequences" caused by their use. As "nuclear deterrence entails preparing for nuclear war, the risk of nuclear weapon use is real. (...) The only assurance against the risk of a nuclear weapon detonation is the total elimination of nuclear weapons", in "the interest of the very survival of humanity"; hence the importance of Article VI of the NPT, and of the entry into force of the CTBT[328].

283. The 2014 Vienna Conference's conclusions can be summarized as follows. First, the use and testing of nuclear

328 *Ibid.*, pp. 5-7.

weapons have demonstrated their devastating immediate, mid- and long-term effects. Nuclear testing in several parts of the world has left a legacy of serious health and environmental consequences. Radioactive contamination from these tests disproportionately affects women and children. It contaminated food supplies and continues to be measurable in the atmosphere to this day.

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

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

286. Fourthly, the existence itself of nuclear weapons raises serious ethical questions, – well beyond legal discussions and interpretations, – which should be kept in mind. Several Delegations asserted that, in the interest of the survival of humankind, nuclear weapons must never be used again, under any circumstances. Fifthly, no State or international organ could

adequately address the immediate humanitarian emergency or long-term consequences caused by a nuclear weapon detonation in a populated area, nor provide adequate assistance to those affected. The imperative of prevention as the only guarantee against the humanitarian consequences of nuclear weapons use is thus to be highlighted. Sixthly, participating Delegations reiterated the importance of the entry into force of the CTBT as a key element of the international nuclear disarmament and non-proliferation regime.

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

4. Aftermath: The "Humanitarian Pledge"

288. At the 2014 Vienna Conference, although a handful of States expressed scepticism about the effectiveness of a ban on nuclear weapons, the overwhelming majority of NPT States Parties expected the forthcoming 2015 NPT Review Conference to take stock of all relevant developments, including the outcomes of the Conferences on the Humanitarian Impact of Nuclear Weapons (*supra*), and determine the next steps for the achievement and maintenance of a nuclear-weapon-free world. At the end of the

Vienna Conference, the host State, Austria, presented a "Pledge" calling upon States parties to the NPT to renew their commitment to the urgent and full implementation of existing obligations under Article VI, and to this end, to identify and pursue effective measures to fill the legal gap for the prohibition and elimination of nuclear weapons[329].

289. The Pledge further called upon NWS to take concrete interim measures to reduce the risk of nuclear weapons detonations, including by diminishing the role of nuclear weapons in military doctrines. The Pledge also recognised that: a) the rights and needs of the victims of nuclear weapon use and testing have not yet been adequately addressed; b) all States share the responsibility to prevent any use of nuclear weapons; and c) the consequences of nuclear weapons use raise profound moral and ethical questions going beyond debates about the legality of these weapons.

290. Shortly before the Vienna Conference, 66 States had already endorsed the Pledge; by the end of the Conference, 107 States had endorsed it, thus "internationalizing" it and naming it at the end as the "Humanitarian Pledge"[330]. On 07.12. 2015, the U.N. General Assembly adopted the substance of the Humanitarian Pledge in the form of its resolution 70/48. As of April 2016, 127 States have formally endorsed the Humanitarian Pledge; unsurprisingly, none of the NWS has done so.

291. Recent endeavours, such as the ones just reviewed of the Conferences on the Humanitarian Impact of Nuclear Weapons have been rightly drawing attention to the grave humanitarian

329 *In*:http://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/-HINW14/HINW14Vienna_Pledge _Document.pdf. The Pledge only refers to States' obligations under the NPT and makes no mention of customary international law.

330 http://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/-HINW14/HINW14.

consequences of nuclear weapons detonations. The reframing of the whole matter in a people-centred outlook appears to me particularly lucid, and necessary, keeping in mind the unfoundedness of the strategy of "deterrence" and the catastrophic consequences of the use of nuclear weapons. The "step-by-step" approach, pursued by the NWS in respect to the obligation under Article VI of the NPT, appears essentially State-centric, having led to an apparent standstill or deadlock.

292. The obligation of nuclear disarmament being one of result, the "step-by-step" approach cannot be extended indefinitely in time, with its insistence on the maintenance of the nuclear sword of Damocles. The "step-by-step" approach has produced no significantly concrete results to date, seeming to make abstraction of the numerous pronouncements of the United Nations upholding the obligation of nuclear disarmament (cf. *supra*). After all, the absolute prohibition of nuclear weapons, – which is multifaceted[331], is one of *jus cogens* (cf. *supra*). Such weapons, as the Conferences on the Humanitarian Impact of Nuclear Weapons have evidenced, are essentially inhumane, rendering the strategy of "deterrence" unfounded and unsustainable (cf. *supra*).

293. Ever since those Conferences (2013-2014), there has been a tendency (in 2014-2016) of slight reduction of nuclear warheads[332], though NWS have kept on modernizing their respective nuclear armament programs, in an indication that nuclear weapons are likely to remain in the foreseeable future[333]. Yet, the growing awareness of the humanitarian impact of nuclear weapons has raised the question of the possibility of developing "a

331 Encompassing measures relating to any use, threat of use, development, production, acquisition, possession, stockpiling and transfer of nuclear weapons.

332 From around 16.300 nuclear warheads in 2014 to 15,850 in 2015, and to 15,395 in early 2016.

333 Cf. *SIPRI Yearbook 2016: Armaments, Disarmament and International Security*, Stockholm-Solna, SIPRI, 2016, ch. 16, pp. 609-667.

deontological position according to which the uniquely inhumane suffering that nuclear weapons inflict on their victims makes it inherently wrongful to use them"[334].

294. *Tempus fugit*. There remains a long way to go to achieve a nuclear-weapon-free world. The United Nations itself has been drawing attention to the urgency of nuclear disarmament. It has done so time and time again, and, quite recently, in the convocation in October 2015, of a new Open-Ended Working Group (OEWG), as a subsidiary body of the U.N. General Assembly, to address concrete and effective legal measures to attain and maintain a world without nuclear weapons[335]. It draws attention therein to the importance of multilateralism, to the relevance of "inclusiveness" (participation of all U.N. member States) and of the contribution, in addition to that of States, also of international organizations, of entities of the civil society, and of the academia[336]. And it reaffirms "the urgency of securing substantive progress in multilateral nuclear disarmament negotiations", in order "to attain and maintain a world without nuclear weapons"[337].

295. It should not pass unnoticed that all the initiatives that I have just reviewed in the present Dissenting Opinion (NPT Review Conferences, the establishment of nuclear-weapon-free zones, and the Conferences on Humanitarian Impact of Nuclear Weapons), referred to by the contending parties in the course of the proceedings before the ICJ in the present case of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, have gone beyond the inter-State

334 ILPI, *Evidence of Catastrophe — A Summary of the Facts Presented at the Three Conferences on the Humanitarian Impact of Nuclear Weapons*, Oslo, ILPI, 2015, p. 15.

335 U.N. General Assembly, doc. A/C.1/70/L.13/Rev.1, of 29.10.2015, pp. 1-3.

336 Preamble, paras. 8 and 14-15.

337 Operative part, para. 2.

outlook. In my perception, there is great need, in the present domain, to keep on looking beyond States, so as to behold peoples' and humankind's quest for survival in our times.

XX. Final Considerations: *Opinio Juris Communis* Emanating from Conscience (*Recta Ratio*), Well Above the "Will"

296. Nuclear weapons, as from their conception, have been associated with overwhelming destruction. It may be recalled that the first atomic bombs were fabricated in an epoch of destruction and devastation, – the II world war, – of the abominable "total war", in flagrant breach of IHL and of the ILHR[338]. The fabrication of nuclear weapons, followed by their use, made abstraction of the fundamental principles of international law, moving the world into lawlessness in the current nuclear age. The strategy of "deterrence", in a "dialectics of suspicion", leads to an unforeseeable outcome, amidst complete destruction. Hence the utmost importance of negotiations conducive to general disarmament, which, – as warned by Raymond Aron [already] in the early sixties, – had "never been taken seriously" by the super-powers[339].

297. Last but not least, may I come back to a key point which I have dwelt upon in the present Dissenting Opinion pertaining to the *opinio juris communis* as to the obligation of nuclear disarmament (cf. part XVI, *supra*). In the evolving law of nations, basic considerations of humanity have an important

338 For an account, cf., e.g., *inter alia*, J. Lukacs, *L'héritage de la Seconde Guerre Mondiale*, Paris, Ed. F.-X. de Guibert, 2011, pp. 38-39, 55, 111 and 125-148 ; and cf. I. Kershaw, *To Hell and Back — Europe 1914-1949*, London, Penguin, 2016, pp. 7, 356, 407, 418, 518 and 521.

339 R. Aron, *Paz e Guerra entre as Nações* [1962], Brasília, Edit. Universidade de Brasília, 1979, pp. 413, 415, 421-422 and 610. R. Aron's book contains his reflections on the new age of nuclear weapons, amidst the tensions of the cold-war era, and the new challenges and dangers it imposed, — persisting to date, — for the future of humankind; cf., for the French edition, R. Aron, *Paix et guerre entre les nations*, 8th ed., Paris, Éd. Calmann-Lévy, 2015, pp. 13-770.

role to play. Such considerations nourish *opinio juris* on matters going well beyond the interests of individual States. The ICJ has, on more than one occasion, taken into account resolutions of the United Nations (in distinct contexts) as a means whereby international law manifests itself.

298. In its *célèbre* Advisory Opinion (of 21.06.1971) on *Namibia*, for example, the ICJ dwelt upon, in particular, two U.N. General Assembly resolutions relevant to the formation of *opinio juris*[340]. Likewise, in its Advisory Opinion (of 16.10.1975) on the *Western Sahara*, the ICJ considered and discussed in detail some U.N. General Assembly resolutions[341]. In this respect, references can further be made to the ICJ's Advisory Opinions on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (of 09.07.2004)[342], and on the *Declaration of Independence of Kosovo* (of 22.07.2010)[343]. In its 1996 Advisory Opinion on the *Threat or Use of Nuclear Weapons*, the ICJ admitted, – even if in a rather restrictive way, – the emergence and gradual evolution of an *opinio juris* as reflected in a series of resolutions of the U.N. General Assembly (para. 70). But the ICJ could have gone (much) further than that.

299. After all, *opinio juris* has already had a long trajectory in legal thinking, being today endowed with a wide dimension. Thus, already in the XIXth century, the so-called "historical school" of legal thinking and jurisprudence (of F. K. von Savigny and G. F. Puchta) in reaction to the voluntarist conception, gradually discarded the "will" of the States by shifting attention to *opinio*

340 On the principle of self-determination of peoples, namely, G.A. resolutions 1514(XV) of 14.12.1960, and 2145(XXI) of 27.10.1966; cf. *I.C.J. Reports 1971* pp. 31, 45 and 49-51.

341 Cf. *I.C.J. Reports 1975* pp. 20, 23, 26-37, 40, 57 and 67-68.

342 Cf. *I.C.J. Reports 1975* pp. 171-172, paras. 86-88.

343 Cf. *I.C.J. Reports 2010* p. 437, para. 80 (addressing a General Assembly resolution "which reflects customary international law").

juris, requiring practice to be an authentic expression of the "juridical conscience" of nations and peoples. With the passing of time, the acknowledgment of conscience standing above the "will" developed further, as a reaction against the reluctance of some States to abide by norms addressing matters of general or common interest of the international community.

300. This had an influence on the formation of rules of customary international law, a much wider process than the application of one of its formal "sources". *Opinio juris communis* came thus to assume "a considerably broader dimension than that of the subjective element constitutive of custom"[344]. *Opinio juris* became a key element in the *formation* itself of international law, a *law of conscience*. This diminished the unilateral influence of the most powerful States, fostering international law-making in fulfilment of the public interest and in pursuance of the common good of the international community as a whole.

301. The foundations of the international legal order came to be reckoned as independent from, and transcending, the "will" of individual States; *opinio juris communis* came to give expression to the "juridical conscience", no longer only of nations and peoples – sustained in the past by the "historical school" – but of the international community as a whole, heading towards the universalization of international law. It is, in my perception, this international law of conscience that turns in particular towards nuclear disarmament, for the sake of the survival of humankind.

344 A.A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, *op. cit. supra* n. (120), p. 137, and cf. p. 138; and cf. R. Huesa Vinaixa, *El Nuevo Alcance de la 'Opinio Juris' en el Derecho Internacional Contemporáneo*, Valencia, Tirant lo Blanch, 1991, pp. 30-31 and 36-38, and cf. pp. 76-77, 173, 192, 194, 199 and 204-205; R. E. Piza Escalante, "La '*Opinio Juris*' como Fuente Autónoma del Derecho Internacional ('*Opinio Juris*' y '*Jus Cogens*')", 39 *Relaciones Internacionales* — Heredia/C.R. (1992) pp. 61-74; J. I. Charney, "International Lawmaking — Article 38 of the ICJ Statute Reconsidered", *in New Trends in International Lawmaking — International 'Legislation' in the Public Interest* (Proceedings of the Kiel Symposium, March 1996), Berlin, Duncker & Humblot, 1997, pp. 180-183 and 189-190.

302. In 1983, Wang Tieya wrote against minimizing the legal significance of resolutions of General Assembly, in particular the declaratory ones. As they clarify principles and rules of international law, he contended that they "cannot be said to have no law-making effect at all merely because they are not binding in the strict sense. At the very least, since they embody the convictions of a majority of States, General Assembly resolutions can indicate the general direction in which international law is developing"[345]. He added that those General Assembly resolutions, reflecting the position of "an overwhelming majority of States", have "accelerated the development of international law", in helping to crystallize emerging rules into "clearly defined norms"[346]. In the same decade, it was further pointed out that General Assembly resolutions have been giving expression, along the years, to "basic concepts of equity and justice, or of the underlining spirit and aims" of the United Nations[347].

303. Still in the eighties, in the course I delivered at the Institute of Public International Law and International Relations of Thessaloniki, in 1988, I began by pondering that customary and conventional international law are interrelated, – as acknowledged by the ICJ itself[348] – and U.N. General Assembly

345 Wang Tieya, "The Third World and International Law", *in The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (eds. R.St.J. Macdonald and D.M. Johnston), The Hague, M. Nijhoff, 1983, p. 964.

346 *Ibid*., pp. 964-965.

347 B. Sloan, "General Assembly Resolutions Revisited (Forty Years Later)", 58 *British Year Book of International Law* (1987) p. 80, and cf. pp. 116, 137 and 141.

348 For example, in the course of the proceedings in the *Nuclear Tests* cases (1973-1974), one of the applicant States (Australia) recalled, in the public sitting of 08.07.1974, that the ICJ had held, in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 41), that a conventional norm can pass into the general *corpus* of international law thus becoming also a rule of customary international law; cf. ICJ, *Pleadings, Oral Arguments, Documents— Nuclear Tests cases* (vol. I: Australia *versus* France, 1973-1974), p. 503. In effect, — may I add, — just as a customary rule may later crystallize into a conventional norm, this latter can likewise generate a customary rule. International law is not static (as legal positivists wrongfully assume); it is essentially dynamic.

resolutions contribute to the emergence of *opinio juris communis*[349]. I stood against the "strictly voluntarist position" underlying the unacceptable concept of so-called "persistent objector", and added that dissent from "one or another State individually cannot prevent the creation of new customary rules" or obligations, ensuing from *opinio juris communis* and not from *voluntas*[350].

304. In the evolution of international law in time, – I proceeded, – voluntarist positivism has shown itself "entirely incapable" of explaining the consensual formation of customary international obligations; contrary to "the pretensions of positivist voluntarism" (with its stubborn emphasis on the consent of individual States), "freedom of spirit is the first to rebel" against immobilism, in devising responses to new challenges affecting the international community as a whole, and acknowledging obligations incumbent upon all States[351].

305. In my "repudiation of voluntarist positivism", I concluded on this point that the attention to customary international law ("incomparably less vulnerable" than conventional international law to voluntarist temptations) is in line with the progressive development (moved by conscience) of international law, so as to provide a common basis for the fulfilment of the needs and aspirations of all peoples[352]. Today, almost three decades later, I firmly restate, in the present Dissenting Opinion, my own position on the matter, in respect of the customary and conventional

349 A.A. Cançado Trindade, "Contemporary International Law-Making: Customary International Law and the Systematization of the Practice of States", *in Sources of International Law* (Thesaurus Acroasium, vol. XIX), Thessaloniki, Institute of Public International Law and International Relations, 1992, pp. 68 and 71.

350 *Ibid*., pp. 78-79.

351 *Ibid*., pp. 126-129

352 *Ibid*., pp. 128-129. And cf., more recently, in general, A.A. Cançado Trindade, "The Contribution of Latin American Legal Doctrine to the Progressive Development of International Law", 376 *Recueil des Cours de l'Académie de Droit International de La Haye* (2014) pp. 9-92, esp. pp. 75-76.

international obligation to put an end to nuclear weapons, so as to rid the world of their inhuman threat.

306. May I here, furthermore, ponder that U.N. General Assembly or Security Council resolutions are adopted on behalf not of the States which voted in favour of them, but more precisely on behalf of the United Nations Organization itself (its respective organs), being thus *valid for all U.N. member States*. This applies to the resolutions surveyed in the present Dissenting Opinion. It should be kept in mind that the U.N. is endowed with an international legal personality of its own, which enables it to act at international level as a distinct entity, independently of individual member States; in this way, it upholds the juridical equality of all States, and mitigates the worrisome vulnerability of factually weaker States, such as the NNWS; in doing so, it aims – by multilateralism – at the common good, at the realization of common goals of the international community as a whole[353], such as nuclear disarmament.

307. A small group of States – such as the NWS – cannot overlook or minimize those reiterated resolutions, extended in time, simply because they voted against them, or abstained. Once adopted, they are valid for all U.N. member States. They are resolutions of the United Nations Organization itself, and not only of the large majority of U.N. member States which voted in favour of them. U.N. General Assembly resolutions, reiteratedly addressing matters of concern to humankind as a whole (such as existing nuclear weapons), are in my view endowed with normative value. They cannot be properly considered from a State voluntarist perspective; they call for another approach, away from the strict voluntarist-positivist one.

353 Cf., in this sense, A.A. Cançado Trindade, *Direito das Organizações Internacionais*, 6th rev. ed., Belo Horizonte/Brazil, Edit. Del Rey, 2014, pp. 51 and 530-531.

308. Conscience stands above the "will". The universal juridical conscience stands well above the "will" of individual States, and resonates in resolutions of the U.N. General Assembly, which find inspiration in general principles of international law, which, for their part, give expression to values and aspirations of the international community as a whole, of all humankind[354]. This – may I reiterate – is the case of General Assembly resolutions surveyed in the present Dissenting Opinion (cf. *supra*). The values which find expression in those *prima principia* inspire every legal order and, ultimately, lie in the foundations of this latter.

309. The general principles of law (*prima principia*), in my perception, confer upon the (national and international) legal order its ineluctable axiological dimension. Notwithstanding, legal positivism and political "realism", in their characteristic subservience to power, incur into their basic mistake of minimizing those principles, which lie in the foundations of any legal system, and which inform and conform the norms and the action pursuant to them, in the search for the realization of justice. Whenever that minimization of principles has prevailed the consequences have been disastrous[355].

310. They have been contributing, in the last decades, to a vast *corpus juris* on matters of concern to the international community as a whole, such as nuclear disarmament. Their contribution to this effect has overcome the traditional inter-State paradigm of the international legal order[356]. This can no longer be overlooked in our days. The inter-State mechanism of the *contentieux* before the ICJ

354 A.A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, *op. cit. supra* n. (120), pp. 129-138.

355 A.A. Cançado Trindade, *A Humanização do Direito Internacional*, 2nd rev. ed., Belo Horizonte/Brazil, 2015, pp. 6-24; A.A. Cançado Trindade, *Os Tribunais Internacionais e a Realização da Justiça*, *op. cit. supra* n. (243), pp. 410-418.

356 A.A. Cançado Trindade, *Direito das Organizações Internacionais*, *op. cit. supra* n. (353), pp. 530-537.

cannot be invoked in justification for an inter-State reasoning. As "the principal judicial organ" of the United Nations (U.N. Charter, Article 92), the ICJ has to bear in mind not only States, but also "we, the peoples", on whose behalf the U.N. Charter was adopted. In its international adjudication of contentious cases, like the present one of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, the ICJ has to bear in mind basic considerations of humanity, with their incidence on questions of admissibility and jurisdiction, as well as of substantive law.

XXI. Epilogue: A Recapitulation

311. Coming to the end of the present Dissenting Opinion, I feel in peace with my conscience: from all the preceding considerations, I trust to have made it crystal clear that my own position, in respect of all the points which form the object of the present Judgment on the case of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, stands in clear and entire opposition to the view espoused by the Court's split majority that the existence of a legal dispute has not been established before it, and that the Court has no jurisdiction to consider the Application lodged with it by the Marshall Islands, and cannot thus proceed to the merits of the case. Not at all: in my understanding, there is a dispute before the Court, which has jurisdiction to decide the case. There is a conventional and customary international law obligation of nuclear disarmament. Whether there has been a concrete breach of this obligation, the Court could only decide on the merits phase of the present case.

312. My dissenting position is grounded not only on the assessment of the arguments produced before the Court by the contending parties, but above all on issues of principle and on

fundamental values, to which I attach even greater importance. As my dissenting position covers all points addressed in the present Judgment, in its reasoning as well as in its conclusion, I have thus felt obliged, in the faithful exercise of the international judicial function, to lay on the records, in the present Dissenting Opinion, the foundations of my dissenting position thereon. I deem it fit, at this last stage, to recapitulate all the points of my dissenting position, expressed herein, for the sake of clarity, and in order to stress their interrelatedness.

313. *Primus*: According to the *jurisprudence constante* of the Court, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests; The existence of an international dispute (at the time of lodging a claim) is a matter for the objective determination of the Court. The existence of a dispute may be inferred. *Secundus*: The objective determination of a dispute by the Court is not intended to protect respondent States, but rather and more precisely to secure the proper exercise of the Court's judicial function. *Tertius*: There is no requirement of prior notice of the applicant State's intention to initiate proceedings before the ICJ, nor of prior "exhaustion" of diplomatic negotiations, nor of prior notification of the claim; it is, in sum, a matter for objective determination of the Court itself.

314. *Quartus*: The Marshall Islands and the United Kingdom/India/Pakistan have pursued distinct arguments and courses of conduct on the matter at issue, evidencing their distinct legal positions, which suffice for the Court's objective determination of the existence of a dispute. *Quintus*: There is no legal ground for attempting to heighten the threshold for the determination of the existence of a dispute; in its *jurisprudence constante*, the Court has expressly avoided a formalistic approach on this issue, which would affect access to justice itself. The Court has, instead, in its

jurisprudence constante, upheld its own *objective determination* of the existence of a dispute, rather than relying– as it does in the present case – on the subjective criterion of "awareness" of the respondent States.

315. *Sextus*: The distinct series of U.N. General Assembly resolutions on nuclear disarmament along the years (namely, warning against nuclear weapons, 1961-1981; on freeze of nuclear weapons, 1982-1992; condemning nuclear weapons, 1982 2015; following-up the ICJ's 1996 Advisory Opinion, 1996-2015) are endowed with authority and legal value. *Septimus*: Their authority and legal value have been duly acknowledged before the ICJ in its advisory proceedings in 1995. *Octavus*: Like the General Assembly, the Security Council has also expressed its concern on the matter at issue, in its work and its resolutions on nuclear disarmament.

316. *Nonus*: The aforementioned United Nations resolutions, in addition to other initiatives, portray the longstanding saga of the United Nations in the condemnation of nuclear weapons. *Decimus*: The fact that weapons of mass destruction (poisonous gases, biological and chemical weapons) have been outlawed, and nuclear weapons, far more destructive, have not been banned yet, is a juridical absurdity. The obligation of nuclear disarmament has emerged and crystallized nowadays in both conventional and customary international law, and the United Nations has, along the decades, been giving a most valuable contribution to this effect.

317. *Undecimus*: In the *cas d'espèce*, the issue of United Nations resolutions and the emergence of *opinio juris communis* in the present domain of the obligation of nuclear disarmament has grasped the attention of the contending parties in submitting their distinct arguments before the Court. *Duodecimus*: The presence of evil has marked human existence along the centuries. Ever since the eruption of the nuclear age in August 1945,

some of the world's great thinkers have been inquiring whether humankind has a future, and have been drawing attention to the imperative of respect for life and the relevance of humanist values. *Tertius decimus*: Also in international legal doctrine there have been those who have been stressing the needed prevalence of human conscience, the universal juridical conscience, over State voluntarism.

318. *Quartus decimus*: The U.N. Charter is attentive to peoples; the recent cycle of World Conferences of the United Nations has had, as a common denominator, the recognition of the legitimacy of the concern of the international community as a whole with the conditions of living and the well-being of peoples everywhere. *Quintus decimus*: General principles of law (*prima principia*) rest in the foundations of any legal system. They inform and conform its norms, guide their application, and draw attention to the prevalence of *jus necessarium* over *jus voluntarium*.

319. *Sextus decimus*: The nature of a case before the Court may well require a reasoning going beyond the strictly inter-State outlook; the present case concerning the obligation of nuclear disarmament requires attention to be focused on peoples, in pursuance of a humanist outlook, rather than on inter-State susceptibilities. *Septimus decimus*: The inter-State mechanism of adjudication of contentious cases before the ICJ does not at all imply that the Court's reasoning should likewise be strictly inter-State. Nuclear disarmament is a matter of concern to humankind as a whole.

320. *Duodevicesimus*: The present case stresses the utmost importance of fundamental principles, such as that of the juridical equality of States, following the principle of humanity, and of the idea of an objective justice. *Undevicesimus*: Factual inequalities and the strategy of "deterrence" cannot be made to prevail over

the juridical equality of States. *Vicesimus*: "Deterrence" cannot keep on overlooking the distinct series of U.N. General Assembly resolutions, expressing an *opinio juris communis* in condemnation of nuclear weapons. *Vicesimus primus*: As also sustained by general principles of international law and international legal doctrine, nuclear weapons are in breach of international law, of IHL and the ILHR, and of the U.N. Charter.

321. *Vicesimus secundus*: There is need of a people-centred approach in this domain, keeping in mind the fundamental right to life; the *raison d'humanité* prevails over the *raison d'État*. Attention is to be kept on the devastating and catastrophic consequences of the use of nuclear weapons. *Vicesimus tertius*: In the path towards nuclear disarmament, the peoples of the world cannot remain hostage of individual State consent. The universal juridical conscience stands well above the "will" of the State. *Vicesimus quartus*: The absolute prohibitions of arbitrary deprivation of human life, of infliction of cruel, inhuman or degrading treatment, and of infliction of unnecessary suffering, are prohibitions of *jus cogens*, which have and incidence on ILHR and IHL and ILR, and foster the current historical process of humanization of international law.

322. *Vicesimus quintus*: The positivist outlook unduly overlooks the *opinio juris communis* as to the illegality of all weapons of mass destruction, including [and starting with] nuclear weapons, and the obligation of nuclear disarmament, under contemporary international law. *Vicesimus sextus*: Conventional and customary international law go together, in the domain of the protection of the human person, as disclosed by the Martens clause, with an incidence on the prohibition of nuclear weapons. *Vicesimus septimus*: The existence of nuclear weapons is the contemporary tragedy of the nuclear age; today, more than ever, human beings

need protection from themselves. Nuclear weapons have no ethics, and ethics cannot be separated from law, as taught by jusnaturalist thinking.

323. *Vicesimus octavus*: Humankind, a subject of rights, has been a potential victim of nuclear weapons already for a long time. *Vicesimus nonus*: The law of nations encompasses, among its subjects, humankind as a whole (as propounded by the "founding fathers" of international law). *Trigesimus*: This humanist vision is centred on peoples, keeping in mind the humane ends of States. *Trigesimus primus*: *Opinio juris communis necessitatis*, upholding a customary and conventional obligation of nuclear disarmament, has been finding expression in the NPT Review Conferences, in the relevant establishment of nuclear-weapon-free zones, and in the recent Conferences of Humanitarian Impact of Nuclear Weapons, – in their common cause of achieving and maintaining a nuclear-weapon-free world. *Trigesimus secundus*: Those initiatives have gone beyond the State-centric outlook, duly attentive to peoples' and humankind's quest for survival in our times.

324. *Trigesimus tertius*: *Opinio juris communis* – to which U.N. General Assembly resolutions have contributed – has a much broader dimension than the subjective element of custom, being a key element in the formation of a law of conscience, so as to rid the world of the inhuman threat of nuclear weapons. *Trigesimus quartus*: U.N. (General Assembly and Security Council) resolutions are adopted on behalf of the United Nations Organization itself (and not only of the States which voted in their favour); they are thus valid for *all* U.N. member States.

325. *Trigesimus quintus*: The United Nations Organization, endowed with an international legal personality of its own, upholds the juridical equality of States, in striving for the realization of common goals such as nuclear disarmament. *Trigesimus sextus*: Of

the main organs of the United Nations, the contributions of the General Assembly, the Security Council and the Secretary-General to nuclear disarmament have been consistent and remarkable along the years.

326. *Trigesimus septimus*: United Nations resolutions in this domain address a matter of concern to humankind as a whole, which cannot thus be properly approached from a State voluntarist perspective. The universal juridical conscience stands well above the "will" of individual States. *Trigesimus octavus*: The ICJ, as the principal judicial organ of the United Nations, is to keep in mind basic considerations of humanity, with their incidence on questions of admissibility and jurisdiction, as well as of substantive law. *Trigesimus nonus*: In sum, the ICJ has jurisdiction to consider the *cas d'espèce*, and there is a conventional and customary international law obligation of nuclear disarmament; whether there has been a breach of this obligation, the Court could only decide on the merits phase of the present case.

327. *Quadragesimus*: A world with arsenals of nuclear weapons, like ours, is bound to destroy its past, dangerously threatens the present, and has no future at all. Nuclear weapons pave the way into nothingness. In my understanding, the International Court *of Justice*, as the principal judicial organ of the United Nations, should, in the present Judgment, have shown sensitivity in this respect, and should have given its contribution to a matter which is a major concern of the vulnerable international community, and indeed of humankind as a whole.

(signed) Antônio Augusto CANÇADO TRINDADE
Judge

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Formato	**15,5 x 22,5 cm**
Mancha gráfica	**10,9 x 17cm**
Papel	**pólen soft 80g (miolo), cartão supremo 250g (capa)**
Fontes	**AaronBecker 16/22, Warnock Pro 12 (títulos); Chaparral Pro 11,5 (textos)**