

The Right to Live: the Illegality under Contemporary International Law of All Weapons of Mass Destruction*

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Introduction

It is a great privilege to me to have been invited by the Ministry of Foreign Affairs of Japan and the University of Hiroshima to address this distinguished audience today, 20 December 2004, at the end of the present academic semester, here in Hiroshima, a city which became historically associated with the awakening of the universal conscience of mankind as to the pressing need to restrain the sad technological capacity achieved by human beings to destroy themselves. This is the first time that a Judge from the Inter-American Court of Human Rights is especially invited by the government and the academic circles of Japan (in Tokyo, Kyoto and Hiroshima) to come all the way from Latin America and visit their country, and to benefit from the exchanges of ideas as to the future of international law and of humankind.

It was here, in Hiroshima, that the limitless insanity of man heralded the arrival of a new era, the nuclear one (with the detonation of the atomic bombs in Hiroshima on 6 August 1945 and in Nagasaki on 9 August 1945), which, after six decades -having permeated the whole cold war period- remains a stalemate which continues to threat the future of humankind. It was from here, from Hiroshima, that the outcry of humankind began to echo around the world as to the pressing need of international law to outlaw all weapons of mass destruction, starting with nuclear weapons. This is the task which remains before us today. This is the topic which I purport to address at this academic event in Hiroshima today.

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There could, in fact, hardly be a more appropriate occasion to dwell upon the subject I have selected for this ceremony, which I see fit to name “The Right to Live: The Illegality under Contemporary International Law of All Weapons of Mass Destruction.” This title reflects the position that I sustain in my book *International Law in a World in Transformation* (*O Direito Internacional em um Mundo em Transformação*), published in Brazil in 2002. I propose to focus on the topic as from the following sequential aspects: firstly, the search for peace through the conception of zones of peace and the formulation of the right to peace; secondly, the establishment of nuclear-weapon-free zones; thirdly, the endeavours towards general and complete disarmament; and fourthly, the illegality of nuclear weapons. I shall then present my final remarks.

The Search for Peace: Zones of Peace and the Right to Peace

1. The Attainment of Peace and Human Security: a Permanent Goal

In 1999, on the celebration of the centennial of the I Hague Peace Conference, the Hague Agenda for Peace and Justice for the twenty first century,¹ adopted on the occasion, included among its main topics those of disarmament and human security, and of prevention of conflicts. The document recalled the long quest of humankind for peace, and the recurring protest against the use of nuclear weapons on the ground that “their effects allegedly cannot be limited to legitimate military targets and that they are thus by nature indiscriminate, and on the ground of excessive cruelty (heat and radiation).”²

The aforementioned Hague Agenda warned emphatically as to the dangers of all weapons of mass destruction, and, as part of a universal effort to abolish them, called upon all States to ratify the existing Conventions against Biological Weapons and against Chemical Weapons (cf. *infra*) and to adopt national measures of implementation. It further called upon all States to “negotiate and conclude within five years” a Convention against Nuclear Weapons, which would prohibit their production, use and threat, and would

1 UN document A/54/98/Annex, reproduced in Kalshoven, F. (ed.), *The Centennial of the First International Peace Conference. Reports and Conclusions*, The Hague, Kluwer, 2000 (remark by H. Blix), pp. 419-454.

2 Kalshoven (ed.), *The Centennial of the First International Peace ...*, p. 52.

provide for “verification and enforcement of their destruction.”³ The document well pondered, “The continued existence of nuclear weapons and their threat or use by accident, miscalculation or design threatens the survival of all humanity and life on earth.”⁴

Weapons of mass destruction continue to constitute a grave threat to the survival of humankind. Comparing with biological weapons and chemical weapons, the risks raised by nuclear weapons are further aggravated by the virtually total lack of control over their effects (of radioactive fall-out, thermal radiation, and ionizing radiation) in time. For ionizing radiation, in particular, the consequences may extend for days, weeks or years, before the appearance of symptoms of ill-health; it may precipitate certain diseases (some terminal ones), and delay the healing of other injuries.⁵

The same reasons which have led to the express prohibition of other weapons of mass destruction, and weapons that cause unnecessary and cruel suffering with indiscriminate effects, apply likewise –and even more forcefully to nuclear weapons, the most inhumane of all weapons.⁶ The damage caused by them has a *temporal* dimension, which can extend for years and years, distinguishing them from other weapons for their extreme cruelty, and causing a suffering which can simply not be measured. This should be kept in mind by all international lawyers, which, in my view, have a duty to sustain their utter illegality in contemporary international law, particularly if they bear in mind -as they ought to- not only the States, but also -and above all- humankind as a whole.

In any case, any consideration of the matter cannot fail to start from the general principle, enunciated in the Hague Conventions of 1899 and 1907,⁷ that the choice, by belligerents, of means and methods of combat of the enemy is not unlimited, as well as from the principle -also set forth in those Conventions- of the prohibition of any weapons and methods of combat that may cause unnecessary

3 Ibid., pp. 450 and 452 (items 48 and 44 of the Hague Agenda), and cf. pp. 426-427.

4 Ibid., p. 450 (item 44).

5 International Committee of the Red Cross (ICRC): *Weapons that May Cause Unnecessary Suffering or Have Indiscriminate Effects* (Report on the Work of Experts), Geneva, ICRC, 1973, pp. 20-21.

6 Glaser, S., *L'arme nucléaire à la lumière du droit international*, Paris, Pédone, 1964, pp. 34, 36-37 and 51.

7 Article 22 of the II Hague Convention of 1899, and of the IV Hague Convention of 1907.

suffering,⁸ with indiscriminate effects.⁹ The persistence of the arsenals of such weapons nowadays, and the dangers of their proliferation, despite decades of endeavours towards general and complete disarmament frustrated to a large extent by the oscillations of the politics of the great powers,¹⁰ has drawn attention in our days to what has come to be termed the *human security*.

Just that the logic of development has developed from the past framework of inter-State state relations into the new conception of *human* development, so has the logic of security: conceived in the past to apply in inter-State relations (including in the renewal scheme of collective security under the UN Charter), it nowadays transcends that dimension to shift attention to **human** security. In one and the other contexts, the central concern is no longer with States¹¹ properly, but rather –and more precisely, as it ought to– with human beings “within and across State borders”, thus replacing the old State-centric approach of the matter by an anthropocentric one.¹² The concern is, ultimately, with humankind as a whole, pointing, once again, to the new *jus gentium* of our days, the international law for humankind.

Some words of precision are here called for. In order to develop a new approach to the whole subject of security, the United Nations determined the creation, in the framework of the Millennium Summit (2000), of its Commission on Human Security. In its *Report* of 2003, the Commission reaffirmed the importance of multilateralism and categorically rejected unilateral action for the peaceful settlement of disputes. Its approach was based on rights and “humanitarian strategies”, thus clearly avoiding to refer to the concept of security of the State. Precisely for that, it insisted on the new concept of “human security.”¹³ Moreover, it called for the

8 Article 23(e) of the II and of the IV Hague Conventions...

9 ICRC: *Weapons that May Cause Unnecessary Suffering...*, p. 11. Glaser: *L'arme nucléaire...*, pp. 45-46.

10 Cf., e. g., Furet, M. F., *Le désarmement nucléaire*, Paris, Pédone, 1973, p. 9.

11 An outlook of sad memory to those victimized by the invocation of “State security” by the power-holders in order to try to “justify” abuses and human rights violations, in dictatorships and in authoritarian regimes, such as the ones in some South American countries, mainly between the mid-sixties and early eighties.

12 Cf., e.g., Ogata, S. and J. Cels, “Human Security. Protecting and Empowering the People,” 9 *Global Governance. A Review of Multilateralism and International Organizations* (2003), n. 3, pp. 274-275.

13 Expressly referring to the three branches of the International Law of Human Rights, of the International Law of Refugees and of International Humanitarian Law; UN Commission on Human Security: *Human Security Now. Protecting and Empowering People*, NY, UN, 2003, pp. 12, 27 and 49.

necessary control of weapons, in order to guarantee the “security of the persons.”¹⁴

In a similar line of thinking, another recent international document, the Declaration on Security in the Americas, adopted in Mexico City by the Special Conference on Security, of the Organization of American States (OAS), of October 2003, singled out the “multidimensional character” of security,¹⁵ invoked the principles of the UN Charter and of the OAS Charter,¹⁶ emphasized the “human dimension” of the issue,¹⁷ and affirmed its commitment with multilateralism.¹⁸ In sum, it can thus be fairly concluded, on this particular point, that human security is nowadays conceived –mainly at United Nations level– not at all to allow for unwarranted “humanitarian intervention” at inter-State level, nor for any manifestation of undue unilateralism, but rather, quite on the contrary, it is devised to strengthen multilateralism, so as to find common and generally accepted solutions to the current needs of security of human beings, and, ultimately, of the humankind.

2. The Initiative of Zones of Peace

In order to avoid the proliferation of weapons of mass destruction, and to put an end to the existing arsenals of those weapons, multilateral mechanisms of their control and prohibition, as well as their destruction, have been conceived, and created by international conventions, which ought to be applied and strengthened, towards world disarmament¹⁹(cf. *infra*). Likewise, the initiative was taken of establishing *zones of peace* in distinct continents, to give concrete expression to the emerging right to peace. In the mid-eighties, the issue occupied an important place in the international agenda, with

14 UN Commission on Human Security: *Human Security Now...*, p.134.

15 Preamble and item II (2).

16 Item I (1).

17 Item II (4) (e).

18 Item II (4) (z).

19 It is not to pass unnoticed that the Latin American countries (and not the great powers) were the ones which constituted the first –and densely inhabited– region of the world to declare itself a *nuclear-weapon-free zone*, by means of the adoption of the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (1967), which served as inspiration for other regions of the world, thus contributing to the formation of a universal conscience as to the pressing need of world disarmament. Cf. OPANAL/UNIDIR, *Las zonas libres de armas nucleares en el siglo XXI*, NY, UN, 1997, pp. 8-19 and 46-47; Epstein, W., “The Making of the Treaty of Tlatelolco,” 3 *Journal of the History of International Law. Revue d’histoire du Droit international*, 2001, pp. 153-177.

the proposal to set up zones of peace, like the one in the Indian Ocean, also in the Mediterranean and in South-East Asia.²⁰ In 1990 a similar zone of peace was contemplated for the whole of South America.²¹

In fact, the concept of zones of peace (sometimes used interchangeably with that of nuclear-weapon-free zones) appears intermingled with that of right to peace (cf. *infra*). The concepts of zones of peace (found, e.g., in the 1971 UN Declaration of the Indian Ocean as a Zone of Peace, not to speak of the 1959 Antarctic Treaty itself),²² as well as of nuclear-weapon-free zones (finding expression in such instruments as the treaties creating the current four nuclear-weapon-free zones, *infra*), were advanced for curbing the geographical spread of the weapons race.²³

When the UN General Assembly proclaimed in 1971 the Indian Ocean as a zone of peace,²⁴ and the States of the region took the initiative of assuming the primary collective responsibility for the preservation of peace therein, the concept of zone of peace was devised as one which would free the region from "great power rivalry," would exclude the setting up of military bases therein in the context of "great power confrontation," and would furthermore lead to measures of arms control and disarmament and of promotion of peace.²⁵ It was, thus, a general concept.

20 Szurek, S., "Zones exemptes d'armes nucléaires et zones de paix dans le tiers-monde," 88 *Revue générale de Droit international public*, 1984, pp. 123-128 and 151-156.

21 Comisión Sudamericana de Paz (CSP): *Proyecto de Tratado de Zona de Paz* (Grupo de Trabajo de Juristas), Santiago de Chile, CSP, 21.06.1990, pp. 1-9 (internal circulation).

22 For an account, cf., e.g., Fujita, E., *The Prevention of Geographical Proliferation of Nuclear Weapons: Nuclear-Weapon-Free Zones and Zones of Peace in the Southern Hemisphere*, NY, UN/UNIDIR, 1989, pp. 1-40.

23 Reference could also be made to relevant resolutions of the UN General Assembly, such as the 1988 Declaration on the Prevention and Removal of Disputes and Situations that may Threaten International Peace and Security and on the Role of the United Nations in this Field. We can add to this latter one, other resolutions of the UN General Assembly, such as resolution 44/21, of 1989, on enhancing international peace, security and international cooperation in all its aspects in accordance with the UN Charter; B. Boutros-Ghali: *An Agenda for Peace*, 2nd. ed., NY, UN, 1995, p. 52.

24 UN General Assembly resolution 2832 (XXVI), of 16.12.1971.

25 International Peace Academy: *Regional Colloquium on Disarmament and Arms Control* (New Delhi, 12-17.02.1978), New Delhi/Bombay/Calcutta, IPA., 1978, pp. 23-25 and 78-80.

Although invoked interchangeably, the concept of zones of peace (such as those proclaimed by the United Nations in the Indian Ocean and in the South Atlantic) is not exactly the same as that of nuclear-weapon-free zones. These latter are based on treaties, while the zones of peace, in turn, give expression to an essentially political conception; but even though based on non-binding instruments, they reflect a consensus, emerging out of debates at the UN General Assembly, which cannot be overlooked or ignored, so as to endeavour to secure the total absence of all weapons of mass destruction, including nuclear weapons, in the respective zones of peace.²⁶

3. The Formulation of the Right to Peace

On its turn, the right to peace has antecedents in successive initiatives taken at international level, in distinct contexts, along the twentieth century.²⁷ Elements provided by Public International Law of relevance for the acknowledgement of the right to peace can be found in the 1928 General Treaty for the Renunciation of War (the so-called Briand-Kellog Pact),²⁸ in Articles 1 and 2(4) of the United Nations Charter,²⁹ complemented by the 1970 UN Declaration on Principles of International Law Governing Friendly Relations and Cooperation among States,³⁰ the 1970 Declaration on the Strengthening of International Security,³¹ and the 1974 Definition of Aggression,³² in the Code of Offences against the Peace and Security

26 Carasales, J. C., "El cambiante valor de las zonas libres de armas nucleares: la experiencia de Tlatelolco y Rarotonga," in *XVI Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano* (1989), Washington DC., Secretaría General de la OEA, 1991, p. 89.

27 Cf., generally, Uribe Vargas, D., *El derecho a la paz*, Bogotá, Universidad Nacional de Colombia, 1996, pp. 1-250; Uribe Vargas, D., "El derecho a la paz," in *Derecho internacional y derechos humanos (Droit international et droits de l'homme)*, D. Bardonnet and A. A. Cançado Trindade (eds.), The Hague/San José, Costa Rica, IIDH/Hague Academy of International Law (1995 External Session), 1996, pp. 177-195.

28 Endeavouring to overcome the dangerous system of the equilibrium of forces by condemning war as a means of settlement of disputes and an instrument of foreign policy, and heralding the new system of collective security and the emergence of the right to peace. Zourek, J., *L'interdiction de l'emploi de la force en Droit international*, Leiden/Genève, Sijthoff/Inst. H.-Dunant, 1974, pp. 39-48.

29 The relevant UN provisions together with the 1928 General Treaty for the Renunciation of War, became major sources –the legal nature of which was unchallenged by States– of limitations of resort to force by States. Brownlie, I., *International Law and the Use of Force by States*, Oxford, Clarendon Press, 1963 (reprint 1981), pp. 83 and 91.

30 UN General Assembly resolution 2625 (XXV), of 24.10.1970.

31 UN General Assembly resolution 2374 (XXV), of 16.12.1970.

32 UN General Assembly resolution 3314 (XXIX), of 14.12.1974.

of Mankind, drafted by the UN International Law Commission; and in resolutions of the UN General Assembly pertaining to the right to peace,³³ relating it to disarmament.

The 1974 Charter on Economic Rights and Duties of States in fact acknowledged the States' duty to coexist in peace and to achieve disarmament.³⁴ Likewise, references to the right to peace and disarmament can be found in the 1982 World Charter for Nature.³⁵ It has been argued that the right to peace entails as a corollary the right to disarmament; attention has in this regard been drawn to the fact that limitations to, or violations of, the rights of the human person have often been associated with the outbreak of conflicts, the process of militarization and the expenditure of arms (especially nuclear weapons and other weapons of mass destruction),³⁶ which have often led to arbitrary deprivation of human life in large scale. International law, moved ultimately by the universal juridical conscience, has reacted to that, in prohibiting the threat or use of all weapons of mass destruction, including nuclear weapons.

The antecedents of the right to peace also comprise the long-standing tradition of UNESCO of sponsoring studies to foster a culture of peace.³⁷ Within the framework of this tradition, UNESCO launched the initiative, in 1997, of the formulation of the human right to peace. To that end, the then Director-General of UNESCO (F. Mayor) convened a Group of Legal Experts (acting in their individual capacity)³⁸ which, at the end of their meetings of Las

33 UN General Assembly resolution 33/73, Declaration on the Preparation of Society to Live in Peace, of 15.12.1978; UN General Assembly resolution 39/11, Declaration on the Right of Peoples to Peace, of 12.11.1984; cf. also UN General Assembly resolution 34/88, of 1979.

34 Articles 26 and 15, respectively.

35 Preamble, par. 4(c), and Principles 5 and 20.

36 Tikhonov, A. A., "The Inter-relationship between the Right to Life and the Right to Peace. Nuclear Weapons and Other Weapons of Mass-Destruction and the Right to Life," in *The Right to Life in International Law*, B.G. Ramcharan (ed.), Dordrecht, Nijhoff/Kluwer, 1985, pp. 97-113; Alston, Ph., "Peace, Disarmament and Human Rights," in *Armement, développement, droits de l'homme, désarmement* (Colloque à l'UNESCO, 1982), G. Fischer (ed.), Paris/Bruxelles, Bruylant, 1984, pp. 325-330.

37 Cf., e.g., *inter alia*, Mayor, F., *The New Page*, Paris/Aldershot, UNESCO/Dartmouth, 1995, pp. 1-10 and 59-67; Symonides, J. and K. Singh, "Constructing a Culture of Peace: Challenges and Perspectives. An Introductory Note," in *From a Culture of Violence to a Culture of Peace*, Paris, UNESCO, 1996, pp. 9-30.

38 The Group was composed of A. Aguiar, M. Bedjaoui, R. Ben Achour, A.A. Cançado Trindade, A. Eide, H. Gros Espiell, G. Guerin, I. Nguema, R. Ranjeva, E. Roucouinas, J. Symonides, K. Vasak (reporter) and C. Zanghi.

Palmas Island (February 1997) and Oslo (June 1997), produced the *Draft Declaration on the Human Right to Peace*. Its preamble³⁹ read that “Peace, a common good of humanity, is a universal and fundamental value to which all individuals and all peoples, and in particular the youth of the world, aspire.”

The right to peace was duly inserted into the framework of human rights,⁴⁰ which was taken into account to assert peace as a right and a duty. It was asserted as a right inherent in all human beings, embodying demands of the human person and of peoples to the ultimate benefit of humankind. The Draft Declaration called upon all subjects of international law (States, international organizations and individuals) to promote and implement that right as the foundation of a genuine culture of peace. The document was prepared as a contribution of UNESCO to the 50th anniversary (in 1998) of the Universal Declaration of Human Rights.

After the Las Palmas and Oslo meetings, UNESCO launched consultations with member States, 42 of which having replied a letter of the Director-General until the end of October 1997.⁴¹ The Draft Declaration became object of much attention when revised by governmental experts from 117 member States, at UNESCO headquarters in Paris, in March 1998. The document, as submitted to them, affirmed that “violence in all its forms is intrinsically incompatible with the right of every human being to peace,”⁴² and added categorically that peace ought to be based upon “the intellectual and moral solidarity of mankind.”⁴³ At the end of the debates, three main positions of the participants were discernible: those fully in support of the recognition of the right to peace as a human right, those who regarded it rather as a **moral right**, and those to whom it was an **aspiration** of human beings.⁴⁴

39 Seventh *considerandum*.

40 Cançado Trindade, A. A., “The Right to Peace and the Conditions for Peace,” 21 *Diálogo. The Human Right to Peace: Seed for a Possible Future*, UNESCO, Paris, June 1997, pp. 20-21.

41 UNESCO General Conference (29th Session, Paris), *Report by the Director-General on the Human Right to Peace*, document 29 C/59, of 29.10.1997, p. 5.

42 Operative part I, par. 4.

43 *Considerandum* 12 of preamble, and operative part I, par. 1. It further recalled the responsibilities of present generations towards future generations, to leave them a better world, with respect for international law and human rights; *considerandum* 14 of preamble.

44 UNESCO Executive Board, *Report by the Director-General on the Results of the International Consultation of Governmental Experts on the Human Right to Peace (Final Report)*, document 154 EX/40, of 17.04.1998, p. 10.

The main difficulty, as acknowledged by the *Report* of the Paris meeting, was its official recognition as a legal right.⁴⁵ While there was general agreement in regarding peace as a universal value and a common good of humankind, some governmental representatives expressed difficulties in reckoning the existence of true human **right** to peace and its legal consequences.⁴⁶ Thus, at the close of the twentieth century, it so appeared that some governments were not yet prepared to assume legal obligations ensuing from the formulated right to peace...

This was surely regrettable, though perhaps not so surprising, given the troubled world in which we live. States seem to be oversensitive, perhaps more than human beings, particularly when what they realize to be at stake is not the well-being of the human beings they represent and are supposed to protect, but rather what they regard –in their often incongruous practice– as being their own vital interests, in the perception of power-holders.

Be that as it may, the aforementioned UNESCO exercise of formulation of the right to peace is rightly oriented towards an international law for humankind. It is a conceptual construction which is helpful to the formation of a new *jus gentium*, responsive to the needs and aspirations of human beings and peoples. In recent years it has been fostered by the advent and evolution of the International Law of Human Rights⁴⁷ and of International Environmental Law; the conception of sustainable development, as endorsed by the 1992 UN Conference on Environment and Development, e.g., points to the ineluctable relationship between the rights to peace and to development. Other relevant elements to the attainment of peace can be found in the domain of disarmament, to which I shall now turn.

45 Cf. UNESCO Executive Board, *Report by the Director-General on the Results...*, pp. 2 and 10.

46 Cf. Aguiar, A., "Perfiles éticos y normativos del derecho humano a la paz," in *Boutros Boutros-Ghali Amicorum Discipulorumque Liber. Paix, Développement, Démocratie*, vol. II, Bruxelles, Bruylant, 1998, pp. 884-894, and cf. pp. 878-884.

47 In fact, as early as in 1968 the *Final Act* of the I World Conference on Human Rights of the United Nations (held in Teheran) contained several references to the relationship between the observance of human rights and the maintenance of peace; cf. UN, *Final Act of the International Conference on Human Rights* (1968), UN doc. A/CONF.32/41, NY, UN, 1968, pp. 4, 6, 9, 14 and 36. And the UN General Assembly, on its turn has constantly been attentive to address the requirements of **survival** of humankind as a whole.

The Establishment of Nuclear-Weapon-Free Zones

The establishment, in the second half of the twentieth century, of nuclear-weapon-free zones, surely responded to the needs and aspirations of humankind, so as to rid the world of the threat of nuclear weapons; furthermore, it gave expression to the growing disapproval of nuclear weapons by the international community. The pioneering initiative in this domain was that of Latin America,⁴⁸ which 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. This initiative, which was originally prompted by a reaction to the **Cuban missiles crisis** of 1962, was followed by three others (duly concluded to date) 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 Treaty on the Southeast Asia (Bangkok) Nuclear-Weapon-Free Zone Treaty, and the 1996 African (Pelindaba) Nuclear-Weapon-Free Zone Treaty.⁴⁹

Basic considerations of humanity have surely been taken into account for the establishment of the nuclear-weapon-free zones. By the time of the creation of the first of them with the adoption in 1967 of the Treaty of Tlatelolco, it was pointed out that it came as a response to humanity's concern with its own future (given the threat of nuclear weapons), and in particular with "the survival of the humankind."⁵⁰ Its reach transcended Latin America, as evidenced by its two Additional Protocols,⁵¹ 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

48 On the initial moves in the UN to this effect, by Brazil (in 1962) and Mexico (taking up the leading role from 1963 onwards), cf. Naciones Unidas, *Las zonas libres de armas nucleares en el siglo XXI*, NY/Geneva, UN-OPANAL/UNIDIR, 1997, pp. 116, 20 and 139.

49 Naciones Unidas, *Las zonas libres de armas nucleares...*, pp. 9, 25, 39 and 153.

50 García Robles, A., "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* (1971), p. 99, and cf. p. 102.

51 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.

contrôle duquel pourraient se trouver ces terribles instruments de destruction massive.⁵²

In fact, besides the Treaty of Tlatelolco, also the Rarotonga, Bangkok and Pelindaba Treaties, purport to extend the obligations enshrined therein, by means of the respective Protocols, not only to the States of the regions at issue, but also to nuclear States, 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 International Atomic Energy Agency (IAEA); 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). Each of the four aforementioned treaties (Tlatelolco, Rarotonga, Bangkok and Pelindaba) creating nuclear-weapon-free zones has distinctive features, as to the kinds and extent of obligations and methods of verification,⁵³ but they share the same ultimate goal of preserving humankind from the threat of nuclear weapons.

The second nuclear-weapon-free zone, established by the Treaty of Rarotonga (1985), with its three Protocols, came as a response⁵⁴ to long-sustained regional aspirations, and increasing frustration of the populations of the countries of the South Pacific with incursions of nuclear-weapons States in the region, "including French testing at Moruroa, U.S. nuclear-armed ship visits, and threats of nuclear waste-dumping."⁵⁵ The Rarotonga Treaty encouraged the negotiation of a similar zone, by the 1995 Bangkok Treaty, in the neighbouring region of Southeast Asia, and confirmed the "continued relevance of zonal approaches" to the goal of disarmament⁵⁶ and the safeguard of humankind from the menace of nuclear weapons.⁵⁷

52 García Robles, "Mesures de désarmement dans des zones particulières...", p. 103, and cf. p. 71.

53 Cf. Goldblat, J., "Zones exemptes d'armes nucléaires: une vue d'ensemble," *Le droit international des armes nucléaires* (Journée d'études, ed. S. Sur), Paris, Pédone, 1998, pp. 35-55.

54 Upon the initiative of Australia.

55 Hamel-Green, M., "The South Pacific. The Treaty of Rarotonga," in *Nuclear Weapons-Free Zones* (ed. R. Thakur), London/NY, MacMillan/St. Martin's Press, 1998, p. 59, and cf. p. 62.

56 As to this latter, the States Parties to the NPT decided in 1995 to extend its duration indefinitely and to adopt the document on "Principles and Objectives for Nuclear Non-Proliferation and Disarmament."

57 Hamel-Green, "The South Pacific. The Treaty...", pp. 77 and 71.

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.⁵⁸

The fourth such treaty, that of Pelindaba, of 1996, in its turn, prompted by the continent's reaction to nuclear tests in the region (as from the French nuclear tests in the Sahara in 1961), and the desire to keep nuclear weapons out of the region.⁵⁹ In fact, as early as in 1964 the Organization of African Unity (OAU) had adopted the "Declaration on the Denuclearization of Africa", -a goal which was thus deeply-rooted in African thinking.⁶⁰ The Pelindaba Treaty⁶¹ (with its three Protocols) appears to have served the purpose to eradicate nuclear weapons from the African continent.

The four treaties at issue, though containing loopholes (e.g., with regard to the transit of nuclear weapons), have as common denominator the practical value of arrangements that transcend the non-proliferation of nuclear weapons.⁶² The establishment of the nuclear-weapon-free zones has fulfilled the needs and aspirations of peoples living under the fear of nuclear-victimization.⁶³ Their purpose has been served, also in withholding or containing nuclear ambitions, to the ultimate benefit of humankind as a whole.

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

59 Naciones Unidas, *Las zonas libres de armas nucleares...*, pp. 60-61.

60 Cf. Ihonvbere, J. O., "Africa. The Treaty of Pelindaba," in Acharya and Ogunbanwo, "The Nuclear-Weapon-Free Zones...", pp. 98-99 and 109.

61 As the outcome of the initiative from such African States as South Africa (having dismantled its nuclear program), Egypt and Nigeria; *Ibid.*, pp. 109 and 107, and cf. p. 114.

62 Enkhsaikhan J., "Nuclear-Weapon-Free Zones: Prospects and Problems," 20 *Disarmament. Periodic Review by the United Nations*, 1997, n. 1, p. 74.

63 Cf., e.g., Fujita, H., "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*, A.J.M. Delissen and G.J. Tanja (eds.), Dordrecht, Nijhoff, 1991, p. 350, and cf. pp. 327-349.

Nowadays, the four 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).⁶⁴ The adoption of the 1967 Tlatelolco Treaty, the 1985 Rarotonga Treaty, the 1995 Bangkok Treaty, and the 1996 Pelindaba Treaty disclosed the shortcomings and artificiality of the posture of the so-called political “realists,”⁶⁵ which insisted on the suicidal policy of nuclear deterrence, in their characteristic subservience to power politics. The fact that the international community counts today on four nuclear-weapon-free zones, in relation to which States that possess nuclear weapons do have a particular responsibility, reveals an undeniable advance of human reason, of the *recta ratio* of the Grotian thinking in international law at its best.

Moreover, the idea 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 (e.g., in Central and Eastern Europe, in the Middle East, in Central and Northeast and South Asia, and in the whole of the southern hemisphere), as well as of the so-called single-State zone (e.g., Mongolia).⁶⁶ Another proposal, which has retained the attention, in particular of the Middle East countries, has been the expansion of the concept of nuclear-weapon-free zones so as to encompass also other weapons (chemical and biological) of mass destruction.⁶⁷

As to this latter, 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. The four treaties establishing nuclear-weapon-free zones foresee cooperation schemes with the IAEA; furthermore, the great majority of States Parties to those four treaties have also ratified the

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

65 Cf. Naciones Unidas, *Las zonas libres de armas nucleares...*, pp. 27, 33-38 and 134.

66 Acharya and Ogunbanwo, “The Nuclear-Weapon-Free Zones...,” p. 443; Enkhsaikhan, “Nuclear-Weapon-Free Zones ...,” pp. 79-80.

67 Shaker, M., “Zones exemptes d’armes nucléaires et zones exemptes d’armes de destruction massive,” in *Le droit international des armes nucléaires* (Journée d’études, ed. S. Sur), Paris, Pédone, 1998, pp. 57-63.

Comprehensive Nuclear-Test-Ban Treaty (CTBT).⁶⁸ All these developments reflect the increasing disapproval by the international community of nuclear weapons, which, for their hugely destructive capability, represent an affront to sound human reason (*recta ratio*).

The Endeavours towards General and Complete Disarmament

At a time when only the nuclear-weapon-free zone established by the Treaty of Tlatelolco existed and the possibility was considered of creation of other zones of the kind (cf. *supra*), the Conference of the Committee on Disarmament presented in 1975 a study on the matter, requested by the UN General Assembly in 1974 and undertaken by an *ad hoc* Group of Experts. The study indicated that the creation of future nuclear-weapon-free zones was to take place in conformity with international law, the principles of the UN Charter and the fundamental principles of international law that govern mutual relations among States. The effective guarantees of security which nuclear States were to provide to the States which were to create those zones ensued from the general principle of prohibition of the threat or use of force.⁶⁹

The study added that the establishment of such zones was not to be regarded as an end in itself, but rather as a means to achieve the wider aims of “general and complete disarmament” and international peace and security.⁷⁰ In the preparation of the study it was recalled that other international instruments on disarmament, with which those zones were to coexist in the search for greater protection to the international community, were conceived to the benefit of humankind;⁷¹ it was argued that such zones had “a fundamentally humanitarian purpose.”⁷²

In fact, it would go almost without saying that the aforementioned nuclear-weapon-free zones, herein envisaged under basic considera-

68 Vargas Carreño, E., *Una Conferencia Internacional de los Estados Partes de las Zonas Libres de Armas Nucleares (ZLANs)*, Mexico City, OPANAL, doc. C/DT/55/Rev.1, of 03.10.2002, pp. 5-8.

69 Naciones Unidas: *Amplio estudio de la cuestión de las zonas libres de armas nucleares en todos sus aspectos. Informe especial de la Conferencia del Comité de Desarme*, UN doc. A/10027/Add.1, NY, Naciones Unidas, 1976, p. 50.

70 Naciones Unidas, *Amplio estudio de la cuestión de las zonas libres...*, p.50.

71 Ibid., pp.18 and 34.

72 Ibid., p. 31 and, in this respect, a parallel was suggested with demilitarized zones foreseen in humanitarian norms of the law of armed conflicts.

tions of humanity in relation to territory, are to be duly related to the long-standing endeavors of general and complete disarmament (including non-proliferation of weapons of mass destruction). Non-proliferation of weaponry is but one aspect of the whole matter; thus, the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT) belongs to the kind of treaties which aim to restrict the spread of weaponry, without however proscribing or limiting the weapons capability of those States which already possess the specified weapons.⁷³

They have contributed to disarmament, but have not escaped the criticism of being discriminatory, in the pursuance of their goals. Furthermore, the techniques of verification regarding disarmament have not proven wholly satisfactory to date, and it has rightly been warned that they should be strengthened in the context of the faithful compliance of international treaties based on the equilibrium of rights and duties between States Parties.⁷⁴

Other treaties, in turn, have gone further, in properly purporting to abolish given categories of weaponry: it is the case, e.g., of the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, and of the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction. The preamble of the 1993 Convention, besides invoking the principles of international law and of the UN Charter, states that the complete banning of the use of chemical weapons is for the sake and benefit of all humankind.

Two decades earlier, in the same line of thinking, the preamble of the 1972 Convention expressed likewise the determination to exclude completely the use of bacteriological (biological) weapons, for the sake of all humankind, as their use “would be repugnant to the conscience of mankind.”⁷⁵ The preamble further asserted the determination of the States Parties to the 1972 Convention to achieve general and complete disarmament, “including the prohibition and

73 Chayes, A. and D. Shelton, “Commentary,” in *Commitment and Compliance*, D. Shelton (ed.), Oxford, University Press, 2000, pp. 522-523.

74 Sur, S., “Vérification en matière de désarmement,” in 273 *Recueil des Cours de l'Académie de Droit International de La Haye*, 1998, pp. 96-102.

75 Last *considerandum* of the preamble.

elimination of all types of weapons of mass destruction” (among which the bacteriological [biological] weapons).⁷⁶

The fact that there have been advances in arms control and reduction in recent years does not mean that disarmament has ceased to be a priority goal. The UN General Assembly adopted the Comprehensive Nuclear-Test-Ban Treaty (CTBT) on 10 September 1996.⁷⁷ Ever since its adoption, the UN General Assembly has been attentive to foster the entry into force of the CTBT; a Conference convened to that end in November 2001 counted on the participation of more than one hundred States.⁷⁸

In the post-cold war period, the UN Conference on Disarmament (originally set up by the I Special Session on Disarmament in 1978 as the single multilateral forum of the international community for negotiating disarmament) has endeavoured to redefine its role, still reckoning that complete disarmament⁷⁹ remains a continuing necessity of humankind. The Conference contributed decisively to the successful conclusion of the 1993 Convention against Chemical Weapons as well as of the CTBT in 1996. Yet, it has to endeavour to maintain its relevance, as the risks to humankind entailed by weapons of mass destruction remain, the dangers of arms trade likewise persist, and the need to put a definitive end to nuclear tests is still felt; the ultimate aim of the international community cannot be other than the **total elimination** of all weapons of mass destruction, including nuclear weapons.⁸⁰

In the early nineties, at the beginning of the post-cold war period, the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) counted on the accession of 189 States, and in its Review Conference

76 First *considerandum* of the preamble.

77 Which is to enter into force 180 days after 44 States deposit their instruments of ratification. Cf. Preparatory Commission for the CTBT Organization, *Advancing the Entry into Force of the Comprehensive Nuclear-Test-Ban Treaty*, Vienna, CTBTO, 2001, pp. 1-14.

78 Vargas Carreño, E., “El futuro de la no proliferación nuclear con especial énfasis en América Latina,” in *Seminario Regional sobre el Protocolo Adicional de Salvaguardias Nucleares* (Lima/Perú, 04-07.12.2001), Lima, [OPANAL], 2001, pp. 5-6 (restricted circulation).

79 For earlier studies, cf., e.g., Dunshee de Abranches, C. A., *Proscrição das Armas Nucleares*, Rio de Janeiro, Livr. Freitas Bastos, 1964, pp. 13-179; Alves Pereira, A. C., *Os Impérios Nucleares e Seus Reféns: Relações Internacionais Contemporâneas*, Rio de Janeiro, Ed. Graal, 1984, pp. 13-288.

80 Boutros-Ghali, *Nouvelles dimensions...*, p. 14, and cf. pp. 3-4, 6, 8, 12-13 and 16-17.

of 1995 its duration was prorogated indefinitely and unconditionally; on the whole, in the domain of disarmament and arms limitation, there remained in force eleven multilateral treaties at global level,⁸¹ fourteen multilateral agreements at regional level, and sixteen bilateral agreements between the United States and the Russian Federation (the former USSR).⁸²

In addition to the indefinite extension of the NPT achieved in 1995, the Review Conference of 2000 attained further commitments in the implementation of the Treaty (Article VI). Yet, there remains a long way to go in the present domain (e.g., the prevention of the acquisition of nuclear weapons by private groups). In a report on the matter, a former UN Secretary-General, calling for a **concerted effort** towards complete disarmament, rightly pondered that

Dans 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.⁸³

The Illegality of Nuclear Weapons

On the occasion of the centennial celebration (1999) of the I Hague Peace Conference, it was pondered that the threat or use of nuclear weapons “is protested both on the ground that their effects allegedly cannot be limited to legitimate military targets and that they are thus by nature indiscriminate, and on the ground of excessive cruelty (heat and radiation).”⁸⁴

81 Among which the 1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-bed and the Ocean Floor and in the Subsoil Thereof, and the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.

82 Among which the 1972 Treaty on the Limitation of the Systems of Anti-Ballistic Missiles (the ABM Treaty), the Agreements reached pursuant to the Strategic Arms Limitation Talks (SALT-I and II, 1972 and 1977, respectively); for an account of the negotiation of these latter, cf., e.g., Furet, *Le désarmement nucléaire...*, pp. 203-226; and cf. [Various Authors], *Regional Colloquium on Disarmament and Arms Control* (New Delhi, February 1978), Bombay/Calcutta, International Peace Academy, 1978, pp. 42-56.

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

84 Kalshoven, F., “Introduction,” in UNITAR, *The Centennial of the First International Peace Conference. Reports and Conclusions*, F. Kalshoven (ed.), The Hague, Kluwer, 2000, p. 52.

The *opinio juris communis* as to the prohibition of nuclear weapons, and of all weapons of mass destruction, has gradually been formed.⁸⁵ Yet, despite the clarity of the formidable threat that nuclear weapons represent, their formal and express prohibition by conventional international law has most regrettably remained permeated by ambiguities,⁸⁶ due to resistances on the part of the so-called **realists** of *Realpolitik*, always at the service of power rather than Law.

On two occasions attempts were made, by means of contentious cases, to obtain a pronouncement of the International Court of Justice (ICJ) –in the **Nuclear Tests** (1974 and 1995)–⁸⁷ and on both occasions the Court assumed a rather evasive posture, avoiding to pronounce clearly on the substance of a matter pertaining to the very survival of humankind. One aspect of those contentious proceedings may be here briefly singled out, 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 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.”⁸⁸ Thus,

85 Cf., e.g., Dunshee de Abranches, *Proscrição das Armas Nucleares...*, pp. 114-179; Do Nascimento e Silva, G. E., “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.

86 For example, in preparing the Draft Code of Offences against the Peace and Security of Mankind (first version), the UN International Law Commission considered, in 1954, the inclusion of nuclear weapons in the reformulation of a list of weapons to be restricted or limited; the polemics generated rendered it impossible to the Commission to determine whether the use of nuclear weapons constituted or not a crime against the peace and security of mankind; at last, the Commission, following a minimalist approach, excluded from the relation of international crimes the use of nuclear weapons. Morton, J. S., *The International Law Commission of the United Nations*, Columbia/South Carolina, University of South Carolina Press, 2000, pp. 46 and 51.

87 Cf. *ICJ Reports* (1974), pp. 63-455, and criticisms in: Lellouche, P., “The Nuclear Tests Cases: Judicial Silence versus Atomic Blasts,” 16 *Harvard International Law Journal* (1975), pp.614-637; and cf. *ICJ Reports* (1995), pp. 4-23, and the position of three dissenting Judges in *ibid.*, pp. 317-421.

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

over three decades ago, the perspective of the application by New Zealand (of 1973) went clearly –and correctly so– beyond the purely inter-State dimension, as the problem at issue pertained to the international community as a whole.

The outcome of the case, however, was quite disappointing: even though the ICJ granted orders of interim measures of protection in the case in June 1973 (requiring France to cease testing), subsequently, in its judgments of 1974,⁸⁹ in view of the announcement of France's voluntary discontinuance of its atmospheric tests, the ICJ found that the claims of Australia and New Zealand no longer had **any object** and it was therefore not called upon to give a decision thereon.⁹⁰

The dissenting Judges in the case rightly pointed out that the legal dispute between the 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.⁹¹ The reticent position of the Court 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 radio-active 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 landmark *obiter dicta* in the *Barcelona Traction* case only four years earlier.⁹²

89 For a critical parallel between the 1973 orders and the 1974 judgments, cf. Lellouche, P., “The International Court of Justice. The Nuclear Tests Cases: Judicial Silence vs. Atomic Blasts,” 16 *Harvard International Law Journal*, 1975, pp. 615-627 and 635.

90 *ICJ Reports* (1974), pp. 272 and 478, respectively.

91 *ICJ, Nuclear Tests Case*, Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock; *ICJ 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 Petré, *ICJ 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.

92 As recalled in the Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock, *ICJ Reports* (1974) pp. 362, 368-369 and 520-521; as well as in the Dissenting Opinion of Judge Barwick, *Ibid.*, pp. 436-437.

As the Court reserved itself the right, in certain circumstances, to reopen the 1974 case, 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 1974.⁹³

Be that as it may, having lost the historical opportunities, in both contentious cases, to clarify the key point at issue (nuclear tests), the Court was, more recently, in the mid-nineties, seized, in the exercise of its advisory function, of a directly related issue, that of nuclear weapons. The UN General Assembly and the World Health Organization (WHO) opened those proceedings before the Court, by means of requests for an Advisory Opinion: such requests no longer referred to nuclear tests (as in the aforementioned contentious cases), 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.

The Court, in the Advisory Opinion of 08.07.1996⁹⁴ on the *Legality of the Threat or Use of Nuclear Weapons*, affirmed that neither customary international law nor conventional international law authorizes specifically the threat or use of nuclear weapons; neither one, nor the other, contains a complete and universal prohibition of the threat or use of nuclear weapons as such; it added that such threat or use which is contrary to Article 2(4) of the UN Charter and does not fulfill 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.⁹⁵

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

94 In response only to one of the petitions, that of the UN General Assembly, as the ICJ understood that the WHO was not competent to deal with the question at issue – despite the purposes of that UN specialized agency and the devastating effects of nuclear weapons over human health and the environment...

95 *ICJ Reports* (1996), pp. 226-267.

In the most controversial part of its Opinion (resolatory point 2E), the Hague Court stated that the threat or use of nuclear weapons “would be generally contrary to the rules of international law applicable in armed conflict,” mainly those of 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 licit or illicit in an extreme circumstance of self defense in which the very survival of a State would be at stake.”⁹⁶ With seven dissenting opinions, this point was adopted with the casting vote of the President of the Court, who, in his Individual Opinion, pointed out that the Court limited itself to record the existence of a legal uncertainty.⁹⁷

In fact, it did not go further than that, and the 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 implications of the basic distinction between the *jus ad bellum* and the *jus in bello*, and of the fact that International Humanitarian Law applies likewise in case of self defense, safeguarding always the principle of proportionality (which nuclear weapons simply ignore).⁹⁸ The Opinion, on the one hand, recognized that nuclear weapons cause indiscriminate and durable suffering, and have an enormous destructive effect,⁹⁹ and that the principles of humanitarian law (encompassing customary law) are **intransgressible**;¹⁰⁰ nevertheless, these considerations did not appear sufficient to the Court to discard the use of such weapons also in self-defense, thus eluding to tell what the Law is¹⁰¹ in all circumstances.

The Opinion minimized¹⁰² the resolutions of the United Nations General Assembly which affirm the illegality of nuclear weapons¹⁰³

96 Ibid., p.266.

97 Cf. Ibid., pp. 268-274, esp. p. 270.

98 Doswald-Beck, L., “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; Fujita, H., “The Advisory Opinion of the International Court of Justice on the Legality of Nuclear Weapons,” in 316 *International Review of...*, pp. 56-64.

99 Par. 35.

100 Par. 79.

101 David, E., “The Opinion of the International Court of Justice on the Legality of the Use of Nuclear Weapons,” 316 *International Review of...*, pp. 21-34.

102 David, “The Opinion of the International Court of Justice...,” par. 68.

103 Notably resolution 1653(XVI) of 24.11.1961

and condemn their use as a violation of the UN Charter and as a crime against humanity. Instead, it took note of the **policy of deterrence**, which led it to find that the members of the international community continued **profoundly divided** on the matter, what rendered impossible to it to determine the existence of an *opinio juris* in this respect.¹⁰⁴ It was not incumbent upon the Court to resort to the “policy of deterrence”, devoid of any legal value for the determination of the formation of the rules of customary law prohibiting the use of nuclear weapons; as rightly regretted, the Court did not help at all in the struggle for non-proliferation and prohibition of nuclear weapons,¹⁰⁵ and, in relying on **deterrence**¹⁰⁶ –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*.¹⁰⁷

The Court, thus, lost yet another opportunity to consolidate the *opinio juris communis* in condemnation of nuclear weapons. It considered the survival of a hypothetical State, rather than that of humankind formed by human beings of flesh and bone (and those still to come). It mistakenly minimized the doctrinal construction on the right to life in the ambit of the International Law of Human Rights, and seemed to have forgotten that the survival of a State cannot have primacy over the right to survival of humankind as a

104Par. 67.

105Reisman, W. M., “The Political Consequences of the General Assembly Advisory Opinion,” in *International Law, the International Court of Justice, and Nuclear Weapons*, L. Boisson de Chazournes and Ph. Sands (eds.), Cambridge, University Press, 1999, pp. 473-487. The Court did not solve the issue raised before it by the UN General Assembly, leaving the “debate open”; Sur, S., “Les armes nucléaires au miroir du droit,” in *Le droit international des armes nucléaires*, pp. 9-25, esp. pp. 12, 16 and 24.

106Par. 73.

107Condorelli, L., “Nuclear Weapons: A Weighty Matter for the International Court of Justice. Jura Novit Curia?,” 316 *International Review of ...*, pp. 9-20. The Opinion is not conclusive and provides no guidance; Queneudec, J. P., “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. The language utilized in the Opinion is ambiguous, lending itself to the most distinct interpretations (including that whereby in self defense military necessity could have primacy over humanitarian law), dangerous for the prevalence of Law; Lanfranchi, M. P. 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; Mahmoudi, S., “The International Court of Justice and Nuclear Weapons,” 66 *Nordic Journal of International Law* (1997), pp. 77-100.

whole.¹⁰⁸ Without humankind, there is no State whatsoever; one cannot simply have in mind the States, apparently forgetting humanity. The position of the Court leaves it quite clear that a matter which concerns the whole of humankind, such as that of the threat or use 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.

The Court took note of the treaties which nowadays prohibit, e.g., chemical and bacteriological (biological) weapons,¹⁰⁹ and weapons which cause excessive damages or have indiscriminate effects.¹¹⁰ But the fact that 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 defense).¹¹¹ In my understanding, it cannot be sustained, in a matter which concerns the future of humankind, that what is not expressly prohibited is thereby permitted (a classic postulate of positivism).

This posture would amount to the traditional –and surpassed– attitude of the *laissez-faire, laissez-passer*, proper of an international legal order fragmented by State voluntarist subjectivism, which in the history of Law has invariably favoured the most powerful ones. *Ubi societas, ibi jus...* Nowadays, at this beginning of the twenty-first century, in an international legal order in which one seeks to affirm common superior values, amidst considerations of international *ordre public*, as in the domain of the International Law of Human Rights, it is precisely the reverse logics which ought to prevail: **that which is not permitted, is prohibited.**¹¹²

Even if there was a **gap** in relation to nuclear weapons –which there is not (cf. *infra*)– it would have been possible to fill it by

108Cf. Mohr, M., “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...*, pp. 92-102.

109The Geneva Protocol of 1925, and the Conventions of 1972 and 1993 against Biological and Chemical Weapons, respectively.

110Par. 76; 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.

111The 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.

112Caçado Trindade, A. A., *O direito internacional em um mundo em transformação*, Rio de Janeiro, Ed. Renovar, 2002, p. 1099.

resorting to a general principle of Law. The Court surprisingly resorted to that of self-defense of a hypothetical individual State, instead of having developed the rationale of the *Martens clause*, the purpose of which is precisely that of filling gaps¹¹³ in the light of the “laws of humanity” and the “dictates of public conscience” (terms of the wise premonition of Friedrich von Martens,¹¹⁴ formulated in the I Hague Peace Conference of 1899).¹¹⁵ It cannot be denied that nuclear weapons are intrinsically indiscriminate, incontrollable, that they cause durable harms and in a wide scale, that they are prohibited by International Humanitarian Law (Articles 35 and 48), and are inhuman as weapons of mass destruction.¹¹⁶

States are bound to respect, and ensure respect for International Humanitarian Law in **any circumstances; intransgressible** principles of humanitarian law (encompassing customary law) belong to the domain of *jus cogens*, wherein no derogation is permitted, in any circumstances.¹¹⁷ As to the aforementioned

113 Salmon, J., “Le problème des lacunes à la lumière de l’avis ‘Licéité de la menace ou de l’emploi d’armes nucléaires’ rendu le 8 juillet 1996 par la Cour Internationale de Justice,” *Mélanges en l’honneur de N. Valticos. Droit et justice* (ed. R.-J. Dupuy), Paris, Phédon, 1999, pp. 197-214, esp. pp. 208-209; Ticehurst, R., “The Martens Clause and the Laws of Armed Conflict,” 317 *International Review of the Red Cross*, 1997, pp. 125-134, esp. pp. 133-134; Azar, A., *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.

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

115 It is not merely casual that the States militarily powerful have constantly opposed themselves to the influence of natural law in the norms applicable to armed conflict, even if they base themselves on natural law to judge war criminals (as in Nuremberg). Ticehurst, “The Martens Clause...,” pp. 133-134.

116 Burroughs, J., *The (Il)legality of Threat or Use of Nuclear Weapons*, Münster, Lit Verlag/International Association of Lawyers against Nuclear Weapons, 1997, p. 84. For the inference of the prohibition of nuclear weapons from the express prohibition, by Article 35 of Additional Protocol I (of 1977) to the 1949 Geneva Conventions on International Humanitarian Law, of weapons that cause “superfluous damage” or “unnecessary suffering” (par. 2), and which cause or intend to cause “extensive, durable and severe damage to the natural environment” (par. 3), cf., e.g., Pastor Ridruejo, J. A., *Curso de derecho internacional público y organizaciones internacionales*, 6th. ed., Madrid, Tecnos, 1996, pp. 680 and 683-684; and cf. comments in *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Y. Sandoz, C. Swinarski and B. Zimmermann (eds.), Ginebra, ICRC/Nijhoff, 1987, pp. 389-420 and 597-600.

117 Coussirat-Coustère, V., “La licéité des armes nucléaires en question,” in *Le droit international des armes nucléaires*, Paris, Pédone, Journée d’études, S. Sur (ed.), 1998, p. 109.

Advisory Opinion of 1996 of the ICJ, the relevance of the Martens clause in the present context was properly emphasized by two dissenting Judges,¹¹⁸ while another dissenting Judge singled out the *jus cogens* character of International Humanitarian Law in prohibition of nuclear weapons.¹¹⁹

The well-known resolution 1653 of 1961, of the UN General Assembly, containing the Declaration of the Prohibition of the Use of Nuclear and Thermonuclear Weapons, considered the use of such weapons not only in violation of the UN Charter, of International Law and of the **laws of humanity**, but also a **crime against humanity and civilization**. While various States endorsed the resolution as a result of the **indiscriminate suffering** caused by such weapons, others (mainly the nuclear powers) attempted to minimize their importance for not having been adopted by an overwhelming majority:¹²⁰ 55 votes to twenty, with 26 abstentions.¹²¹

However, the several subsequent resolutions which reaffirmed the resolution 1653 referred to, were adopted by increasingly expressive majorities, such as resolution 46/37D of 1991, which called upon the elaboration of a convention prohibiting the use of nuclear weapons (by 122 votes to 16, with 22 abstentions). The non-nuclear States, which form the overwhelming majority of members of the international community, came to sustain that the series of resolutions in condemnation of the use of nuclear weapons as illegal under general international law, together with the fact the 1968 Treaty on Non-Proliferation of Nuclear Weapons (NPT) is in force, and the establishment of regional nuclear-weapon-free zones (cf. *supra*), among other developments, evidenced the emergence of a prohibition of customary law of the use of such weapons.¹²²

Still in the ambit of the United Nations, the Human Rights Committee (under the Covenant on Civil and Political Rights) has

118Cf. the 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.

119Dissenting Opinion of Judge Koroma, pp. 573-574 and 578.

120Cassese, A., "The Prohibition of Indiscriminate Means of Warfare," in *Declarations on Principles. A Quest for Universal Peace*, R.J. Akkerman *et alii*, Leyden (eds.), Sijthoff, 1977, pp. 176-182.

121With the negative votes coming from NATO member States and other allies of the United States.

122Burroughs, *The (Il)legality of Threat or Use of Nuclear...*, p. 27.

affirmed that “the production, the tests, the possession, the proliferation and the use of nuclear weapons” constitute “crimes against humanity.”¹²³ The Human Rights Committee, 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.” The Committee characterized that danger as one of the “greatest threats to the right to life which confronts mankind today”, which created “a climate of suspicion and fear between States, which is in itself antagonist to the promotion of universal respect for and observance of human rights” in accordance with the UN Charter and the UN Covenants on Human Rights.¹²⁴ The Committee, accordingly, “in the interest of mankind”, called upon all States, whether Parties to the Covenant or not, “to take urgent steps, unilaterally and by agreement, to rid the world of this menace.”¹²⁵

It may be recalled that, already in 1969, *the Institut de Droit International condemned all weapons of mass destruction*. 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),¹²⁶ the terrifying effects of the use of nuclear weapons were pointed out,¹²⁷ the example of the atomic bombing of Hiroshima and Nagasaki having been expressly recalled.¹²⁸ 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

123General Comment’ n. 14 (of 1984) of the Human Rights Committee, 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, p. 19, par. 6.

124UN, *Report of the Human Rights Committee*, G.A.O.R., 40th Session (1985), suppl. n. 40 (A/40/40), p. 162.

125UN, *Report of the Human Rights...*, p. 162.

126Cf. *Annuaire de l’Institut de Droit International. Session d’Edimbourg*, 1969, II, pp. 49, 53, 55, 60, 62-63, 66 and 99.

127Cf. *Annuaire de l’Institut de Droit...*, pp. 50, 88-89 and 90.

128Ibid., p.88

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.”¹²⁹

In its operative part, the aforementioned resolution of the *Institut* stressed the importance of the principle of distinction (between military and non-military objectives) as a “fundamental principle of international law” and the pressing need to protect civilian populations in armed conflicts,¹³⁰ 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.¹³¹

The absence of conventional norms stating that nuclear weapons are prohibited in all circumstances does not mean that they would be allowed in a given circumstance. The Martens clause safeguards the integrity of Law (against the permissiveness of a *non liquet*) by invoking the “laws of humanity” and the “dictates of the public conscience”. Thus, that absence of a conventional norm is not conclusive¹³², and is by no means the end of the matter, - bearing in mind also customary international law.

If weapons less destructive than the nuclear ones have already been expressly prohibited by their names, it would be nonsensical to argue that, those, which have, not, by positive conventional international, and which, like nuclear weapons, have long-lasting devastating effects, threatening the existence of the international community as a whole, would not be illicit in certain circum-

¹²⁹Ibid., pp. 375-376.

¹³⁰Ibid., par. 1-3, 5-6 and 8, in pp. 376-377.

¹³¹Ibid., pp. 376-377.

¹³²Glaser, *L'arme nucléaire à la lumière...*, pp. 15, 24-25 and 41.

tances.¹³³ A single use of nuclear weapons, irrespective of the circumstances, may today ultimately mean the end of humankind itself.¹³⁴ The criminalization of the threat or use of such weapons is even more forceful than that –already established by positive conventional international law– of less destructive weapons. This is what ineluctably ensues from an international legal order the ultimate source of which is the universal juridical conscience.

From the outlook of the emerging international law for humankind, the conclusion could not be otherwise. Had the ICJ 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 to human reason, the ultimate insult to human reason, and an affront to the juridical conscience of humankind.

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 Damages* (1949), on *Reservations to the Convention against Genocide* (1951), and on *Namibia* (1971), which have so much contributed to the evolution of International Law. This evolution, in our days, points, in my understanding, towards the construction of a universal law for humankind, with the outlawing by general international law of all weapons of mass destruction (among other aspects).

Final Observations

In the course of the proceedings (written and oral phases) before the ICJ (1994-1995) pertaining to the aforementioned requests for an Advisory Opinion (of 1996) on the question of the legality (or rather illegality) of nuclear weapons (*supra*), Japan, the one country whose population has been victimized by the use of those weapons, consistently argued that

¹³³Ibid., pp. 53 and 21, and cf. p. 18.

¹³⁴Singh, Nagendra, *Nuclear Weapons and International Law*, London, Stevens, 1959, p. 242.

Because of their immense power to cause destruction, the death of and injury to human beings, the use of nuclear weapons is clearly contrary to the spirit of humanity that gives international law its philosophical foundation.¹³⁵

In its oral statement before the ICJ in the public sitting of 7 November 1995, Japan further asserted that

with their devastating power, nuclear weapons can in an instant take a tremendous toll in human life and deprive people of their local community structures; they can also cause the victims who survive an attack itself indescribable and lasting suffering due to atomic radiation and other lingering effects.¹³⁶

All this has been duly demonstrated in documents collected by the prefectures of the cities of Hiroshima and Nagasaki.¹³⁷ And this coincides with the concerns of the international community as a whole nowadays.

In the aforementioned pleadings (of 1995) before the ICJ, other States were as clear and uncompromising as Japan in their arguments. To recall but a couple of examples, Australia invoked the Martens clause, and argued that the principles of humanity and the dictates of public conscience are not static, and permeate the whole of international law in its evolution, calling for the prohibition of nuclear weapons for all States. Australia further recalled the final preambular paragraph of the Convention against Biological Weapons, pondering that its warning that those weapons are “repugnant to the conscience of mankind” applies likewise to nuclear weapons, and that the use of them all would be contrary to general principles of humanity.¹³⁸

¹³⁵Government of Japan, *Written Statement of the Government of Japan* [on the Request for an Advisory Opinion to the ICJ by the World Health Organization], 10 June 1994, p. 2 (internal circulation); Government of Japan: *Written Statement of the Government of Japan* [on the Request for an Advisory Opinion to the ICJ by the United Nations General Assembly], 14.06.1995, p. 1 (internal circulation); Government of Japan: *The Oral Statement by the Delegation of Japan in the Public Sitting Held at the Peace Palace*, The Hague, 07 November 1995, p. 1 (internal circulation).

¹³⁶Government of Japan, *The Oral Statement...*, pp. 1-2 (internal circulation).

¹³⁷Cf. accounts, Committee of Japanese Citizens, *Days to Remember. An Account of the Bombings of Hiroshima and Nagasaki*, Hiroshima/Nagasaki, Hiroshima-Nagasaki Publishing Committee, 1981, pp. 1-37; Hiroshima Peace Memorial Museum (HPMM): *Atomic Bomb Tragedy. The Spirit of Hiroshima*, Hiroshima, HPMM, pp. 1-128; Ôé, Kenzaburô, *Notes de Hiroshima*, Paris, Gallimard, 1996, pp. 17-230; Ogura, T., *Letters from the End of the World. A Firsthand Account of the Bombing of Hiroshima*, Tokyo, Kodansha International, 2001 [reed.], pp. 15-192; Shohno, N., *The Legacy of Hiroshima. Its Past, Our Future*, Tokyo, Kôsei Publ. Co., 1987 [reed.], pp. 13-136.

¹³⁸ICJ, pleadings of Australia (1995), pp. 45, 60 and 63, and cf. p. 68.

On its turn, New Zealand stated that the *rationale* of the 1968 Nuclear Non-Proliferation Treaty is that “nuclear weapons are too dangerous for humanity and must be eliminated.”¹³⁹ Moreover, Egypt asserted that International Humanitarian Law prohibits the threat or use of nuclear weapons as weapons of mass destruction; the Additional Protocol I of 1977 to the 1949 Geneva Conventions establishes the prohibition of unnecessary suffering (Article 35) and imposes the differentiation between civilian population and military personnel (Article 48). Thus, by their effects, nuclear weapons, being weapons of indiscriminate mass destruction, infringe International Humanitarian Law, which contain precepts of *jus cogens*, as recalled by successive resolutions of the UN General Assembly; those precepts are the *opinio juris* of the international community.¹⁴⁰

In historical perspective, the lack of common sense of still trying to approach the challenges facing international law from an exclusively inter-State outlook is today manifest, and has in the past led to some rather awkward situations, to say the least. A pertinent illustration is afforded by the outcome of the case *Shimoda and Others versus Japan*. On 7 December 1963, a Japanese domestic court, the District Court of Tokyo, delivered a decision regarding claims against the Japanese State advanced by five injured survivors of the atomic bombings of Hiroshima and Nagasaki. They claimed compensation from the Japanese government for damages suffered as a result of the atomic blasts. Japan, and not the United States, was the defendant, by virtue of Article 19(a) of the Treaty of Peace following the II world war, whereby Japan waived the claims of its nationals against the United States.¹⁴¹

The District Court’s decision contained discussion of those bombings in the light of the laws of armed conflict and descriptions of the horrifying injuries resulting from the blasts. The plaintiffs argued that the atomic bombing was an illegal act contrary to international law (as it stood in 1945) aiming at a non-military target and causing unnecessary pain, in violation of fundamental human

139ICJ, pleadings of New Zealand (1995), p. 33.

140ICJ, pleadings of Egypt (1995), pp. 37-41 and 44.

141The Japanese Government thereby saw itself in the ironical situation of having to argue as defendant in a case moved by Japanese nationals, victims of the atomic bombings of Hiroshima and Nagasaki. Cf. 355 *Hanrei Jibo* (*Decisions Bulletin*), p. 17, later translated into English and reported in: *Toward a Theory of War Prevention* (Series *The Strategy of World Order*), vol. I, R.A. Falk and S.H. Mendlovitz (eds.), NY, World Law Fund, 1966, pp. 314-354.

rights. Furthermore, the plaintiffs asserted the responsibility of the defendant State for waiver of claims for damages against the United States (in municipal law as well as in international law).¹⁴²

In its decision, the District Court began by asserting that the atomic bombing on both cities was “an illegal act of hostility as the indiscriminate aerial bombardment on undefended cities” and “contrary to the fundamental principle of the laws of war that unnecessary pain must not be given;” thus, left aside the Peace Treaty, Japan would theoretically have a claim for damages against the United States in international law.¹⁴³ By exercising diplomatic protection of its nationals, Japan would be asserting its own right; however –the Court proceeded,– in principle “individuals are not the subject of rights in international law”, and in the case the victims could not ask for redress either before the courts of Japan, or those of the United States:¹⁴⁴ their claims under the municipal laws of Japan and of the United States had in fact been waived by Article Nineteen (a) of the Peace Treaty.¹⁴⁵

The defendant State, although conceding that the atomic bombing of Hiroshima and Nagasaki was “exceedingly enormous in destructive power” and a “matter of deep regret”, the damage being the “heaviest in history”, found nevertheless that the plaintiff’s claims were “not legal questions” but rather “abstract questions.”¹⁴⁶ The defendant State’s reasoning, as to the waiver of claims pursuant to Article Nineteen (a) of the Peace Treaty, was very much in the lines of an analogy with the practice of diplomatic protection: the individuals concerned could not pursue their claims directly against a foreign State at international level, as their State had exercised its right to waive any such claims by agreement with the foreign State.¹⁴⁷ The defendant State argued that domestic courts were to recognize the conclusion of the Peace Treaty as a *fait accompli*.¹⁴⁸

142 *Shimoda and Others versus Japan Case*, pp. 316-322.

143 *Shimoda and Others...*, pp. 339-345.

144 Under the U.S., Federal Tort Claims Act after the War.

145 *Ibid.*, pp. 347-352.

146 *Ibid.*, pp. 323-330.

147 *Ibid.*, pp. 330-331.

148 Cf. *ibid.*, pp. 331-332. The Defendant State added that although “deep sympathy” was due to the victims of the atomic explosions in the war, the way of consolation for them “must be balanced with the consolation for other war victims.” Whether measures should be taken in legislature and in finance was a political rather than legal question; “this is the same as where the State receives indemnity from another country by exercising the right of diplomatic protection,

The District Court of Tokyo concluded that, notwithstanding the atomic bombing of Hiroshima and Nagasaki had been an illegal act in violation of international law, the plaintiffs' claims in the *cas d'espèce* were "improper", and they were therefore dismissed on the merits.¹⁴⁹ It was certainly not purely coincidental that District Court saw it fit to deliver its decision on 07.12.1963, the anniversary of Pearl Harbor...¹⁵⁰

Even in the days of the *Lotus* case (1927), the view endorsed by the old Permanent Court of International Justice (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 itself¹⁵¹ but also on the part of expert writing of the time.¹⁵² Such conception could only have flourished in an epoch "politically secure" in global terms,¹⁵³ certainly quite different from that of the last decades, in face of the recurrent threat of nuclear weapons and other weapons of mass destruction, the growing vulnerability of the territorial State 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 -as I sustained in a recent book- the logic opposite to that of the *Lotus* case which imposes itself: all that is not expressly permitted is surely prohibited.¹⁵⁴ All weapons of mass

and where the State can decide independently by its authority whether it will distribute the indemnity to the sufferers and also the method of distribution [...]"; *ibid.*, p. 332, and cf. p. 333.

149The costs of litigation were to be borne by the plaintiffs, *ibid.*, pp. 352 and 314. The Court, nevertheless, expressed its "whole-hearted compassion" for the victims of the atomic blasts, cf. *Ibid.*, p. 352.

150It is somewhat surprising that the District Court should treat the plaintiffs on the same footing as other war victims, as their claims were specifically directed against an armed attack -the atomic bombings of undefended cities- which the same Court had held to have been contrary to the laws of armed conflict.

151Cf. 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").

152Cf. Brierly, J. L., *The Basis of Obligation in International Law and Other Papers*, Oxford, Clarendon Press, 1958, pp. 412 and 94-96; Lauterpacht, H., *The Function of Law in the International Community*, Oxford, Clarendon Press, 1933, pp. 409-144; and cf., subsequently, e.g., Herczegh, G., "Sociology of International Relations and International Law," in *Questions of International Law*, G. Haraszti (ed.), Budapest, Progresprint, 1971, pp. 69-71 and 77.

153Bos, Maarten, "Dominant Interest in International Law," 21 *Revista Española de Derecho Internacional*, 1968, p. 234.

154Cançado Trindade: *O direito internacional em um mundo...*, p. 1099.

destruction, including nuclear weapons, are illegal and prohibited and contemporary international law.

Furthermore, in an essay published more than two decades ago, I allowed myself to warn against the disastrous consequences -in times of peace and of war- of not recognizing the position of individuals as subjects of international law, and of insisting to erect this latter on an exclusively inter-State basis. The widespread bombings of largely undefended cities (either with weapons of mass destruction, or with conventional weapons in large scale), with thousands and thousands of helpless, innocent and silent victims (e.g., Hiroshima, Nagasaki, Tokyo, Coventry, Dresden, Hamburg, Güernica, to name a few, among so many others also bombarded), has been -like the issue of arms trade- simply overlooked¹⁵⁵ in international legal doctrine, and has passed with impunity in international law to date. The case of *Shimoda and Others* stands as a dreadful 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 erected on an exclusively inter-State basis.

May I thus reiterate, here at the University of Hiroshima in 2004, 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 being impotent in the absence of express treaty provisions granting them procedural status at international level. Even in such a matter directly affecting fundamental human rights, the arguments were conducted in the case in the classical lines of the conceptual apparatus of the so-called law on diplomatic protection, in a further illustration of international legal reasoning still being haunted by the old Vat Elían fiction.¹⁵⁶

In conclusion, the initiatives I have mentioned in the present study of the conception of zones of peace, of the formulation of the right to peace (within the conceptual universe of the International Law of Human Rights),¹⁵⁷ and of the establishment of nuclear-weapon-free

155With rare and distinguished exceptions, among which, e.g.

156Cançado Trindade, A.A., "The Voluntarist Conception of International Law: A Re-Assessment," in 59 *Revue de droit international de sciences diplomatiques et politiques*, Genève, 1981, p. 214.

157For a projection into the future, cf. Cançado Trindade, A. A., "The Future of the International Protection of Human Rights," in Boutros-Ghali, B., *Amicorum*

zones, added to the successive and constant endeavors towards general and complete disarmament, disclose the existence nowadays of an *opinio juris communis* as to the illegality of all weapons of mass destruction, including nuclear weapons, 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 (chemical and bacteriological [biological] 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 human beings as subjects of international law. 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, also in my Opinions within the Inter-American Court of Human Rights.¹⁵⁸ And this is also in keeping with the similar conception upheld, in his Opinions within the ICJ four decades ago, by the distinguished Japanese Judge Kotaro Tanaka: that is, an international law transcending the limitations of legal positivism,¹⁵⁹ and thus capable of responding effectively to the needs and aspirations of the international community as a whole, and, ultimately, of humankind.

Discipulorumque Liber. Paix, Développement, Démocratie, vol. II, Bruxelles, Bruylant, 1998, pp. 961-986.

158Cançado Trindade, A. A., "La humanización del derecho internacional y los límites de la razón de Estado," 40 *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais*, Belo Horizonte/Brazil, 2001, pp.11-23; Cançado Trindade, A. A., "Reflexiones sobre el desarraigo como problema de derechos humanos frente a la conciencia jurídica universal," in *La nueva dimensión de las necesidades de protección del ser humano en el inicio del siglo XXI*, A.A. Cançado Trindade and J. Ruiz de Santiago (eds.), 3rd. ed., San José, Costa Rica, UNHCR, 2004, pp. 19-78.

159Cf. Tanaka, K., "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; and cf. Gowlland-Debbas, V., "The International Court of Justice: Its Future Role after Fifty Years," A.S. Muller et al. (eds.), The Hague, Kluwer, 1997, pp. 344-346; and cf. Saito, Y., "Judge Tanaka, Natural Law and the Principle of Equality," in *The Living Law of Nations. Essays in Memory of A. Grahl-Madsen*, G. Alfredsson and P. Macalister-Smith (eds.), Kehl/Strasbourg, N.P. Engel Publ., 1996, pp. 401-402 and 405-408.