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Clarifying the Obligations of States Regarding Nuclear Technology & Weapons Disarmament in the 21st Century

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INTRODUCTION

Despite numerous efforts realized by the world community to reduce nuclear arsenals, to ban nuclear tests and to stop the development of nuclear weapons in some parts of the world, the proliferation of nuclear weapons remains a major threat for Humankind. This remains a key issue for the international community, since a "nuclear-weapon-free world" is one of the "oldest" agendas of the General Assembly (United Nations’ Resolution-1946). Since the explosion of the Atomic Bombs: Little Boy in Hiroshima, and Fat Man in Nagasaki in August, 6th and 9th, 1945 (which killed at least 210 000 people immediately), Humankind entered into the Nuclear Age. Developed and assembled during the Manhattan Project, in the United States, the use of the atomic bomb encouraged several governments to acquire it. It unables States to enjoy a status of superpower. The end of the Second World War and the knowledge of the destructive power of the atomic bomb accelerated the proliferation of nuclear weapons. By invoking the Nuclear deterrence doctrine during the Cold War, the two main Powers, the United States and the ex USSR, developed a stock of nuclear weapons that would allow them to destroy each other or discourage the other to use its nuclear power.

Nuclear age marks the entry of Humankind into the Anthropocene, this means that Humankind has acquired an unprecedented power on the Earth, on the very conditions of the livings and of those to come. Massive destruction and total threats are two unprecedented characteristics of nuclear age (humans and non-humans).

According to Günther Anders, there is no distinction between “nuclear energy in a context of peace” and “nuclear power in a context of war”. It is specific because it integrates “a disruption in the History of Humankind”, of the very concept of History. There are four main philosophical arguments:

- The nuclear technology prevails on human morality: in other words, the capacities of destruction of humankind are total, but the moral capacities of humans to think this new all-powerfulness are not adequate.
- In Anders’ point of view “the very foundations of our moral existence have changed” because of the technification of our being: we can be do things which can have
consequences “beyond the horizon of our eyes and imagination” (Letter to Claude Eatherly, June 3rd, 1959).

- There is a discrepancy (Diskrepanz), a promethean gap between our actions and our abilities of imagining the consequences of them!
- We have to broaden our imagination abilities in order to adapt it to our actions. Anders highlighted the fact that there is a new asymmetry which can have apocalyptic consequences: on the one hand, we have unlimited power (nuclear technologies\(^1\)) but, on the other hand, we have limited cognitive abilities to figure out what we are doing.

To conclude on Anders’ arguments, we are now living “in the Age of inability to fear” although we have to face a technology which threatens the whole humankind through space and time. For instance, France has a nuclear submarine with 16 warheads ready to be used and explode within 15 minutes.

According to Hans Jonas, the entry into the technological civilisation demanded an ethical theory capable of instituting respect for the future. This new vulnerability of Humankind in the future requires us to think out and transpose a new ethical framework: respect for future generations and holistic means for preserving their future.

These philosophical arguments are essential to renew the international legal framework.

Precisely, as members of civil society and NGOs we wish to clarify the obligations of States regarding the Nuclear Technology and Weapons Disarmament in the 21st Century. Things changed deeply since World War II. In 2017, it is no more acceptable to let the future be jeopardized nor been threatened to be jeopardized!

Some figures:

Concerning the use of nuclear technology in a context of peace, there are ambivalent effects. On the one hand, we have developed interesting uses for public health, but on the other hand, we have to face unprecedented situations. Indeed, we are the generations who have to face nuclear disasters: Chelyabinsk (1957), Three Mile Island (1979), Chernobyl (1986), and Fukushima (2011) are still ongoing disasters, for ever jeopardizing the future!

\(^1\) Such as Nuclear powerplants and Nuclear weapons.
Concerning the use of nuclear technology for war, the endangering of future generations is a global and current reality. The number of nuclear weapons evolved through the years:

- in 1945 : 3 Nuclear Weapons
- in 1986 : 69,368 Nuclear Weapons,
- in 2017 : 15,000 Nuclear Weapons.

Some States as Kazakhstan (ex-USSR member State) have gathered more than 450 tests. Not because there are less tests in 2017 than in the end of the 80s means things are improving: indeed, the capacity of destruction of nuclear weapons has tremendously increased e.g. the weapons are more powerful today than 30 years ago.

Still today, we face transgenerational health consequences: thyroid cancers (within the following 2 years after Fukushima, more than 200 children developed this disease); birth defects; infertility; lack of red blood cells… and we still ought to fight for the truth! For example, Nadezhda Kutepova (human rights attorney) is still sharing her parents’ experience on Chelyabinsk disaster and she is now political refugee in France. There is a veil of lies and silences on transgenerational pollutions.

Concerning Chernobyl, there is a perimeter of 30 km around the former plant which correspond to the contaminated zone, forbidden for ever.

Around Fukushima, the Japanese government does not seem to tell the truth about the reality of the radioactive contamination. For example, there are major legal reforms which tend to protect secret of State rather than civil society. The japanese government is going on using nuclear powerplants.

**Facing the consequences of the use of nuclear technologies necessarily means facing transgenerational threats and/or damages. There is a specificity concerning genetic damages due to nuclear exposure.** Radioactivity cuts DNA and it gets worse, through generations.

As representative of civil society, we do not accept to live under a “nuclear totalitarianism era” (G. Anders’ words): we call for an urgent clarification of the obligations of States concerning nuclear disarmament and technology.
Since the 20th and 21st Centuries are characterised by new actions of Humankind that are harmful for future generations, one can now ask if it is legitimate to take the future into account? First, what are and should be the obligations of States regarding weapons disarmament in the 21st Century? Although the first UN resolution (January 1946) was to achieve nuclear disarmament, there is still a gap between intentions and deeds. Nuclear weapons are still used, nuclear threats are still our common reality.

Second, is the use of nuclear technology still legitimate and respectful of human rights and environmental law regarding future generations? Is the use of nuclear power plants safe? What are the transgenerational risks or threats that infer from the use of nuclear powerplants?

On behalf of several NGOs (notably, IPPNW, ICAN, EEE, IALANA) and in the name of civil society, we will first question the clarification of obligations of States regarding rights of Future Generations concerning nuclear disarmament (I), and, second, the obligations of States regarding the use of nuclear technology in a context of peace (essentially use of nuclear powerplants) (II).
I. OBLIGATIONS OF STATES REGARDING NUCLEAR WEAPONS DISARMAMENT

The characteristics and impacts of nuclear weapons are well known since 1996, when the International Court of Justice Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons examined the various effects of nuclear-weapons-use including explosive blast, creation of fire-storms, and radioactive contamination/fallout.

At that time, the ICJ reported that: ‘Nuclear weapons are explosive devices whose energy results from the fusion or fission of the atom. By its very nature, that process, in nuclear weapons as they exist today, releases not only immense quantities of heat and energy, but also powerful and prolonged radiation… The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area… According to the material before the Court, the first two causes of damage are vastly more powerful than the damage caused by other weapons, while the phenomenon of radiation is said to be peculiar to nuclear weapons. These characteristics render the nuclear weapon potentially catastrophic.’

The ICJ concluded that: ‘The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet.’

Civil society, such as ICAN call for a complete weapons disarmament. Nuclear tests triggered many consequences on health, safety and on the right to live of humans. There are examples we ought to emphasise in order to show how dangerous nuclear weapons are for innocent civilians.

The story of Karipbek Kuyukov is one of them. He was born without arms as a result of nuclear radiation exposure of his parents. He is now 45 and has become an activist and an artist showing the need for disarmament through his point of view: for his whole life, Karipbek Kuyukov has been facing the consequences of the 450+ nuclear tests conducted by the ex-USSR.

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2 Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, delivered on July 8, 1996. Para 35.
Jelly-sh babies are another dreadful consequence of nuclear tests: Darlene Keju-Johnson, Director of Family planning in the Marshall Islands from 1987 to 1992, explains: « Now we have this problem of what we call “jelly-sh babies.” These babies are born like jelly-sh. They have no eyes. They have no heads. They have no arms. They have no legs. They do not shape like human beings at all. When they die they are buried right away. A lot of times they don’t allow the mother to see this kind of baby because she will go crazy. It is too inhumane. »³

Our goal to ban the use of nuclear weapons is based on stories of victims. We know that exposure to radiations leads to humanitarian disasters: birth defects and transgenerational health problems. Unfortunately there are already many victims to prove this.

Hence, we will first remind the obligations of States in international law regarding nuclear weapons (A), then we will emphasize the existence of paradoxes concerning obligations of States regarding current International Public Law (B). Finally, as representative of NGOs we call for a ban treaty on nuclear arms (C).

A. The obligations of States in International Law regarding Nuclear Weapons

January, 24th 1946: in its first resolution, the UN General Assembly called for the total elimination of nuclear weapons and set up a commission to deal with the problem of atomic discovery. Fourteen years later, the treaty on the Non Proliferation of Nuclear Weapons (NPT) considered the obligations of nuclear-weapons States. Although the NPT does not directly constrain nuclear States, it does prevent from proliferation of nuclear weapons technology. There are also international agreements limiting the testings of nuclear bombs. Still, some States continue using them as a main defensive tool. The odds of today’s world, compared to the context in which the NPT was signed, force international law to state new rules and create new barriers protecting the health and security of humans.

Hence, to detail the Obligations of States in International Law regarding Nuclear Weapons, we will first present the obligations of States resulting from the Non Proliferation of Nuclear Weapons Treaty (1), then we will consider what the Comprehensive

³ See https://www.charterforcompassion.org/index.php/marshall-islands
Nuclear-Test-Ban Treaty set as obligations (2). Finally, we will develop what conditions the nuclear-weapon-free zone require (3).

1. The Non Proliferation of Nuclear Weapons Treaty (NPT) - 1970 : a will to end the development of Nuclear Weapons in the world

In 1968, many countries decided to set up a treaty to reduce the risk of the proliferation of nuclear weapons in the world. The Treaty on the Non-proliferation of Nuclear Weapons (NPT) was open to signature in 1968, and ratified for a period of 25 years in 1970 by 40 States included the depositary States : United States, the United Kingdom and the Soviet Union. It will be renewed in 1995 for an indefinite period. Three pillars are structuring this treaty: nuclear disarmament, non-proliferation and peaceful use of nuclear energy.

The first pillar which appears in this treaty is the one of disarmament. In the Article VI, the parties undertake "to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control". The objective of this disarmament condition is to encourage efforts to reduce nuclear arsenals and to eliminate nuclear weapons.

After reminding in the preamble the need to refrain the use of threat and the fundamental objective of ensuring the maintenance of peace and security in the world, the treaty in the article 1 sets obligations of the parties in terms of non-proliferation of nuclear weapons : « Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices (...) ». In this treaty, there is a clear divide between the Nuclear-Weapon States (NWS) (the United States, the USSR, the United Kingdom, France and China) and the other States, the Non-Nuclear Weapons States -NNWS which do not have nuclear weapons and undertake not to attempt to obtain it.
The Third pillar of this treaty is the **peaceful use of nuclear energy**. In order to achieve this goal, States are encouraged to cooperate with one another. Indeed, as stated in the Article IV, parties keep their inalienable right to "develop research, production and use of nuclear energy for peaceful purposes without discrimination" by exchanging technological or scientific information whenever it is possible. Under Article V, it is also mentioned that NNWS may be helped or could have some benefits from others NWS in order to avoid research and development costs.

The implementation of the Nuclear Non-Proliferation Treaty is guaranteed by the International Atomic Energy Agency (IAEA), which is responsible for overseeing and monitoring the great implementation of the treaty by each parties.

**The Review Conferences of the Parties to the Treaty on the Non Proliferation of Nuclear Weapons - Final Documents 2000 and 2010.**

Every five years, a Review Conference of the NPT is held to suggests new commitments. The objective of these Review Conferences of the parties (COP) is to improve “the effectiveness of the strengthened review process for the Treaty”. In 2000, the 6th Review Conference decided in an unambiguous commitment to eliminate Nuclear Weapons. Indeed, it is mentioned in the item 6 of the 13 steps that States recognize “an unequivocal undertaking by the nuclear weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all States parties are committed under article VI.”

In this Review Conference of 2010, the States agreed on a final document regarding nuclear disarmament. This final document of the COP consists in 64 actions devised in 3 pillars. Among the **disarmament pillar**, there are 24 actions. Currently, the most important commitments are not undertaken by nuclear weapon States. The latter contravene the third action they were supposed “to undertake further efforts to reduce and ultimately eliminate all types of nuclear weapons, deployed and non-deployed, including through unilateral, bilateral, regional and multilateral measures”. Nuclear weapon States do not respect either action number 5 which aims to « rapidly moving towards an overall reduction in the global stockpile of all types of nuclear weapons (...) [and] to further diminish the role and significance of nuclear weapons in all military and security concepts, doctrines and policies». 
Thus, in the Non-Proliferation Treaty, States parties agreed on the pillars of non-proliferation and the peaceful use of nuclear energy, but not on nuclear disarmament. Whereas NNWS are in favor of a nuclear disarmament, NWS seem to be more particularly concerned about the proliferation of nuclear weapons. Nowadays, even if most of unarmed states in 1970 have given up their military nuclear program, some countries such as India, Pakistan and Israel have actually acquired it. Moreover, the uncertainty regarding the situation of North Korea remains a current issue. Despite its Treaty signature, the country has withdrawn from the Treaty in order to carry out nuclear tests. Following the launch of a nuclear program considered illegal, North Korea has conducted five experiments since 2006.

2. The Comprehensive Nuclear-Test-Ban Treaty (1996) : an answer to end nuclear experiments

In August 1963, a Multilateral Treaty for the Partial Prohibition of Nuclear Tests was opened to signature in Moscow by the United Kingdom, the Soviet Union and the United States. Entering into force in October 1963, the Treaty prohibits States Parties to test nuclear explosions in the atmosphere, underwater or in outer space. In keeping with this treaty and following numerous attempts during the Cold War that a treaty banning nuclear tests was signed in Geneva in September 1996 by nearly one hundred and sixty states including the five Official nuclear powers and Israel. The purpose of this treaty is to prohibit all kinds of nuclear tests (including underground explosions), whether carried out for peaceful or military purposes. To enter into force, the treaty must be ratified by the 44 States that had the capacity to develop nuclear technologies during the Treaty negotiations in 1996. Currently, 182 States have signed the Treaty, 153 have ratified it as France, Russia and the United Kingdom, but nine of the 44 States listed in the Treaty negotiations have still not ratified it (China, North Korea, Egypt, India, Indonesia, Iran, Israel, Pakistan and the United States of America).

In this Treaty, countries recognize the need to find an effective way to end nuclear tests. Finally, it is also reminded that in the field of disarmament and non-proliferation, a treaty banning completely nuclear tests, has been for a long time one of the objectives to which the international community attaches the highest priority.
The Article 1 of the Treaty stipulates that « each State Party undertakes not to carry out any nuclear weapon test explosion or any other nuclear explosion, and to prohibit and prevent any such nuclear explosion at any place under its jurisdiction or control ». Moreover, it is added that “each State Party undertakes to refrain from causing, encouraging, or in any way participating in the carrying out of any nuclear weapon test explosion or any other nuclear explosion”.

Furthermore, the Comprehensive Nuclear-Test-Ban Treaty (CTBT) provides an international monitoring system directed by the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO), whose role is to detect atomic explosions, verify the actions of States and to notify the signatory States of any breach of this Treaty. The organization has specific measuring instruments (seismographs, infrasound detection stations, analyzes of radioactive particles in the air) to check and analyze what is happening in different parts of the world.

Although the Comprehensive Nuclear-Test-Ban Treaty (CTBT) is essential, it is highly controversial and has not yet entered into force. In addition, three countries have already tested nuclear weapons since 1996: India and Pakistan in 1998, and North Korea, which has been conducting nuclear tests since 2006.

3. The existence of five nuclear-weapon-free zones to reduce the risk of nuclear proliferation

As mentioned in the article VII of the Non-Proliferation Treaty, States are allowed to conclude regional treaties to ensure the total absence of nuclear weapons in their respective territories. In 1967, a Treaty for the Prohibition of Nuclear Weapons in Latin America and in Caribbean (Treaty of Tlatelolco) established for the first time a nuclear-weapon-free zone in a world inhabited area. A nuclear-weapon-free zone is a region of the world where states agree, for an indefinite period, not to develop, acquire, test or possess nuclear weapons. Nuclear-weapon-free zones are conceived as transitional measures to in order to achieve a complete nuclear disarmament.

Since then, three other nuclear-weapon-free zones have been established: in the South Pacific (Treaty of Rarotonga, 1985), in South-East Asia (Treaty of Bangkok, 1995) and in Africa (Pelindaba Treaty, 1996). Thanks to these treaties, a great part of the planet has the
status of a nuclear-weapon-free zone which considerably reduces the risk of nuclear proliferation. Since 2002, another project of a nuclear-weapon-free zone is planned in Central Asia.

B. Paradox and Obligations of States regarding current International Public Law

Hence, to present the Paradox and Obligations of States regarding current International Law, we will first explain the paradox between the use of Nuclear Weapons and the existing Chemical Weapons Convention (1). Secondly, we will demonstrate the infringement of existing principles of international law (2), and to finish, we will emphasize the paradoxical position of the International Court of Justice regarding the legality of the threat or use of nuclear weapons (3).

1. The paradox between the use of nuclear weapons and the Chemical Weapons Convention - CWC (1997)

Currently, as stated by the Nuclear Disarmament Initiatives organization: "Nuclear weapons remain the only weapons of mass destruction still allowed by international law, even though they are" inhuman "and do not differentiate civilians and military". This legal vacuum implies significant risks to society and the environment that deserve to be taken into account and discussed multilaterally.

The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, more commonly known as the CWC, is opened to signature in Paris in January 1993 and came into force in 1997. This international Treaty is considered as a success in disarmament. Under Article 1 of the Convention, States undertake not to produce or use, directly or indirectly, chemical weapons. They shall not "assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention". Moreover, States must destroy existing arsenals on their territory but also those "abandoned in the territory of another State Party". Chemicals are defined as hazardous chemicals and substances presenting a significant risk to humans and
the environment. Finally, in order to ensure the respect of States Parties commitments, the Convention organizes a system to check these obligation. CWC defines the role and tasks of the Organization for the Prohibition of Chemical Weapons, created to supervise the process of destruction of chemical weapons and to ensure the conformity of actions and measures taken by States with the Convention. This inspection commission also encourages States to cooperate "for the peaceful use of chemistry". It also aims at convincing new States to become members of the Convention.

Thus, nuclear weapons able to cause humanitarian damage should be prohibited by international law as well as other weapons of mass destruction. Chemical weapons are already prohibited by the CWC, which states in its preamble that States are "determined to act with a view to achieving effective progress towards general and complete disarmament under strict and effective international control, including the prohibition and elimination of all types of weapons of mass destruction". As a result, even if they have not yet been totally eliminated, their quantity has been considerably reduced. According to ICAN, as it happened with the prohibition of chemical weapons, Nuclear-Weapon States which refuse to sign a ban treaty could be influenced in their decision by its normative force. For NNWS and ICAN a Ban Treaty is necessary whatever the participation of nuclear States or not. Such a Treaty could be a way to affirm and recognize several principles of law and to advance in this process of nuclear weapons elimination.

2. The paradox of the infringement of existing principles of international law

As representative of civil society, we do not understand why two major principles of international law are still disrespected.

- First, the principle of non-harmful use of the national territory is not respected by the threat or use of nuclear weapons. It is obvious that nuclear weapons have consequences throughout national boundaries. Andreas Nidecker from IPPNW has made a statement entitled Climate mediated nuclear famine in March 2015. Abstract: Among man made disasters, unfortunately there remains the risk for nuclear war. Such an event would make resilience in the affected societies impossible.
Recent meteorological research by Roebuck & Toon (University of Colorado/USA), based on new climate models indicates that even a limited nuclear war e.g. in south Asia, with a few nuclear weapons, would lead to a significant sooth, dust and ash amount lifted into the atmosphere to create a major filtering effect for sunlight lasting up to ten years. This would have the effect of measurable shortening of the agriculture growth times in the entire Northern hemisphere. As a consequence this could lead to a major decrease of the rice and grain reserves of the affected countries which would provoke widespread famine for up to 1 billion people. Thus, the term « nuclear famine » was coined. We suggest that « climate mediated nuclear famine » should be included in the context of « man made disasters » (UN World Conference on Disaster Risk Reduction, Sendai, Japan).

Consequently, the principle of non-harmful use of the national territory, which is international current law, is not respected!

- Second, the right to a healthy environment is now well adopted throughout the world. More than 140 Constitutions recognize it now. But the use of nuclear weapons does not matches the requirements to respect this right.

The International Monsanto Tribunal (April 2017) quotes the first preamble of the Stockholm Declaration, in which it is stated that “both aspects of man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights - even the right to live itself”. This proclamation affirms the fundamental character of the right to a healthy environment. Moreover, the very first Principle of the Stockholm Declaration on the Human Environment expressly recognizes the linkage between the environmental and a life of dignity. Principle 1 proclaims that “man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”.

This widespread State practice evidences the crystallization of the right to a healthy environment, including on account of its fundamentally norm-creating character, as a norm of international customary law. This legal development was highlighted by the UN High Commissioner’s aforementioned study, which concluded that “[t]he increasing
constitutional recognition of environmental rights and responsibilities globally reflects growing awareness of the importance of environmental values and greater acceptance of a right to a healthy environment”.

Moreover, the threats and disasters are complex and systemic. This is clearly stated by IPPNW which is pleased to quote the draft treaty submitted last May 22nd, in Geneva: “The catastrophic consequences of nuclear weapons transcend national borders, pose grave implications for human survival, the environment, socioeconomic development, the global economy, food security and for the health of future generations, and the disproportionate impact of ionizing radiation on maternal health and on girls”⁴. This has been the argument of IPPNW for forty years concerning the right to a healthy environment concerning Hibakushas. For instance, in an article published on this noteworthy day, John Loretz states that: “The recognition early in the draft [of the ban] of “the suffering of the victims of the use of nuclear weapons (Hibakusha) as well as those affected by the testing of nuclear weapons” is appropriate and essential.”

In others words, according to the existing legal framework, State should not enforce an activity which may involve damage on its territory or in the territory of another State. Then, the use of nuclear weapons considered as a weapon of mass destruction should be prohibited because the impact of a nuclear test may extend to the territory of another States. This principle is still not applied to nuclear technologies and the threat of use is therefore not recognized.

3. The paradoxical position of the International Court of Justice - ICJ (1996) : Legality of the threat or use of nuclear weapons

The Comprehensive Nuclear-Test-Ban Treaty (CNTBT) shows the existence of a legal vacuum when it comes to discuss the consequences of a nuclear test on the environment. The threat of use is not taken into account in international environmental law. Indeed, some countries still have not ratified the CNTBT and some of them have carried out new nuclear tests since its creation. The Advisory Opinion of the ICJ in 1996 on the

⁴ http://ippnw.org/
question "Is it permissible under international law to use the threat or use of nuclear weapons in all circumstances?", has clarified the situation but has also led to a stagnation of the law. The decision of the judges is rather controversial, since it is stated that "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict," but that given current international law and the elements available, the threat or use of nuclear weapons can not be considered illegal under any circumstances. The Court recognizes the importance of the environment but considers the possibility of using nuclear weapons in the event of legitimate defenses and the survival of a state (art. 49). Furthermore, the Court specifies that a total prohibition of nuclear weapons does not exist in conventional and customary law.

In his dissident opinion, judge Weeramantry suggests that the threat or use of nuclear weapons was illicit in any circumstances whatever it be. Indeed, “the threat or use of nuclear weapons is a violation of the ground principles of international law and is a negation of the humanitarian concerns of humanitarian law”. The Geneva Protocol is also not respected when States use their nuclear power to threaten other States or a population. “The threat or use of nuclear weapons endanger the environment of the planet in a way which jeopardize the entire life on the planet.”

Hence, civil society underlines and points out that using or threatening to use nuclear weapons constitute a sustainable danger on human rights. Indeed, by using or threatening of using its nuclear power, a State does not respect the common right to live in a healthy environment, which is part of the major human rights. It is not coherent that the dangers triggered by the threat or use of nuclear weapons are not recognized as an actual jeopardy of the respect of human rights. However, this right is present in 140 State Constitution in the world. It has hence become a norm in customary international law.

C. Calling for a Ban Treaty on nuclear arms

By virtue of Sustainable Development Goals (SDGs), we are notably “seeking for promoting peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective accountable and inclusive institutions at all levels”.

If we want to fulfil SDG Nr 16, we definitely call for a ban treaty on nuclear arms.
First, we note that the growing occurrence of conferences held on a global scale in disarmament is encouraging. March 2013 (Oslo), February and December 2014 (Nayarit and Vienna) showed the willingness of the Non-Nuclear-Weapon States and civil society to take a step further and build a denuclearized world. In december 2014, the conference process on the humanitarian impact of nuclear weapons held in Vienna dedicated itself to “complete the knowledge already acquired in previous conferences and open new perspectives to fill the existing legal vacuum” (GRIP).

In Nayarit, the process started in Oslo accelerated: many forums were held discussing the humanitarian dimension of disarmament. The conferences were widely supported by civil society.

The third conference, in Vienna, is worth analyzing since it hosted 158 States (128 in Oslo and 146 in Nayarit). Among them, 27 out of the 28 EU member States were present, as well as 27 out of 28 NATO member-States (France was the absent). Pakistan and India participated in the whole cycle which is important to notice. For the first time, the United Kingdom and the United States -two major nuclear power, participated in a humanitarian conference.

NGO and civil society enabled the conference to be successful: 152 civil society organizations and 24 international organizations (IAEA, IFCR, ICRC, OSCE, WHO, UNIDIR, UIP, UE…) were present. ICAN - International Campaign for the Abolition of Nuclear Weapon, together with Austria, organized a Forum of the civil society before the official conference. This pre-meeting showed a large involvement of the civil society and were welcomed by the diplomats.

The GRIP - Research and Information Group on Peace and Security recently published an analysis entitled “the UN General Assembly opens perspectives for a treaty to ban nuclear weapons”, in which it is stated:

“For the first time in two decades, the international community met at the United Nations First Committee to adopt or reject a concrete resolution proposal to take negotiations on multilateral nuclear disarmament forward. A large majority of states – result of the humanitarian initiative movement – supported by civil society proposed that in 2017, a legal instrument for the prohibition of nuclear weapons should be negotiated, despite strong opposition from the nuclear powers. It is therefore a real argumentative battle on the objectives and consequences of this resolution establishing a future treaty which took place
between the different parties during this 71st session of the United Nations General Assembly.”

For twenty years, there has been a lack of concrete multilateral actions on nuclear disarmament. The main reasons are that the commitments taken in the NPT are not respected and the Disarmament conference (DC) of the UN obstructs these actions to be taken.

Apart from the resolution on “Creation of a nuclear weapon-free zone in the Middle East”, the resolution L.65 “Ban treaty on the production of fissionable material for making weapons or other explosive nuclear materials” was made by Canada, Germany and the Netherlands during the commission. This resolution was approved (177 pro votes, 10 abstentions, 1 against) and creates a process for 2017-2018 with a preparatory group of experts in charge of preparing the future treaty.

One problem is the lack of transparency: the preparatory group is composed with 25 countries out of 193 which prevents a global, inclusive debate to take place.

Those resolutions call for “the pursuit of a legal instrument to ban” nuclear weapons. This call for a ban treaty has been transformed into the L 41 resolution, stating: “Further the multilateral negotiations on nuclear disarmament”. The goal being to open negotiations on a ban treaty.

Seventy years after the first UN resolution promising to “eliminate national armaments and atomic weapons”, this resolution can be considered an historical step towards nuclear disarmament.

Indeed, the text recommends to “elaborate concrete and efficient legal measures to putting into force a world without any kind of nuclear weapons”. It also asks for “a diversity of measures which may contribute to move forward multilateral negotiations on nuclear disarmament”, such as transparency measures. The resolution also plans a conference of the UN in 2017, aiming at “negotiating a restrictive legal tool to ban nuclear weapons” and present during the 72nd session “a report to evaluate the improvement in the negotiations and decide the procedure to follow”.

Because the impacts and consequences of the use of nuclear weapons are threatening the whole humanity, including future generations, we call for a clear obligation to prohibit the use of nuclear weapons in the 21st Century. According to judge Weeramantry, “the law needs to be clearly stated in the light of State rights and obligations under the new world
dispensation brought about by the United Nations Charter which, for the first time in human history, outlawed war by the consensus of the community of nations”. Also adding: “Those (past) 50 years have been years of inaction, in so far as concerns the clarification of the most important of legal issues ever to face the global community”.

End Ecocide on Earth is calling for the qualification of nuclear bombing as an ecocide: we shall remind the definition given by Alyn Ware in his in the International Peoples Tribunal on the Nuclear Powers and the Destruction of Human Civilisation, June 2016: an ecocide is defined as “an international crime relating to causing extensive damage to, destruction of or loss of ecosystem(s) of a given society”. Civilians victims of previous bombing or nuclear explosion know that the use of nuclear weapons generate ecological damage sufficient to warrant the charge of ecocide.

As it is stated in the International Monsanto Tribunal Advisory Opinion, a whole body of environmental law began to develop within many States since the Stockholm Conference. The fundamental value of environmental protection as enabling life on the planet and human well-being fully justifies the imposition of criminal sanctions for conduct resulting in serious environmental harm. At the same time, international environmental arguments began to include provisions requiring the State to criminalize certain conduct offensive to the environment. For example, in order to address the cross-border dumping of hazardous wastes affecting health and the environment (usually affecting poor communities in the global south), the Basel Convention on the Transboundary Movements of Hazardous Wastes and their Disposal of 22 March 1989 set up a system of controls to prevent harm. The Basel Convention also established that illegal shipments of hazardous waste are a crime (Article 4(3)). In this context and in the name on civil society, we call for a comprehensive treaty banning -among others, the transportation and stockage of nuclear wastes.

\[^5\] Alyn Ware, *International Peoples Tribunal on the Nuclear Powers and the Destruction of Human Civilisation*, June 7-8 2016, Sydney
II. OBLIGATIONS OF STATES REGARDING NUCLEAR TECHNOLOGY

In the 21st century, a new juridical utopia is now moving on, specifically aiming at protecting the future. It takes into account the finitude of human existence, the essential transmission of conditions and possibilities for life of future generations. It presupposes an upsurge of conscientious awareness of our common life and destiny. There is a paradigm shift to realize if we want to integrate a law protecting Future Generations.

As representative of civil society, we want to emphasize the fact that nuclear technology is unsustainable from the very beginning of the chain of this technology, i.e. uranium mining, to the management of nuclear wastes, this technology infringes futures generations basic human rights and more particularly their right to a decent life.

Hence, to consider the Obligations of States in International Law regarding Nuclear technology, we will, in a first time, illustrate the reality transgenerational risks and damages related to nuclear technology (A), then we will emphasize The need to recognize and respect Human rights and the Rights of Future Generation (B).

A. Facts: transgenerational risks and damages related to nuclear technology are real

To illustrate transgenerational risks and damages regarding nuclear technology, we will separate nuclear power plants projects into three parts: the uranium mining extraction (1), the lack of risks anticipation before the project (2) and then, dismantling and burying nuclear wastes (3).

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1. Uranium mining and transgenerational threats to health and to the environment

Between 1945 and 2001, 210 mines of uranium were exploited only in France. This represents a production of 76,000 tonnes. These 210 exploration of extraction areas are located in 25 districts in France, where there are still nuclear wastes. They represent more than 166 million tonnes of radioactive elements.\[7\]

In the 1980s, the production of enriched uranium was mostly delocalised in Niger. The areas are highly polluted and Touaregs people pointed out the danger of the open-pit mines and created an association aiming at informing the population of the contamination in process in Niger. In an article published in January 2015, Almoustapha Alhacem, an employee of Somaîr (AREVA) states: “the wind takes toxic particles towards the city, which become embedded everywhere in the desert”\[8\].

In France, contaminated rubbles from uranium mining are buried under parkings, buildings, even under the roads! There is no traceability of the wastes produced by the nuclear industries. Meanwhile, children are touching and in contact everyday with the ground. Hence our call for dealing with the rests of the uranium mining in the world. There cannot be another outcome than a nuclear ban to protect the generations to come.

2. Lack of risk anticipation regarding nuclear power plants

The end of the 20th Century witnessed many construction of nuclear power plants all over the world. As of April 2017, 30 countries worldwide are operating 449 nuclear reactors for electricity generation and 60 nuclear plants are under construction in 15 countries.\[9\]

There were no anticipation of the risks taken in building nuclear power plants, nor there was a plan to dismantle the reactors. People at that time did not think about the future of the buildings they were creating and developing. At that time, there were no environmental

\[7\] Figures for France taken from the TV documentary : “Uranium, le scandale de la France contaminée”, 14 déc. 2015: https://www.youtube.com/watch?v=zJokzr8nryk&feature=youtu.be
\[8\] http://www.francetvinfo.fr/replay-radio/planete-geo/au-niger-sur-la-route-de-l-uranium_1769559.html
\[9\] TV documentary : “Uranium, le scandale de la France contaminée”, 14 déc. 2015: https://www.youtube.com/watch?v=zJokzr8nryk&feature=youtu.be
\[10\] World statistics from the NEI - Nuclear Energy Institute
general principles: no precautionary principle, no prevention principle, no principle of participation nor polluter-pays principle!

In 2012, the Max Planck Institute underlined the fact that “nowadays, the current core damage frequency (CDF) of the current generation II reactors is said to be between about $5 \times 10^{-5}$ per reactor-years or one core damage for every 20,000 reactor years (as expected by Rasmussen in 1975 for the US) in Europe and one for every 50,000 reactor years (or $2 \times 10^{-5}$) in the US. With about 440 nuclear reactors currently operating worldwide, this corresponds to one core damage every 45 to 100 years and more. However, with three new core damage accidents at Fukushima-Daiichi nuclear reactors 1, 2 and 3 (with Three Mile Island in 1979 and Chernobyl in 1986), we have had five core damage accidents in less than 40 years. In fact, a core damage has happened every eight years on the average in the world since 1970, corresponding to the beginning of the operation of generation II reactors (very few generation I reactors remain today). This shows a large discrepancy between the safety announced by the nuclear industry and the safety actually measured.”

The security norms evolve through time. Fukushima helped civil society and NGO understand further the necessity of anticipating the risks of explosion. After Fukushima, it became clear that we need to reconsider the matrix of anticipation of nuclear risks. France for instance, ordered to submit its nuclear powerplants to “stress tests” : that means that France has for the very first time increased its criterias of nuclear safety. French civil society ask for the oldest nuclear powerplants to be closing down! One of the main example of the lack of complexity in the anticipation of nuclear disasters is the nuclear powerplant in Fessenheim : exploited since 1978, it has been built on a major rift, 8 meters down below the Rhin Canal with a reinforced concrete slab of only 1 meter. This means that even in the case of a low intensity earthquake, this slab would not secure the groundwater table located under the nuclear powerplant! Moreover, in case of earthquake of high intensity, then the risks of breach of the Rhin Canal means that french, german, swiss and possibly austrian people are endangered! It would lead to a multiple and high disaster with radioactive flood!
3. Dismantling and burying nuclear wastes

Faith in progress made humans continue believing in nuclear technology as a future way of producing energy. There were no room for thinking the aftermath, the danger such technologies would trigger. Dismantling was out of the considerations then, as well as recycling the radioactive waste. Nowadays we still do not know how to manage the huge stock of nuclear wastes! In France, there is only an experimental location: 500 meters underground. In Finland, they are creating Onkalo, huge construction site which will be finished in the 22st century in order to stock nuclear wastes. It is supposed to keep the nuclear waste in a safe condition for more than 100 000 years\(^\text{11}\).

Then, it would be important to transmit a culture of anticipating transgenerational risks and to take into account the precautionary principle regarding to new technologies. This principle asks for further researches when there is no scientific consensus and when there is a suspected risk of causing harm to humans or the environment.

One of the solutions chosen by the generations inheriting the waste was to bury them. A recent accident in the USA reminds that it is not the way to prevent pollution nor it is a way to insure security for people: This month, in the State of Washington, a tunnel holding radioactive waste partially collapsed. Emergency was declared at Hanford, although no one was injured nor victim of radiation. This former plant has become the largest depository of radioactive defense waste in the USA. It contains about 56m gallons of radioactive waste.

B. The need to recognize and respect Human Rights and the Rights of Future Generations

There are several argument in favor of the recognition and respect of Human rights and the rights of future generations: first, States must protect their population, as it is stated in any domestic law (1). Moreover, this obligation of security is also a major arguments which must be further respected and include future generations, specifically because they are transpatial and transtemporal (2).

\(^{11}\) https://www.youtube.com/watch?v=5HArxuzs1AA
1. The obligation of each States to protect its population

Each state must guarantee the protection of its population. This obligation exists in domestic law whatever the type of state of Law regime. Recently, in climate change lawsuits, the attorney Roger Cox won a historic case on behalf of Future Generations. The Dutch judges stated in the Urgenda case that the Netherlands should protect, by virtue of domestic law, its population from a great threat which is climate change. It condemned the government to do more and to be more involved against climate change in the name of future generations too!

In this 21st century, this obligation must be reconsidered at least as a rule of customary international law: there is an obligation of protection of human safety. This obligation should be all the more applied through general principles of environmental law such as the precautionary principle, the prevention principle, the polluters-pays principle and the participation principle.

It would lead to a revolution in the way of thinking and putting into force international human rights. There are already core concepts inscribed in the Universal Declaration of Human Rights (UDHR) of 1948 which recognizes the human dignity of the "human family". As a result, the obligation of security should be now uphold at the transpatial and transtemporal levels.

2. The obligation of security at the trans-spatial and trans-temporal levels

The duty to ensure Human and Environmental security now means reasoning in a transgenerational way in international law. This 21st century means the entry in a new era which ask for the recognition of a legal duty to respect the substantive rights of future generations.

When it comes to deal with nuclear technology, we can perfectly plead for a transgenerational presentation of Human rights. If we have to face a technology which put

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eternally, irreversibly into danger populations and environment including Future Generations in the long run, one can ask whether we are not facing a new category of crimes: crimes against future generations, crimes against Humanity to come\textsuperscript{13}.

First, we should recognize a legal principle of temporal non-discrimination: it would make it possible to draw into the legitimate field of law the ethical imperative of protection of the future. By virtue of this principle, the non-existence of future generations can no longer be synonymous with an absence of juridical protection. This principle enables a stand to be taken against a real abuse of power by present generations over the future, based on prioritising their temporal existence. It would be applied differently according the context of scientific knowledges (in a context of certainties or uncertainties of trans-generational harm). Then, regarding nuclear technology, the objective would be to integrate the principle of temporal non-discrimination in law by opening up the temporal matrix of international criminal law to protecting the future. The very idea of this principle of temporal discrimination has been taken up in the report by UN Secretary-General Ban Ki Moon entitled “Intergenerational Solidarity and the Needs of Future Generations” in 2008. End Ecocide on Earth ask precisely and definitively for the recognition of ECOCIDE at the international level. The International Criminal Court should have jurisdiction in the case of infringement and contamination of the environment for ever! So should be the International Court of Justice in case of a State vanishing the quality of the environment for ever!

Secondly, we should recognize the principle of dignity of future generations, which is both descriptive and normative. Descriptive, for this principle corresponds to an evolution already recognised in international law and also in national law concerning the protection of future generations. This is particularly evident in law relating to the environment and human rights. Indeed, more and more legal provisions tend to protect the environment, biodiversity and we have entered into an era of ecological transition. Normative, because this principle is

designed to be the matrix of a law giving respect to future generations. It can become the cornerstone of a system of human rights open to protecting the future. Then, **the principle of the dignity of future generations** which justifies the adoption of a trans-generational reading of human rights **should be recognized.** Indeed, we now have to go further and to implement a transgenerational framework of legal rules in order to assure a safe environment and healthy life for our children and grandchildren. Nuclear technology has many particularities and raises transgenerational questions of responsibility from the very beginning to the end.

**In concrete words, we ask for the recognition of Human rights for future generations:**

- the right to live, means the right to be born without environmental conditioned birth defects or without genetic damages due to radioactive exposure before birth.
- the right to health means also, the right for future generations to live in an environment which is not contaminated by nuclear substances.
- the right to come and go means the right to enjoy every part of the Earth. This right is already infringed! Ghosts towns are already the topical example that this freedom to come and go can be vanished for ever!
- the right to food means the right to eat healthy and non contaminated food.
- the right to water means the right to drink a non contaminated water.
CONCLUSION

The imperative of respect of Future Generations has become legally necessary because of the acquisition of unprecedented power over Humankind’s future. Nuclear technologies and nuclear weapons affect either the intrinsically human characteristics of current and future generations, and jeopardize their essential conditions for life on Earth. In other words, the fact of placing the future under our power requires a new utopia (in the full sense of the term) enabling future horizons to remain open. This utopia has to be enforced by international law!

Our duty as representant of this global community judge Weeramantry was referring at is to ask for a recognition in international law of the need to protect future generations against the transgenerational threats resulting from the use of nuclear weapons, hence our call for:

1. End the use of nuclear weapons in times of peace and war
2. End of the use of nuclear technology in the world
3. Achieve disarmament and total ban of nuclear weapons

The following NGOs’ have specific requests:

- **ICAN (International Campaign to Abolish Nuclear Weapons) France**, which is a French section of ICAN International, calls for States, international organizations, civil society organizations (NGOs) and all stakeholders to:
  - Recognize that any use of nuclear weapons would have catastrophic humanitarian and environmental consequences
  - Recognize that there is a humanitarian imperative to prohibit nuclear weapons, even for states that do not possess nuclear weapons.
  - Recognize that nuclear-weapon States have an obligation to eliminate them completely
  - Acting Immediately to Support a Multilateral Process of Negotiating a Nuclear Weapons Treaty

- **The International Physicians for the Prevention of Nuclear War (IPPNW)** which is a non-partisan federation of national medical organizations in 64 countries, ask for the recognition of transgenerational and transpatial damages tied with radioactive
exposures (from either nuclear technologies or the use of nuclear arms). They also advocate for the elimination of nuclear weapons from the world’s arsenals.”

- **IALANA** is the International Association of Lawyers Against Nuclear Arms and ask for the elimination of nuclear arms, the strengthening of international law and the development of effective mechanisms for the peaceful settlement of international disputes.

IALANA also contributes to the negotiations on the treaty to prohibit nuclear weapons: in a statement dating back March 2017, they affirm the illegality of use of nuclear weapons under customary international law. Because of the very nature of nuclear weapons, their potential use is a threat to human rights, a disrespect of international environmental and humanitarian law and must be recognized as such.

IALANA also suggests that the “use of nuclear weapons would constitute war crimes under the Rome Statute of the International Criminal Court, and, in many circumstances, crimes against humanity as well.”

One of the proposals of IALANA on the writing of a ban treaty is stated as follows:

“Each State Party to this Treaty undertakes never under any circumstances:

a. To use nuclear weapons;
b. To threaten to use nuclear weapons;
c. To engage in any activity related to any military or other preparations to use nuclear weapons;
d. To encourage or authorize, directly or indirectly, use and threatened use of nuclear weapons;
e. To design, develop, test, produce, otherwise acquire, possess, deploy, stockpile, maintain, retain, or transfer nuclear weapons;
f. To develop, test, produce, otherwise acquire, possess, stockpile, retain, transfer or use [proscribed nuclear material];
g. To design, develop, test, produce, otherwise acquire, possess, deploy, stockpile, maintain, retain, or transfer nuclear weapons delivery vehicles;
h. To conduct nuclear weapons research, with the exception of research related to nuclear disarmament and to assistance to victims of nuclear weapons;
i. To permit the stationing or transit of nuclear weapons in their territory including their airspace and waters, including by ships or aircraft carrying nuclear weapons;
j. To assist, encourage, induce or permit, in any way, directly or indirectly, anyone to engage in any activity prohibited under this Treaty;
k. To finance anyone to engage in any activity prohibited under this Treaty.”
IALANA is hence calling for a comprehensive treaty prohibiting any use or threat of nuclear weapons or technology.

- **End Ecocide on Earth (EEE)** “is a grass-roots citizens movement focused on the recognition and addition of the crime of ecocide to international criminal law as the fifth crime prosecutable before the International Criminal Court (ICC), alongside genocide, war crimes, crimes against humanity and the crime of aggression”. Their aim is to inscribe the very concept of ecocide in International Law understood as activities “causing serious damage or destroying the environment, so as to significantly and durably alter the global commons or ecosystem services upon which certain human groups rely”. They ask for the reform of the Rome Statute in order to widen the jurisdiction of the International Criminal Court on ECOCIDE. Thanks to new concepts in law such as the *ecocide*, civil society and the NGO’s are strongly asking for the respect of Human and Nature rights in the long run. If the law remains unclear on the need to respect the right to live in a healthy environment, we will lead humanity to a “Tragedy of Human rights” or the Tragedy of Nature’s Rights.

- **Parliamentarians for Nuclear Non-Proliferation and Nuclear Disarmament (PNND)** is a non-partisan forum, bringing together parliamentarians at national and international levels, to exchange resources and information, to develop cooperation and disarmament-related strategies, and to participate for Initiatives and events about non-proliferation and nuclear disarmament.
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