Good Faith, International Law, and Elimination of Nuclear Weapons: Keynote Address

Judge Mohammed Bedjaoui[*]

translated from the French by Linda Asher and Peter Weiss[†]

> *It seems almost inconceivable that nuclear weapons can be used—at least as a means of "rational" warfare.* ***Their military value may be smaller*** *than ever since it has been shown so clearly that they present no solution to the conflicts of today. But on the other hand, the actual risk of their use, by miscalculation, accident or desperation in a regional conflict, is probably greater today than in quite some time.*
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> *– Henrik Salander*[1]

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The International Court of Justice was asked to respond to certain legal questions concerning nuclear weapons, acting upon two separate requests to the Court for advisory opinions: one from the World Health Organization, on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, and the other from the General Assembly of the United Nations, on the *Legality of the Threat or Use of Nuclear Weapons*.

The Court ruled first, on July 8, 1996, on the WHO request for advice. I will not here go back over the legal reasons that led the Court to conclude that it could not give the advice requested.

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

I. The Content of the Advisory Opinion

1. The law applicable to armed conflicts

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

This body of law consists fundamentally of what is usually called the "*Law of the Hague"* and the "*Law of Geneva*," those two branches of law applicable to armed conflict having developed such close connections that they are regarded as having gradually built a single complex system, as demonstrated by the Additional Protocols of 1977 to the Geneva Conventions of 12 August 1949. This is to say that the Court now stood at the very heart of ***one of the most sensitive areas of contemporary international law, as it bears on some of the most essential values of humankind.***

A. The cardinal principles of humanitarian law

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

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

In its opinion, the Court mentioned the point, but declared itself not obliged to rule on it, as the question of *the nature* of humanitarian law applicable to nuclear weapons did not enter into the framework of the General Assembly's request. Nonetheless the Court did expressly consider those

fundamental principles—and I quote—as "*intransgressible principles of international customary law."* This was a step forward in accepting them as *jus cogens*.

B. Applicability of these principles to nuclear weapons

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

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

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

2. The Court's uncertainty

Nonetheless, the Court did consider that **it did not have at its disposal adequate elements to permit concluding with certainty that such a use would necessarily be contrary in all circumstances to the principles and rules of the law applicable in armed conflict**. The Court added that it should not meanwhile lose sight of the fundamental right of survival of all states and thus the right of a state to resort to legitimate self-defense when that survival is at stake; and neither could the Court ignore the practice known as the "policy of deterrence" to which a sizable segment of the international community has adhered for years. Consequently, in view of the present state of international law considered in its entirety, as examined by the Court, and of the elements of fact at its disposal (in particular what is unknown about the existence of supposedly "clean" nuclear weapons), the Court had to find that **it could not reach a definitive conclusion on the legality or illegality of the use of nuclear weapons by a state in an extreme circumstance of legitimate defense in which its very survival would be at stake**.

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

Having reached this conclusion, the Court insisted on observing that in the end, international law, and with it the stability of the international order it is intended to govern, are bound to suffer from differences of view with regard to the legal status of weapons as deadly as nuclear weapon weapons. Therefore it judged that there was reason to end this state of affairs: ***the complete nuclear disarmament promised for so long seemed to the Court to be the best means of reaching this outcome.*** In these circumstances the Court emphasized the great importance of the consecration, in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, of a good-faith obligation to negotiate nuclear disarmament. And the Court recalled that this double obligation—to negotiate in

good faith and to arrive at nuclear disarmament in all its aspects—formally concerns the 182 states party to the Non-Proliferation Treaty, that is to say the very large majority of the international community, and requires the cooperation of all states.

4. A useful "caveat"

At the end of its Advisory Opinion, the Court made clear that its response to the question posed by the General Assembly rested upon the full array of the legal grounds set forth, which should be read in relation to one another. In effect the Court's opinion constitutes a totality, from which passages ought not to be extracted, especially not in isolation from their context.

5. The obstacles which the Court had to confront

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

(1) would permit the threat or use of nuclear weapons; or on the contrary,

(2) would prohibit such threat and such use.

Beyond the need for the Court to deal with these obstacles, each of its members was also confronted with a very serious problem of conscience, since none of them failed to recognize the stakes involved—the very survival of humankind. Witness the adoption by a 7-to-7 vote, with the President's deciding vote, on the second clause of paragraph (2)E of the dispositif. This conclusion of the Court, very synthesized and marked by its balanced structure, reads:

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

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

In the second clause of point (2) E, the Court indicates that it reached a point in its reasoning beyond which it could only go at the risk of failing before the two obstacles I have cited—that is, adopting a conclusion that would go beyond what it deemed legitimate. This is ***the Court's position as a judicial body.*** A number of judges have taken this position, but probably each of them with his or her own approach and interpretation. It is clear that the distribution of the votes, as many in favor

as against point (2) E, followed no geographic or ideological cleavage, which is a sign of the independent thinking of the members of the Court, I am pleased to emphasize.

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

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

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

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

6. Pronounce law and risk falling into *non-liquet*?

The Court was sharply reproached, by a segment of the doctrine, for its inability to say whether "*the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.*" It is true that it is difficult to give a "non-opinion", or an empty opinion, to the General Assembly of the United Nations which was expecting to be enlightened by the Court on what policy to follow, especially in such a vital domain.

But a few points need to be clarified:

(a) First of all, we should not fear to acknowledge that international law is still relatively little developed and that it has gaps in it. To postulate otherwise would be to leap ahead in time.

It is also the reason why a judge has in principle the power to refuse to rule.

This situation is not peculiar to international law. Any juridical system is formed of a multitude of norms and, from this very fact, is by nature discontinuous. To avoid such an "unstitching," Paul Reuter tells us to draw on certain principles, like that of *good faith*, which can encompass a broad expression and expansion and which allow the legal system under consideration to adapt more readily to new problems as they arise.

(b) According to certain writers, the incomplete normativity of international law is balanced by a de facto plenitude, through the existence of rules whose function is to fill lacunae. These compensating rules are provided by the *general principles of law* and by *equity.* Therefore there should be no room for the *non-liquet.*

(c) **But did the Court pronounce a *non-liquet*? In truth, it is the unfortunate interference of "elements of fact" in its reasoning (namely, the technological advances which might make possible the manufacture of "clean" bombs) which unduly troubled certain minds**

and which stopped the Court on the threshold of a ruling on the prohibition of nuclear weapons. This prohibition already existed in the first clause of paragraph E, and besides imposed itself on the Court in view of the "unique characteristics" of nuclear weapons whose explosion, as it said, "by its very nature" releases "powerful and prolonged" ionizing radiation, which would strike combatants as well as civilian populations, belligerent states as well as neutral states, present as well as future generations.

(d) "*Jura non novit curia?*", wonders Luigi Condorelli. The eminent professor does know, however, that the Court certainly knows the law quite well. It has analyzed it perfectly, and its fault may perhaps lie in having on this occasion delivered an Advisory Opinion which stopped at only implicitly condemning the use of nuclear weapons, rather than ruling more overtly on its prohibition.[2]

Let us say that the Court's manner of proceeding arose from, *in this instance, an excessively cautious perception of its judicial policy.* Still, it has often displayed its capacity to go beyond its function of "stating the law" and has skillfully practiced "*normative replacement*". But we must acknowledge the unavoidable reality of the existence of this unfortunate and useless second clause of paragraph E, infiltrating as if by trespass a judgment whose whole philosophy rejects it.

Supposing then that this second clause made clear the existence of a gap in international law and brought on a situation resembling a non-liquet—*quod-non*, in my opinion—then it would be useful to ponder the observations of Judge Vereshchetin, who said

> the case in hand presents a good example of an instance where the absolute clarity of the Opinion would be "deceptive" and where, on the other hand, its partial "apparent indecision" may prove useful "as a guide to action".[3]

II. The Lessons to be Drawn from the Opinion

1. The Court has recognized the pertinence of the law of armed conflict, including humanitarian law, prohibiting the use of nuclear weapons

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

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

render the use of nuclear weapons completely illegal.

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

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

It is my concern for the realities that has led me to clearly assert, in the declaration I attached to the opinion, that nuclear weapons seem to me absolutely of a nature to cause indiscriminate victims among combatants and non-combatants alike, as well as unnecessary suffering among both categories. ***By its very nature the nuclear weapon, a blind weapon, therefore has a destabilizing effect on humanitarian law, the law of discrimination which regulates discernment in use of weapons. The existence of nuclear weapons is therefore a major challenge to the very existence of humanitarian law****,* not to mention their long-term harmful effects on the human environment, in respect to which the right to life can be exercised. Because of their indiscriminate effects, nuclear weapons constitute the negation of humanitarian law. ***Nuclear warfare and humanitarian law therefore appear to be mutually exclusive, the existence of the one automatically implying the non-existence of the other****.* And that remains true no matter how exceptional the situation confronting any eventual user of nuclear weapons.

I would add, especially, that any use of nuclear weapons, even in such a situation, would risk the survival of humanity, because of the inextricable link between terror and escalation in the use of such weapons.

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

> the use of nuclear weapons by a State in circumstances in which its survival is at stake risks in its turn endangering the survival of all mankind, precisely because of the inextricable link between terror and escalation in the use of such weapons. It would thus be quite foolhardy unhesitatingly to set the survival of a State above all other considerations, in particular above the survival of mankind itself.[4]

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

2. The Court recognized the non-pertinence of taking so-called "clean" nuclear weapons into account

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

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

The Court should not have credited such reports, in particular because it had not received any evidence to prove the existence of nuclear weapons that emit no radiation and have no prolonged effects in space and time. Per the definition of the nuclear weapon provided in paragraph 35, these would no longer be "nuclear" weapons but rather some new and wholly other type of classical or conventional weapon, lying beyond the "*nuclear threshold*." Weapons of a type releasing less heat or less blast could certainly be invented; they would still remain "nuclear" weapons so long as they retained their *fundamental characteristic of emitting ionizing radiation* which is particularly devastating in time and space. If technological progress should eliminate that characteristic, we would no longer be looking at a "*nuclear*" weapon.[5]

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

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

Let us read carefully paragraph 35 of the Court's Advisory Opinion; it is particularly instructive and revealing. On what type of weapons has the high international jurisdiction been asked to give its opinion? On "nuclear weapons, **as they exist today**," not on some other type of weapon of tomorrow. How are they characterized? By several elements including **"the phenomenon of radiation" which "is said to be peculiar to nuclear weapons**." Now, "ionizing radiation," which is the essential element characterizing these weapons, is "a powerful and prolonged radiation," with an especially long life ravaging the environment and compromising the survival of future generations. Hence the Court's conclusion, in the same paragraph: "The destructive power of nuclear weapons cannot be contained in either space or time." It is exclusively on these weapons, and not on some new type (about which, besides, we do not know whether it can lessen the duration in time and the dispersion in space of its devastating effects) that the Court has been asked to rule. In its reasoning, there could be no room for considering some possible "advances" which, in any case, would place us before weapons quite different from the nuclear arms of today. The impossibility of limiting their effects to military objectives alone necessarily places nuclear weapons in manifest contradiction with the principles and rules of the law of armed conflict and of humanitarian law, and cannot therefore do otherwise than make it a weapon prohibited under international law. Any possible or claimed advances in the conception of the weapon can have no effect on this situation. The Court could only take account of the nuclear weapon's "unique characteristics," which it very carefully specified, in particular "of their destructive capacity, their

capacity to cause untold human suffering, and their ability to cause damage to generations to come."[6] It was that weapon, and no other, that stood in judgment before the Court.

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

> The Court does not consider that, in giving an advisory opinion in the present case, it would necessarily have to write "scenarios," to study various types of nuclear weapons, and to evaluate highly complex and controversial technological, strategic, and scientific information.[7]

3. A "clean" bomb nonetheless polluting the atmosphere of the Court

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

I have the impression that this idea of a possible "advance" which would make the nuclear weapon a "clean" bomb has not totally vanished from the discourse of the Court, despite its repeated assertions. The Court has not completely cleansed its argumentation of this element that may perhaps have weighed on the minds of some of the judges. *Herein lies the whole problem of paragraph E of the dispositif. That is the Gordian knot of the whole business*. Unfortunately this problem of "clean weapons," or of "low yield" has left something in the atmosphere.

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

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

4. One possible reason for the intrusion of clause 2 of paragraph E into the Court's Opinion

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

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

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

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

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

There was some hesitation within the Court, not because it opposed such good-faith negotiation, but rather because that question had not been explicitly put to the Court in the request for an advisory opinion as formulated by the United Nations General Assembly, so that the Court risked declaring itself "*ultra petita."*[8]

The precious unanimity of the Court on the double obligation to negotiate and to conclude should not be eroded by the criticisms of the legal doctrine, which, however, should be answered, in order to strengthen this important declaration from the high jurisdiction, as I shall try to do below.

These are the main lessons to be drawn from the Advisory Opinion of 8 July 1996.

III. The Double Obligation: to Negotiate and to Bring to Conclusion

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

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

(b) Four decades ago international law articulated a conventional obligation to negotiate in good faith toward complete nuclear disarmament. Article VI of the 1968 Non-Proliferation Treaty mandates that obligation, but this stipulation merely crystallizes, that is to say codifies, what certainly already existed as a *customary obligation*—one whose constituent elements began to take shape starting in the earliest months of existence of the United Nations Organization. Well before 1968, actually, the path to this mandate was carefully paved by several

expressions of the conviction in the international community of the necessity for nuclear disarmament. In 1946 already, the ***very first resolution*** adopted by the General Assembly of the United Nations provided for the creation of a commission, one mandate of which was to present proposals with a view, *inter alia*, to "the elimination from national armaments of atomic weapons and all other major weapons adaptable to mass destruction."[9]

(c) The question of disarmament, which by the terms of Article 11 of the United Nations Charter enters into the field of competence of the General Assembly, has never since that time ceased to interest that organ. In a great number of its resolutions, the General Assembly has effectively reiterated the necessity for nuclear disarmament, as in 1954 when it determined

> that a further effort should be made to reach agreement on comprehensive and co-ordinated proposals to be embodied in a draft international disarmament convention providing for: … b) The total prohibition of the use and manufacture of nuclear weapons and weapons of mass destruction of every type, together with the conversion of existing stocks of nuclear weapons for peaceful purposes.[10]

(d) In 1965, the General Assembly called for the conclusion of a treaty intended to prevent the proliferation of nuclear weapons, and which "should be a step toward the realization of general and complete disarmament and, more particularly, nuclear disarmament."[11]

In a following resolution, the General Assembly reaffirmed "the paramount importance of disarmament for the contemporary world and the urgent need for the achievement of this goal," as well as the imperative to "exert further efforts towards reaching agreement on general and complete disarmament …."[12]

(e) The same conviction was also expressed outside the framework of the United Nations. Thus in 1963, three nuclear powers proclaimed

> as their principal aim the speediest possible achievement of an agreement on general and complete disarmament under strict international control in accordance with the objectives of the United Nations which would put an end to the armaments race and eliminate the incentive to the production and testing of all kinds of weapons, including nuclear weapons.[13]

(f) Not until 1968 was that determination enshrined in the operative portion of a treaty, in which today participation is nearly universal. Article VI of the Treaty on Non-Proliferation of Nuclear Weapons[14] in fact provides that

> Each of the Parties to the Treaty undertakes 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.[15]

(g) As was solemnly declared by the states possessing nuclear weapons, "the non-proliferation of nuclear weapons is not an end in itself but, rather, a means of achieving general and complete disarmament at a later stage."[16] Their commitment to good-faith negotiation on general and complete disarmament, including nuclear disarmament, was subsequently confirmed on

several occasions, as for instance in the Treaty of 11 February 1971[17] forbidding the emplacement of nuclear weapons or other weapons of mass destruction on "the Seabed and the Ocean Floor and in the Subsoil Thereof," and also in the Treaty on the Limitation of Anti-Ballistic Missile Systems signed on 26 May 1972.[18]

(h) The obligation outlined in Article VI of the NPT is to be analyzed as a *pactum de negociando*,[19] but one of a particular type—this for reasons both intrinsic and extrinsic. *In fact, both by its wording and by its nature as conventional counterpart* to another obligation, the obligation to negotiate in good faith stipulated here is shown to be *a true international obligation requiring its subjects to adopt a specifically determined conduct in the sense intended by the International Law Commission.*

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

(j) It is again worthwhile to point out that while, *de facto*, the states which are party to the negotiations on nuclear disarmament all belong to the narrow circle of states that possess nuclear weapons, all the states signatory to the NPT are *de jure* considered to be party to these negotiations.[20] In consequence, **any state that is party to the Treaty has the right to demand that the negotiations be conducted in good faith, and thus has the right to invoke, should it occur, any failure of the obligation laid out by Article VI.**

(k) Though not explicitly and specifically forbidden by international law, nuclear weapons are nonetheless, as we have shown, weapons whose effects are clearly contrary to certain prescriptions of that *corpus juris* of certain rules of humanitarian law. Thus the direct prohibition of the use of nuclear weapons as such lies in a kind of legal grey area: indeed, *that interdiction, practically speaking, no longer arises from the domain of* lex ferenda, *but does not yet emerge completely from that of* lex lata. In the end, international law, and with it the stability of the international order which it is tasked to govern, can only suffer from that uncertainty over the legal status of so fearsome a weapon. *It is therefore necessary to put an end to this regrettable legal vagueness, and the complete nuclear disarmament so long promised seems the best way to achieve this result.*

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

2. The obligation to negotiate nuclear disarmament in good faith: an obligation to adopt a prescribed conduct

International judges and arbitrators were very early called upon to define the legal meaning of an obligation to negotiate. Thus in the arbitral decision rendered on 4 March 1925 in the *Tacna-Arica (Chile/Peru) Case*, a case in which an agreement was to be negotiated to hold a plebiscite as prescribed by the 1883 Treaty of Ancona, the arbitrator declared that the negotiations were to be conducted in good faith by the parties.[21] He added that in the case before him, the obligation to negotiate was not violated by a party merely because it refused an agreement whose terms it did not judge acceptable; such a finding, he said, would also require a demonstration that the party was trying to prevent the conclusion of any reasonable agreement aimed at organizing the plebiscite.[22]

In the decision of 16 November 1957 in the case of *Lac Lanoux*, the arbitral tribunal recognized *the variety of undertakings by states with respect* to negotiation, and their scope, even as it ruled that

> the reality of the obligations thus undertaken is incontestable and sanctions can be applied in the event, for example, of an unjustified breaking off of the discussions, abnormal delays, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or interests, and, more generally, in cases of violation of the rules of good faith.[23]

The tribunal also gave some general indications as to the conditions that must surround a negotiation, noting that in order for it "to occur in a favorable climate, the Parties must consent to suspend, for the period of the negotiation, the full exercise of their rights".[24]

In its ruling of 20 February 1969 in the *North Sea Continental Shelf* case, the International Court of Justice did somewhat specify these conditions; it said that the parties

> are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.[25]

Following the Court, the Arbitral Tribunal of the Agreement on German External Debts also clarified the meaning of the obligation to negotiate. In its judgment rendered on 26 February 1972, the Tribunal said that

> both sides would make an effort, in good faith, to bring about a mutually satisfactory solution by way of a compromise, even if that meant the relinquishment of strongly held positions earlier taken…. Though … an agreement to negotiate does not necessarily imply an obligation to reach an agreement, it does imply that serious efforts toward that end will be made.[26]

In the operative part of its unanimous decision the Tribunal defined the obligation for parties to engage in negotiations as a commitment "to confer with a view to reaching an agreement"—and, here echoing the Court, it specifically stated that these negotiations

> shall be meaningful and not merely consist of a formal process of negotiations. Meaningful negotiations cannot be conducted if either party insists upon its own position without contemplating any modification of it.[27]

This rapid overview of the international jurisprudence shows us that judges and the arbitrators have seen in the obligations to negotiate in good faith submitted to their scrutiny an obligation with a relatively flexible content. Generally speaking, the obligation to negotiate in fact presents itself as an obligation prescribing to the interested states the adoption of a certain conduct in the course of negotiation but not commanding them to reach a determined result, for instance, bringing to conclusion the agreement which was the purpose of the negotiation.[28]

Referring back to Article VI of the NPT, such an obligation of conduct requires parties to that instrument to ***give meaning to*** the negotiations on nuclear disarmament; to ***reach a mutually satisfactory compromise,*** not insisting on their own position without envisaging any modification of it; to ***make serious*** **efforts** with the goal of ***reaching an agreement.*** The circumstances mentioned in the arbitral decision in the *Lac Lanoux* case could also serve as useful indicators for the good-faith conduct of negotiations in this area. Invoking a single one of these circumstances should suffice to engage the responsibility of one or several states party to the NPT for failure to fulfil the obligation to negotiate in good faith. Without denying the great technicality and complexity of the negotiations in process, the impression that emerges is that these negotiations are not progressing. There is even reason to fear that they are regressing. A large majority of the states party to the NPT could also complain of systematic refusals to take account of their proposals or their interests.

The criteria drawn from international jurisprudence could thus provide yardsticks for assessing the reality of the activation of the obligation of good-faith negotiation prescribed by Article VI of the NPT for, *prima facie*, that obligation can at a minimum, be analyzed as an obligation of conduct. But the legal effects of the Article VI obligation do not end there. As a more careful examination of that conventional obligation will show, the Article VI obligation actually has a legal scope much greater than a mere obligation of conduct. As the arbitral panel quite properly indicated in the *Lac Lanoux* case, the scope of the commitments undertaken by states on the occasion of a *pactum negociando*

> varies according to the way they are defined and according to the procedures intended for their execution.[29]

3. The obligation to negotiate nuclear disarmament in good faith: an obligation to adopt a certain conduct to achieve a certain result

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

When issues of border delimitation or debt recovery are involved the obligation of good-faith negotiation aims at leveling existing differences, at bringing about a system acceptable to the parties; it takes on a quite particular aspect when it concerns nuclear disarmament. ***In fact, here it has all the***

appearance of an obligation to negotiate in order to achieve a very precise result: nuclear disarmament. The objective of the negotiation is denuclearization, total nuclear disarmament of the states that are party to the negotiation. ***Nuclear disarmament is an objective on which a consensus has existed since 1945,*** as attested by the number and quality of legal instruments expressing the conviction of the international community as to the importance and necessity of general and complete disarmament, including in the nuclear realm. ***In itself, this objective can certainly be subject to compromise, but as a series of steps leading toward the final goal; in particular, the focus of negotiations is the schedule to follow for bringing to life the objective which is the purpose of the negotiation.***

The obligation to negotiate in good faith for nuclear disarmament can thus be analyzed both as a obligation to reach a result and as *a veritable obligation of conduct,* in the sense of Article 20 in the draft articles on the international responsibility of states elaborated by the International Law Commission. In the terms of the commentary on that provision, what distinguishes obligations termed "*of conduct"* or "*of means"* from obligations "*of result"* is not that the former

> do not have a particular object or result, but that their object or result must be achieved through action, conduct or means "specifically determined" by the international obligation itself, which is not true of international obligations "of result". This is the essential distinguishing criterion for characterizing an international obligation as an obligation "of conduct" or "of means". It is not sufficient, for example, for an obligation to provide, as does Article 33 of the Charter of the United Nations, that States shall settle their international disputes by "peaceful means", for it to be characterized forthwith as an obligation "of conduct" or "of means". In practice, as the same Article indicates, States remain free to choose the "peaceful means" which they consider most appropriate for settling the dispute between them.*[30]*

Also, in substance, in the spirit of the NPT negotiators, Article VI, which lays out the obligation to negotiate nuclear disarmament in good faith, was clearly conceived as ***the necessary counterpart to the commitment by the non-nuclear states not to manufacture or acquire nuclear weapons; it is without a doubt one of the essential elements of the "acceptable equilibrium of mutual responsibilities and obligations between nuclear powers and non-nuclear powers" which, according to the General Assembly, was to be established by the Nuclear Non-Proliferation Treaty which it called for in 1965. In 1995, at the time of the fifth Conference of Parties, which decided the extension of the NPT for an indefinite duration, the reciprocal nature of the said obligations was vigorously reaffirmed.***[31] ***Article VI should for this reason be considered an essential provision of the NPT, the breach of which could be considered "material" in terms of Article 60 of the Vienna Convention on the Law of Treaties***[32] ***and could entail the legal consequences thereto attached.***[33]

The states party to the NPT and especially the nuclear states have *the obligation to execute in good faith their obligation to negotiate nuclear disarmament in good faith.* The good-faith conduct of the negotiations by the nuclear states mandates, among other things, ***that they not betray the legitimate trust which the non-nuclear states could reasonably have invested in the hope that the promised negotiations would lead swiftly to an agreement on nuclear disarmament. But the progress made so far by states possessing nuclear weapons in commencing good-faith***

negotiations toward nuclear disarmament do not seem to reach the level of expectations of the countries without such weapons.

On the occasions of the Conferences of Parties organized every five years since the Treaty entered into force, the non-nuclear states have in fact regularly called attention to the absence of implementation of the obligation of good-faith negotiation called for by Article VI of the Treaty. The 1990 Conference of the Parties is symptomatic in this regard insofar as, in the absence of agreement, *no final declaration could be adopted, essentially because of the fact that the non-aligned states felt that the nuclear powers were making inadequate efforts toward disarmament.*

In its Resolution 984 (1995) of 11 April 1995, the Security Council made a point of "[r]eaffirming the need for all States Party to the Treaty on the Non-Proliferation of Nuclear Weapons to comply fully with all their obligations," and urged

> all States, as provided for in Article VI of the Treaty on Non-Proliferation of Nuclear Weapons, to pursue **negotiation in good faith on effective measures relating to nuclear disarmament and on a treaty on general and complete disarmament under strict and effective international control which remains a universal objective.**

The importance attached to the respect for reciprocal obligations stipulated in the NPT had been emphasized some days earlier by the United States government as follows:

> It is important that all Parties to the Treaty on the Non-Proliferation of Nuclear Weapons fulfill their obligations under the treaty. In that regard, consistent with generally recognized principles of international law, Parties to the Treaty on the Non-Proliferation of Nuclear Weapons must be in compliance with these undertakings in order to be eligible for any benefits of adherence to this treaty.[34]

Lastly, in its Final Document, the Conference of Parties to the Non-Proliferation Treaty, charged with reviewing the Treaty and the question of its extension, which was held from 17 April to 12 May 1995, declared *inter alia* that

> 3. Nuclear disarmament is substantially facilitated by the easing of international tension and the strengthening of trust between States which have prevailed following the end of the cold war. The undertakings with regard to nuclear disarmament as set out in the Treaty on the Non-Proliferation of Nuclear Weapons should thus be fulfilled with determination. In this regard, the nuclear-weapon States reaffirm their commitment, as stated in article VI, to pursue in good faith negotiations on effective measures relating to nuclear disarmament.
>
> 4. The achievement of the following measures is important in the full realization and effective implementation of article VI, including the programme of action as reflected below:
>
> (a) The completion by the Conference on Disarmament of the negotiations on a universal and internationally and effectively verifiable Comprehensive Nuclear-Test-Ban Treaty no later than 1996.

> Pending the entry into force of a Comprehensive Test-Ban Treaty, the nuclear-weapon States should exercise utmost restraint;
>
> (b) The immediate commencement and early conclusion of negotiations on a non-discriminatory and universally applicable convention banning the production of fissile material for nuclear weapons or other nuclear explosive devices, in accordance with the statement of the Special Coordinator of the Conference on Disarmament and the mandate contained therein;
>
> (c) The determined pursuit by the nuclear-weapon States of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goals of eliminating those weapons, and by all States of general and complete disarmament under strict and effective international control.[35]

IV. Significance of the Addition of "Good Faith" to Article VI of the NPT

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

"Good faith," writes a specialist in this matter,[36] "constitutes this chemical addition which makes it possible to go from a formal mechanical principle to a concrete, material principle which takes the measure of what is to be executed … or to be done."

Robert Kolb distinguishes "good faith" in the *subjective* or psychological sense from that in the *semi-objective* sense and finally from that in the *objective* sense, as a general principle of law. And he sees this last one from different aspects: Under its *objective side* it protects the legitimate confidence which a certain behavior has engendered in another person, whatever the real or intelligible intention of its author; under its *negative side* it protects certain aims anchored in the collective interest against excessive individualistic pretensions (the theory of abusive law); and finally, in a *subordinate manner*, good faith hinders a subject from profiting from unfair behavior which acts as a brake on reciprocity and equality.[37]

A. Good faith, the essential vector of law

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

> a fundamental principle which can be eradicated from international law at the price of the destruction of international law itself.[38]

Christian Tomashat, however, believes that good faith is an axiom and, as such, has an empirically unverifiable character:

> It stands to reason that good faith … cannot be observed by empirical methods. As an ever-present element of any legal system, it constitutes a rationalization of a certain way of correct conduct required of everyone.[39]

Oscar Schachter has this to say:

> Whether called legal or political, [the] meaning [of good faith] is essentially the same. A significant legal consequence of the "good faith" principle is that a party which committed itself in good faith to a course of conduct or to recognition of a legal situation would be estopped from acting inconsistently with its commitment or position when other parties have reasonably relied on it.[40]

Oscar Schachter is speaking here of the unilateral undertaking of the state. His point of view is very significant, for if a unilateral act gives rise to a legal effect in all good faith, *a fortiori* a treaty instrument must bind every contracting state. This is the well-known jurisprudence of the International Court of Justice in the *Nuclear Test Case* of 1974 and the case *Military and Para-Military Activities in and against Nicaragua.*[41]

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

In the wording of Article 26 of the Vienna Convention,

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

Article 31 of the same Convention provides, in its first paragraph, "A treaty shall be interpreted *in good faith* ...." This is the codification of an international law principle so fundamental that it counts among the basic principles mentioned in certain legal instruments such as the *Declaration on Friendly Relations* of October 24, 1970[42] or the *Final Act of the Helsinki Conference* of August 1, 1975.[43]

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

> One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith.[44]

The *Dictionnaire Salmon* specifies that good faith concerns

> the behavior which the parties are legally obliged to observe in the execution and interpretation of their rights and obligations, whatever their source, based on a general principle of law the obligatory force of which rests on a constant practice and jurisprudence.[45]

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

B. Good faith, the generator of legitimate expectations

Paul Reuter has said

> [A state] created a certain expectation in its partners, and … it was the non-fulfillment of that expectation that was incompatible with good faith.[46]

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

One can see straightaway that *good faith* and *confidence* have a close relationship. Good faith corresponds and responds to legitimate confidence.

C. Good faith in the light of trust

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

In its commentary on the draft of article 26 (then article 23), the International Law Commission has also recalled that good faith is a legal principle which plays an integral part in the rule "*Pacta sunt servanda"* and as a result of which an obligation based on a treaty undertaking must not be evaded by a strictly literal interpretation of its clauses.[47]

2. The specific significance of this addition to the NPT

In the particular context of the NPT, one can vigorously affirm that the principle of good faith illuminates the entirety of the negotiations called for by Article VI. In becoming parties to the NPT, all states have agreed *to execute in good faith their obligation to pursue in good faith negotiations concerning general and complete disarmament.* This means that these states must display good-faith behavior both in the conduct of the negotiations and while the negotiations last. ***They must therefore abstain from performing any act which would deprive the treaty on general and complete disarmament of its object and its aim. It is obvious that any act bolstering its nuclear arsenal by a state party to the NPT would be such an act.***

Let us examine these aspects more closely.

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

A. Significance of a negotiation qualified as "in good faith"

(a) The negotiations must be conducted with

> good faith as properly to be understood; sustained upkeep of the negotiation over a period appropriate to the circumstances; awareness

> of the interests of the other party; and a persevering quest for an acceptable compromise.[48]

(b) "The negotiations to be conducted … must be guided by the following principles:

- They shall be meaningful and not merely consist of a formal process of negotiations. Meaningful negotiations cannot be conducted if either party insists upon its own position without contemplating any modification of it.
- Both parties are under an obligation to act in such a way that the principles of the Agreement are applied in order to achieve a satisfactory and equitable result."[49]

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

> The obligation expressed in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons includes its fulfillment in accordance with the basic principle of good faith …. The importance of fulfilling the obligation expressed in Article VI … was also reaffirmed in the final document of the Review and Extension Conference of the parties to the Treaty on the Non-Proliferation of Nuclear Weapons, held from 17 April to 12 May 1995. In the view of the Court, it remains without any doubt an objective of vital importance to the whole international community today.[50]

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

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

C. Obligation to preserve the object and purpose of the NPT and to respect its integrity

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

(a) The obligation to refrain from acts incompatible with the object and purpose of the NPT: prohibition to disrupt the general scheme of the NPT; proscription of every initiative the effect of which would be to render impossible the conclusion of the contemplated disarmament treaty;

(b) The obligation to refrain from enacting, at the national level, laws and rules incompatible with the purpose of the treaty;

(c) The obligation to refrain from concluding an agreement manifestly incompatible with the purpose of the treaty;

(d) The obligation to respect the integrity of the treaty; a specialist on the question of good faith in international law has rightly written the following on this subject:

> a treaty must be considered executory in all its provisions, whether they are favorable or unfavorable to the contracting party. Good faith prohibits selectivity according to the interests of the moment.[51]

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

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

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

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

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

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

Robert Kolb writes that the negotiations must take place with a **minimum of "fair dealing"**. The International Law Commission has stated:

> The Commission's choice … had not wished to deprive States of their freedom of action. During negotiations each of the parties expected a minimum of fair dealing on the part of the other. A State remained free to break off negotiations; only acts of bad faith were excluded.[52]

And Robert Kolb adds:

> The interpretation of what good faith requires in this matter must reflect this: it will retain only the irreducible minimum which, according to the nature, the subjects and the object of the negotiation, emerges as the indispensable condition for its reasonable progress.[53]

E. General duty to cooperate in good faith

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

Virally and Böckstiegel said this in a wholly different context, but it is even more valid for disarmament:

> the parties … have to work in good faith to resolve any difficulty which may arise in implementing the agreements which bind them. As it was already stressed, such an obligation is a general principle of international law, codified in the Vienna Convention and applicable to every treaty.[54]

The case *Interpretation of the Agreement on March 25, 1951 between the World Health Organization and Egypt* gives an interesting overview of the content of the obligation to cooperate. The duty to cooperate in good faith prescribes

(a) that every unilateral action be avoided: The World Health Organization and Egypt must consult with each other in good faith in order to arrive at agreement over the modalities of transfer;[55]

(b) that every precipitous action is impossible: the party which desires transfer must give to the other reasonable notice according to the circumstances.[56]

F. General obligation of information and communication

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

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

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

G. Obligation to compromise

The NPT is a "*pactum de negociando*." But,

> [A] *pactum de negociando* is also not without legal consequences. It means that both sides would make an effort, in good faith, to bring about a mutually satisfactory solution by way of a compromise, even if that meant the relinquishment of strongly held positions earlier taken. It implies a willingness … to meet the other side part way.[57]

H. Prohibition of abuse of process

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

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

I. Unjustified termination of good-faith negotiations

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

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

V. Building Confidence

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

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

First elementary law:

Opacity breeds opacity

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

Let us approach these complex matters with a few simple ideas. It is clear that the nuclear arms policies of states are among those that, by nature and by definition, require secrecy. The opacity of activities connected to nuclear weapons is an essential element of the nuclear age.

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

Second elementary law:

Opacity breeds arms racing

Arms racing is the obvious manifestation of the law of opacity, feeding on the fear of the Other. States tend constantly toward "*ever more and ever better*," drawing them into exhausting and costly escalation.

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

Third elementary law:

In the end, transparency generates transparency

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

The opposite of opacity in nuclear activities—*transparency and openness*— is likely, if the terrain is favorable to a "*break in the vicious circle of opacity*," to bring about similar behavior by other states. Of course, this does not have the rigor, and the automatic nature of a law; transparency by one party can be met by concealment by the other. But this negative behavior only "pays off" over the short term, for concealment by the one will snuff out transparency in the other as soon as the latter notices the negative attitude of his partner. There is reason to think that, insofar as it exists, transparency can end by generating a similar behavior.

This idea does not spring from some irresponsible, sweet naiveté. But it is clear that transparency cannot "prosper" unless it is fed by *converging wills*. In other words, transparency

cannot survive and grow strong except in conformity with a basic and highly comprehensible law of *strict reciprocity*.

Fourth elementary law:

The tyranny of the "psychological factor"

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

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

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

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

Therefore, it is crucial to reduce subjectivity.

Fifth elementary law:

Reduce subjectivity to increase objectivity

To this end, the international community is working to create "*confidence-building measures*" (CBMs). As we know, the notion of "*confidence and security-building measures*" was broached in 1984-1986 at the Stockholm Conference. It has been developed more deeply over time by the OSCE.

CBMs are generally defined as being

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

More thoroughly stated:

> the primary goal of confidence-building measures is to reduce the risk of arms conflict by building trust and reducing misperceptions and miscalculations in international relations, thereby contributing to international peace and security.[58]

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

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

> The system of confidence- and security-building measures in OSCE now constitutes a stable and effective foundation for a culture of cooperation, transparency, and predictability as regards military-political matters for the 55 States Members of the Organization.[59]

Sixth elementary law:

Support verification

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

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

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

The panorama of various experiments in disarmament certainly shows the range of verification possibilities that states have conventionally accepted. For instance, in the framework of the 1959 Washington Treaty on the Antarctic, states have an absolute obligation to "denounce" any state, whether or not party to the Treaty, that fails to respect the denuclearization and demilitarization of that region. Another example is the *Club of London (Nuclear Suppliers Group)* created in 1975, which brings together all the exporters of technologies considered sensitive, for better cooperation among themselves and better control of the final destination of their products. The Helsinki treaty of 24 March 1992, called the "Open Skies" treaty, authorizes aerial overflight of states for purposes of verification. But clearly, such an option would in fact only be available to the large powers that have the sophisticated technologies to carry out such overflights.

We may also remark that at the level of the IAEA, the main virtue of a diplomatic instrument known as the "Additional Protocol," to which the nuclear powers seek ratification from states not having nuclear weapons, resides in the fact that this text sets out a very heavy and detailed arsenal of measures meant to obtain an exceptionally rigorous and thorough verification of a state's nuclear activities.

In this very sensitive area, we should also cite the "transparency measures" listed in Article 7 of the Ottawa Convention of 4 December 1997 on the prohibition of anti-personnel mines. The

member states must, when they have finished destroying these devices, not only send reports to the Secretary-General of the United Nations, but also cooperate with any on-site monitoring by "fact-finding missions" carried out at the request of either the suspected state or the Assembly of States Party to the Convention.

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

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

> Each Party undertakes not to release to the public the information provided pursuant to the agreement except with the express consent of the Party that provided such information.[60]

Seventh elementary law:

The legal status of CBMs between necessary rigidity and desirable flexibility

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

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

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

> the legal effect to be attributed to conduct exhibited during negotiations depends on the circumstances in which these actions take place.[61]

Indeed, it is in order to *protect confidentiality* that the International Court of Justice has often ruled that the proposals a state may make in the course of negotiations cannot bind it definitively, especially when those negotiations have not come to a conclusion.[62]

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

> The building of confidence is a dynamic process, and a gradual step-by-step approach.[63]

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

ENDNOTES

[1] "Special Comment," in "What Next for the NPT?" *Disarmament Forum* (2000, no. 1) p. 4.
[2] In his declaration, Judge Vereshchetin makes clear that in his opinion "the Court has clearly shown that the edifice of the total prohibition on the threat or use of nuclear weapons is being constructed and a great deal has already been achieved." *ICJ Reports* 1996, p. 281.
[3] *Id*. In agreeing with this, Judge Vereshchetin found himself in the excellent company of Sir Hersch Lauterpacht, whom he cites, and who had stated that the "apparent indecision, which leaves room for discretion on the part of the organ which requested the Opinion, may … be preferable to a deceptive clarity which fails to give an indication of the inherent complexities of the issue." (Lauterpacht, Hersch: *The Development of International Law by the International Court of Justice*, reprint, 1982, p. 152). See also Weil, Prosper: " 'The Court cannot conclude definitively…' Non liquet revisited," in "Essays on International Law in Honour of Professor Louis Henkin," Columbia Journal of Transnational Law, 1997, vol. 36, pp. 109-119, and "Ecrits de droit international," Paris, P.U.F., pp. 141-150.
[4] Declaration of President Bedjaoui, *ICJ Reports*, 1996, p. 273, ¶ 22.
[5] *Cf. contra*, Coussirat-Coustère, Vincent, "Armes nucléaires et droit international," *Annuaire français de droit international*, 1996, pp. 337-356.
[6] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *ICJ Reports*, 1996 (hereafter "Advisory Opinion"), p. 244, ¶ 36.
[7] Advisory Opinion, p. 273, ¶ 15.
[8] Two members of the Court were concerned about this problem and expressed their doubts in their respective opinions, without, however, breaking the unanimity when this paragraph came to a vote.
[9] Resolution 1(1), 24 January 1946, adopted unanimously.
[10] Resolution 808A (IX), 4 November 1954, adopted unanimously.
[11] Resolution 2028 (XX), 18 November 1968, "Non-Proliferation of nuclear weapons," adopted by a vote of 93 for, 0 against and 5 abstentions (Cuba, France, Guinea, Pakistan, Rumania).
[12] Resolution 2030 (XX), 29 November 1965, "Question of convening a worldwide disarmament conference," adopted by 112 vote for, 0 against, one abstention (France). See also Resolution 2031 (XX), 3 December 1965, "Question of general and complete disarmament," adopted by 102 votes for, 0 against, with 6 abstentions (Albania, Algeria, France, Guinea, Mali, Tanzania.)
[13] Preamble of the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater, signed in Moscow 5 August 1963 by the Soviet Union, the United Kingdom and the United States.
[14] Open for signing as of 1 July 1968 and in force as of 5 March 1970. *United Nations Treaty Series*, vol. 729, p.161.
[15] In the preamble to the Treaty, the Parties declare "their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament."
[16] Preamble to Protocols I and II of the Treaty for the Prohibition of Nuclear Weapons in Latin American and the Caribbean, signed in Mexico 14 February 1967. By virtue of Protocol I, the United States, France, Great Britain and the Netherlands undertook to respect the conditions stated in the treaty; by virtue of Protocol II, all nuclear weapon states undertook to recognize the denuclearized status of Latin America

[17] See its preamble in which the states party declare themselves "Convinced that this Treaty constitutes a step towards a treaty on general and complete disarmament under strict and effective international control, and determined to continue negotiations to this end."
[18] In the preamble of this treaty the United States and the Soviet Union state that they are "Mindful of their obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons" and declare "their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to take effective measures toward reductions in strategic arms, nuclear disarmament, and general and complete disarmament."
[19] As a general matter, a *pactum de negociando* can be understood "as a prior undertaking by which one or more states agree to enter into negotiations with a view to reaching an agreement concerning a precise problem". Zoller, Elisabeth, *La bonne foi en droit international public*, Paris, Pedone 1977, p. 59.
[20] In practice, those actually obliged to negotiate nuclear disarmament in good faith seem to represent only a minuscule fraction of the states subject to the obligations laid out under Article VI of the NPT.
[21] *Reports of International Arbitral Awards*, volume II, p. 929.
[22] "In order to justify either Party in claiming to be discharged from performance, something more must appear than the failure of particular negotiations or the failure to ratify particular protocols. There must be found an intent to frustrate the carrying out of the provisions of Article 3 with respect to the plebiscite; that is, not simply the refusal of a particular agreement proposed thereunder, because of its terms, but the purpose to prevent any reasonable agreement for a plebiscite." *Id*., pp. 929-930.
[23] *Reports of International Arbitral Awards*, volume XII, pp. 306-307.
[24] *Id*., p. 311.
[25] *North Sea Continental Shelf* (Federal Republic of Germany/Denmark), Judgment of 20 February 1969, *ICJ Reports*, p. 47, ¶ 85(a).
[26] *Case concerning the agreement on German external debt: Claims arising out of decisions of the Mixed Graeco-German Arbitral Tribunal set up under Article 304 in Part X of the Treaty of Versailles (between Greece and the Federal Republic of Germany)*, *Reports of International Arbitral Awards*, vol. XIX, pp. 56-57.
[27] *Id*., p. 64.
[28] According to Paul Reuter, the minimum content of the obligation to negotiate requires that states undertake to open negotiations and conduct themselves as negotiators; concerning this undertaking to conduct themselves as negotiators, he states: "It is unanimously known that this is not an obligation to reach a result, but an obligation of conduct: negotiators must behave in a certain manner, discounting the results of the negotiations; this obligation cannot be defined in a rigid manner, but is rather the object of somewhat flexible standards. The dominant principle is that of good faith; negotiators must refrain from certain types of behavior because such behavior is incompatible with an honest intention to negotiate." Paul Reuter, "De l'obligation de négocier," Communicazioni e studi, Milano, Giuffre, 1975, pp. 717-718.
[29] *Reports of International Arbitral Awards*, vol. XII, pp. 306-307.
[30] Commentary on article 20 adopted by the Commission, *Yearbook of the International Law Commission 1977*, vol. II, part two, pp. 13-14, ¶ 8.
[31] See for instance the speech of the representative of Iran in the context of the two advisory opinions; according to him: "It needs to be clarified, however, that the extension decision was a part

of a package of three inter-linked compromise decisions. The other two decisions were: 'Strengthening the Review Process for the Treaty', which provides for a greater measure of accountability by all parties, in particular by the nuclear powers, and secondly, 'Principles and Objectives for Nuclear Non-Proliferation and Disarmament', which reiterates 'the ultimate goal of the complete elimination of nuclear weapons and a treaty on general and complete disarmament'." CR 95/26, p. 26.

[32] According to its ¶ 3, a material breach of a treaty consists, *inter alia*, in "the violation of a provision essential to the accomplishment of the object or purpose of the treaty."

[33] See ¶ 2 of Article 60.

[34] "Statement issued on 5 April 1995 by the Honourable Warren Christopher, Secretary of State, regarding a declaration by the President on security assurances for non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, " UN Doc. A/50/153, S/1995/263, 6 April 1995.

[35] 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons**,** Decision 2: Principles and Objectives for Nuclear Non-Proliferation and Disarmament, NPT/CONF.1995/32 (Part I).

[36] Robert Kolb, *La bonne foi en droit international public: Contribution à l'étude des principles généraux du droit*, préface Georges Abi-Saab, Publications de l'Institut universitaire des hautes études internationales, Geneva and Paris, PUF, 2000 (756 pages), p. 588. This particularly well-researched work has become a classic on good faith. *Cf*. also Elisabeth Zoller, *La bonne foi en droit international public,* published in Paris 1977 and republished and completed in 1994 under the title "La bonne foi" in the collection *Travaux de l'Association Henri Capitant*, Paris, vol. 43. And finally see R. Yakemtchouk, *La bonne foi dans la conduite internationale des Etats*, 2002.

[37] Robert Kolb, *op. cit*., pp. 112-113.

[38] Cited by Robert Kolb, *op. cit*.

[39] Christian Tomuschat, "Obligations arising for States without or against their will," *Recueil des courts de l'Académie de droit international*, 1993-IV, vol. 241, p. 322.

[40] Oscar Schachter, "Non-conventional concerted acts," in Mohammed Bedjaoui (ed.), *International Law: Achievements and Prospects*, Paris, UNESCO, 1991, pp. 267-268.

[41] *Cf*. for instance *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility* (Nicaragua v. United States), *ICJ Reports* 1984, p. 418.

[42] Resolution 2625 (XXV): "Every State has the duty to fulfill in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law."

[43] In effect, one of the basic principles mentioned in this document is the principle of good-faith execution of obligations assumed under international law.

[44] *Nuclear Tests* (Australia v France), Judgment of 20 December 1974, *ICJ Reports* 1974, p. 268, ¶ 46.

[45] *Dictionnaire Salmon*, p. 134.

[46] *Yearbook of the International Law Commission*, 1965, vol. 1, p. 91, ¶ 41.

[47] *Yearbook of the International Law Commission*, 1966, vol. II, pp. 210-211.

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

[49] *Case concerning the agreement on German external debt, op. cit.,* p. 64. This echoes the formulas used by the International Court of Justice in the *North Sea Continental Shelf* case (*ICJ Reports* 1969, p. 47) and the *Gulf of Maine* case (*ICJ Reports* 1984, p. 299).

[50] Advisory Opinion, pp. 264-265, ¶¶ 102-103.
[51] Robert Kolb, *op. cit.*, p. 295.
[52] Vienna Conference on the Law of Treaties, Special Rapporteur Humphrey Waldock, first session, p. 104, ¶ 25.
[53] Robert Kolb, *op. cit*., pp. 201-202.
[54] Case A.15, *Iran v. United States*, August 20, 1986, Iran/US Claims Tribunal Reports, vol. 12, p. 61 (cited by Robert Kolb, *op. cit.*).
[55] *ICJ Reports*, 1980, p. 95.
[56] *ICJ Reports*, 1980, p. 96.
[57] *Case concerning the agreement on German external debt, op. cit.*, p. 56.
[58] Working Paper submitted by Greece on behalf of the European Union, Disarmament Commission, 2003, Substantive Session, A/CN.10/2003/WG.II/WP.2, 4 April 2003.
[59] *Id*., ¶ 5
[60] Agreement on Confidence-Building Measures Related to Systems to Counter Ballistic Missiles other than Strategic Missiles, September 1997, Article VII.
[61] Mosler, H., *General Course on International Public Law*, *Recueil des Cours of the Academy of International Law*, 1974-IV, vol. 140, p.111.
[62] *Cf. Nottebohm Case*, *ICJ Reports* 1955, p. 20; *Minquiers and Ecrehous Case*, *ICJ Reports* 1953, p. 71; *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, ICJ Reports* 1994, pp. 125-126.
[63] Working Paper, *op. cit.*, fn. 57, ¶ 19.