

**Address from Mohammed Bedjaoui, former President  
of the International Court of Justice and Foreign  
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**“Conference on Trident and International Law”**

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**The Era of the Ultimate Weapon or**

**"the greatest level of savagery"**

**(Albert Camus)**

**I. Characteristics of Nuclear Weapons**

**1.** The arrival of nuclear weapons has radically changed the human condition and destiny of man. A nuclear weapon has a specific nature and unique characteristics, giving it unprecedented destructive power. After its use in Hiroshima and Nagasaki, Albert Camus commented : *“Our technological civilization has just reached its greatest level of savagery.”*

**2.** The destructive power of nuclear weapons is insane. The 1987 report from the commission chaired by Gro Brundtland, former Prime Minister from Norway, *“Our Common Future”* said that the power of a single thermonuclear bomb at 20 megatons is bigger than that of all explosives used during wars which pierced the history of humankind.

**3.** The International Court of Justice noted that humanity is in the presence of weapons of *“A catastrophic nature”* whose destructive power *“cannot be contained in either space or time... These weapons have the potential to destroy all civilization and the entire ecosystem of the planet.”* They lead humanity into a “nuclear winter” with casualties to present and future civilian populations . The nature of these weapons of mass destruction is such that it is impossible to confine their destructive impact in space and time to only military targets. Future generations would not be spared. The explosion is accompanied by instantaneous radiation and radioactive fallout. This is incremented by the ionizing

radiation to both human beings and the environment. The "period" (necessary to expend the harmful effects) of one of the byproducts of a nuclear explosion, plutonium 239, is over 20,000 years, which speaks volumes about the suffering future generations may still endure.

4. Such "special nature" of nuclear weapons is not devoid of legal consequences.

a) First the principle of "anything not prohibited is allowed" cannot possibly be so when it comes to a weapon of such nature and it would be better to say "anything that is not prohibited, is not necessarily and automatically allowed. ";

b) Then, more specifically, under the law of armed conflict and humanitarian law, i.e. jus in bello, the specific nature of nuclear weapons plays a key role when referring to the application of the principle of distinction between civilians and combatants, and the principle of limiting the choice of means used against the enemy, the principles of necessity and proportionality and finally the "Martens clause".

c) In addition, and because of radiation alia, the use of nuclear weapons does not respect the basic distinction between warring states and neutral countries. The fifth Hague Convention of 1907 stipulates in Article 1 that "the territory of neutral powers is inviolable", that the use of nuclear weapons can not ensure.

***It is by taking into consideration these two truly general and paramount principles, that early humanitarian law has logically banned certain weapons, since on the one hand they confused in the same tragic fate, combatant and civilians, and on the other hand they cause unnecessary suffering to combatants.***

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

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

## **II. Nuclear Weapons and International Court of Justice**

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

### **1. The Content of the Advisory Opinion**

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 international humanitarian law applicable in armed conflict.

Nonetheless, the Court did consider that *it did not have at its disposal adequate elements to permit concluding with certainty that such a use would necessarily be contrary in all circumstances to the principles and rules of the law applicable in armed conflict.* The Court had to find that *it could not reach a definitive conclusion on the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of legitimate defense in which its very survival would be at stake.*

***The only way out of the uncertainty would be the obligation to negotiate in good faith and bring nuclear disarmament to actuality***

Having reached this conclusion, the Court judged that there was reason to end this state of affairs: ***the complete nuclear disarmament promised for so long seems [[to the Court]] to be the best means of reaching this outcome.*** In these

circumstances the Court emphasized the great importance of the consecration, in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, of a good-faith obligation to negotiate nuclear disarmament.

## ***2. The lessons to be drawn from the opinion***

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

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

***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.***

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”.***

**C.** *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.*

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

*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. Article VI should for this reason be considered an essential provision of the NPT, the violation of which could be considered “substantial” in terms of Article 60 of the Vienna Convention on the law of Treaties and could entail the legal consequences thereunto attached.*

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

#### ***A. 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.

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

**i)** The negotiations must be conducted with

*“good faith as properly to be understood; sustained upkeep of the negotiation over a period appropriate to the circumstances; awareness of the interests of the other party; and a persevering quest for an acceptable compromise.”*

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

*– They should be meaningful and not merely consist of a formal process of negotiations. Meaningful negotiations could not be conducted if either party insisted upon its own position without contemplating any modification of it.*

*– Both parties were under an obligation to act in such a way that the principles of the agreement are applied in order to achieve a satisfactory and equitable result.”*

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

*“The obligation expressed in Article VI of the Treaty on the Non-*

*Proliferation of Nuclear Weapons includes its fulfillment in accordance with the basic principle of good faith (...)In the view of the Court, it remains without any doubt an objective of vital importance to the whole international community today.”*

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

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

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

**ii)** The obligation to refrain from enacting, at the national level, laws and rules incompatible with the aim of the treaty;

**iii)** The obligation to refrain from concluding an agreement manifestly incompatible with the aim of the treaty;

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

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

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

**d) General duty to cooperate in good faith.**

**e) General obligation of information and communication**

**f) Obligation to compromise**

**g) Prohibition of abuse of process**

## **h) Unjustified termination of good faith negotiations**

### **5 Building confidence**

#### **A. First elementary law:**

***Opacity breeds opacity***

#### **B. Second Elementary law:**

***Opacity breeds the arms race***

#### **C. Third elementary law:**

***In the end, transparency generates transparency***

#### **D. Fourth elementary law:**

***The tyranny of the “psychological factor”***

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

Therefore, it is crucial to reduce subjectivity.

#### **E. Fifth elementary law:**

***Reduce subjectivity to increase objectivity***

#### **F. Sixth Elementary law**

***Support verification***

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

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

### ***G. Seventh Elementary Law***

#### ***The legal status of the CBMs, between necessary rigidity and desirable flexibility***

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

But everything depends on circumstances.

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*H.E. Mohammed Bedjaoui prepared this address for the Conference in Edinburgh on Trident and International Law: Scotland's Obligations. It is with immense regret that he is now unable to attend and give the keynote address, and he sends this with his best wishes for a successful event.*

*le 28 janvier 2009*