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AND
THE DESTRUCTION OF HUMAN CIVILISATION

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Emerging International Law:

Future Generations & Ecocide

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Introduction

Twenty years ago, the General Assembly of the United Nations requested the International Court of Justice urgently to render its advisory opinion on the following question: **“Is the threat or use of nuclear weapons in any circumstance permitted under international law”?**

The very question of survival of humankind was raised by Mr Mittal (delegation of India), who supported the UN resolution in order to move the world community closer towards the goal of eliminating once and for all the danger of a nuclear war, thereby ensuring that “our generation as well as future generations are free from the ever present and growing threat to their survival from such a war”¹.

¹ M. MITTAL, A/C.1/35/PV 35, p.10.

In the advisory opinion delivered by the ICJ on July 8th, 1996, the threats identified by the parties were essentially of two types:

1. Threat to the survival of mankind.
2. Threat to the life sustaining system.

In 2016, these threats can be analysed through two emerging concepts and principles in international law.

The first one is the principle of protection of future generations and of their rights. This principle was included briefly in the 1996 ICJ Advisory Opinion², and was explored further by some of the ICJ judges in their dissenting opinions³. Today, the law for future generations has grown and is now well integrated in several branches of international law⁴. The protection of future generations is challenged most absolutely by threats to the survival of humankind. It can be highlighted, through emerging perspectives in law, that there exists a **fundamental legal imperative to protect the survival of humankind through time and space**. This legal imperative is related to the protection of the environment and to all elements which sustain life.

The second principle is an emerging concept in international criminal law, that of ecocide⁵ and crimes against future generations⁶. These principles provide new and additional legal

² See paragraph 35 of the ICJ Advisory Opinion which holds that: *'the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations.'* and para 36 : *'In consequence, in order correctly to apply to the present case the Charter law on the use of force and the law applicable in armed conflict, in particular humanitarian law, it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come.'*

³ See particularly Judge Weeramantry, diss. op. CIJ Rec, 1996, pp.101-171 ; Judge Koroma, diss.op. CIJ Rec, 1996, pp.172-224.

⁴ E. BROWN WEISS, *In Fairness to Future Generations. International law, common patrimony, and intergenerational equity*, United Nations, Transnational publishers, 1989, 385p. ; E. GAILLARD, *Génération futures et droit privé. Vers un droit des générations futures*, préf. Prof. Delmas-Marty, éd. LGDJ, Paris, 2011, 673p. (defended in 2008) ; E. AGIUS, S. BUSUTTIL, *Future generations and international law*, Earthscan, 2009, 206p. ; P. LAWRENCE, *Justice for Future Generations. Climate Change and International Law*, E. Eldgar pub., 2014, 227p.

⁵ L. WESTRA, *Globalization, violence and world governance*, Brill, 2011, 237p. ; J.P. STOETT, *Global ecopolitics : crisis, governance and justice*, University of Toronto Press, 2012, 241p. ;

⁶ World Future Council, Crimes against future generations : <https://www.worldfuturecouncil.org/crimes-against-future-generations/>

E. GAILLARD, « Crimes against future generations », epublica : <http://e-publica.pt/crimes-against-future-generations.html>

frameworks for ensuring the protection of the environment and humanity against the threat or use of nuclear weapons **through time and space**.

I. FROM AN INTERGENERATIONAL EQUITY TO AN INTERNATIONAL LAW PROTECTING FUTURE GENERATIONS

A. GENEALOGY OF THE CONCEPT OF FUTURE GENERATIONS IN INTERNATIONAL LAW

Every society through time makes choices. We can identify foundational values, and value changes over time, by identifying changing legal concepts. **With the recent development of the concept of future generations, we have entered in a new civilizational era:** an era which integrates an imperative of transgenerational responsibility. The very concept of future generations has grown in both international environmental (1) and human rights law (2). This a reflection of the development of this concept in societies today.

1°) Genealogy in international environmental law

- It is possible to find some expressions of the goal of protecting future generations at the international level from 1893. Indeed, in the *Bering Fur Seals Case*⁷, which has been submitted to arbitration, the very question of the protection in the interest of humanity in a transgenerational perspective was raised.

But at that time, even if the concept was somehow present, it was not at that time a legal concept with legal consequences.

- After WW2, undoubtedly, the entry into the nuclear era accelerated the process to figure out the concept of Humankind at the international level. Professor René-Jean Dupuy stated: “*the concept of humanity includes the one of future generations*”. It is a

⁷ F. FROMAGEOT, *JDI*, 1894, pp.36-59.

concept which is inscribed in a **concept of “History-promises”**⁸. It is important to emphasize on this paradigm of History synonymous of promises, with the idea of horizons of future which are always open. The idea is that, we, as humanity, are not just living in the present. We are planning for the future. We are building for the future. We are creating shared plans for the future. We are giving up some rewards today, in order that there will be even better rewards in the future, for us and our offspring. Indeed, we share a common future that is being built today. However, without a concurrent body of law protecting the future, these ‘horizons’ or ‘promises’ for the future remain empty and uncertain, like a paper house built with no foundations and likely to collapse at any moment. **Law protecting the future is thus a natural law phenomenon of human activity.**

- **The emergence of the concept of common heritage of humankind marks another new step of evolution and diffusion of the concept of future generations in international law.** Nations, worldwide, were sharing for the first time a new legal imaginary frame integrating future generations⁹.

This kind of concept can be qualified as a “**matrix concept**”: that is to say, that they open the way to the apparition of the concept of future generations because they have the ability to generate this very specific concept. **The concept of “Common concern of humanity”** is a key concept in international law. It can also be considered as a matrix concept of the one of future generations. It has the ability to open the legal imaginary to new goals of protection through time and space, transcending the paradigm of State Nations which tend to be locked in the current time-frame.

- With the progression of international environmental law, the concept of future generations has become more and more evident. **There is no use to create, to defend the**

⁸ R-J. DUPUY stated : Humankind is transpatial, and includes all the people. Humankind is transtemporal and is inscribed in a conception of History-promises, « La notion de patrimoine commun de l’humanité appliquée aux fonds marins », in *Droit et libertés à la fin du XXème siècle : influence des données économiques et technologiques*, Etudes offertes à Cl.-A. Colliard, A. Pédone, 1984, pp.197-205.

⁹ Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, EMuT, 967 :07 (opened to signature on January, 27th 1967) ; UN Convention on the Law of the Sea (signed in 1958, entered into force 1962): http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

environment at the international level if we do not have a conscience of responsibility through time and space.

This imperative of transgenerational protection has also become more evident and unavoidable because of the new vulnerabilities of humankind and of the environment.

This is a strong paradox: it is because we, as humankind has to face a brand new vulnerability, that the concept of future generations has become all the more necessary.

- After the Stockholm Declaration (1972), the concept of future generations was regularly inscribed in the preamble of international conventions.

- A 1980 UN Resolution was adopted and stated “the Historical Responsibility of States for the preservation of Nature for present and future generations”¹⁰. I shall emphasize on the fact that this historical responsibility **is a civilizational Responsibility**.

International Environmental Law is a way to address this issue of civilizational responsibility.

- A new legal frame of moral responsibility towards future generations has since then been built, starting with the World Charter for Nature in 1982¹¹, followed by the 1992 Rio Declaration.¹² They proclaim the foundational principles of international environmental law which are now also integrated in regional and national laws.

¹⁰ A/RES/35/8/

¹¹ UNGA Resolution 37/7, 28 October 1982. The preamble recognises ‘*the supreme importance of protecting natural systems, maintaining the balance and quality of nature and conserving natural resources, in the interests of present and **future generations***’.

<http://www.un.org/documents/ga/res/37/a37r007.htm>

¹² Article 3 of the Rio Declaration holds that: *The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.* See <http://www.unep.org/documents.multilingual/default.asp?documentid=78&articleid=1163>

- During the 1990's, the concept of future generations participated to the definition of the goal of sustainable development (water, biodiversity protections) and was inscribed in the 1992 UN Climate Change Convention.¹³

- In addition, the doctrine of intergenerational equity has been formulated in a book intitled "In Fairness to Future Generations". Based on an pioneer analysis of international law, professor Edith Brown Weiss, identified general principles of intergenerational equity: the principle of conservation of options, of quality and of access to the common planetary heritage.

Progressively, the concept of future generations integrated the *corpus* of international treaties and of regional treaties. It is rooted in the preservation instinct of humankind.

- Another process of evolution can be seen in international case-law. **The ICJ, for example, has had to consider transgenerational threats and contaminations in a number of cases.** In the 1973 French nuclear test case¹⁴ and the 1995 Gabcikovo-Nagymaros case¹⁵, the legal logics were inscribed in a short term time-frame. For example, in the second case, the concept of "ecological necessity" was based on the precautionary principle. However, the ICJ took a narrow view of the principle, requiring certainty and proof of expected environmental damages, even though the risks of environmental damage would existed over a long time period and would be difficult to anticipate precisely.

In the 1996, ICJ Advisory opinion¹⁶:

§28. Some states argued « that the principal purpose of environmental treaties and norms was the protection of the environment in time of peace. It was said that those treaties made no mention of nuclear weapons. It was also pointed out that warfare in general, and nuclear warfare in particular, were not mentioned in their texts and that it would be

¹³ Article 3 notes that '*The Parties should protect the climate system for the benefit of present and future generations.*' <https://unfccc.int/resource/docs/convkp/conveng.pdf>

¹⁴ ICJ December, 20 1974, *Nuclear Tests Case (New Zealand v. France)*, ICJ Reports 1974, p.457 ; ICJ December 20, 1974, *Nuclear Tests Case (Australia v. France)*, ICJ Reports 1974, p.253.

¹⁵ ICJ, September 25 1997, *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 1. C. J. Reports 1997, p. 7

¹⁶ ICJ, *Legality of the Threat or Use of Nuclear Weapons, Advisory opinion*, ICJ Reports 1996, p.226.

destabilizing to the rule of law and to confidence in international negotiations if those treaties were now interpreted in such a way as to prohibit the use of nuclear weapons

In 2016, this cannot be argued anymore!

Indeed, the legal imperative to protect the environment is now inscribed in many constitutions around the world. There are new duties to respect the environment. There is also a development of human rights law, which links with the environment. This trend embraces the concept that human rights of individuals and peoples depend on protection of the environment.

This is a reflection of the fact that international human rights law has also entered into a process of major transformation.

2. Genealogy in international human rights law

- The 1996 ICJ Advisory opinion recalled that the goal of preserving future generations is inscribed in the Preamble of the UN Charter adopted in San Francisco “*We, the people of the United Nations, determined to save succeeding generations from the scourge of war*”.

This means that the very concept of peace at the international level, at least from 1945 on, should be analysed through a transgenerational perspective.

- In 1948, the adoption of the Universal Declaration of Human Rights marks another historical step: it opens the way to a new way of thinking about human rights

*First, it is the first text which codifies the concept of human rights at the international level

* Second, the text recognizes “the **inherent dignity** and of the equal and inalienable rights **of all members of the human family** is the foundation of freedom, justice and peace in the world”.

The concept of ‘all members of the human family’ should not be constrained to the current time, but also to members of the human family existing in the future.

Therefore, ascribing rights to ‘all members of the human family’ should open the way to a concept of recognition of dignity for future generations in the international formulation of human rights law.

Indeed, the concept of human family, embraced in the Universal Declaration, was a new approach in international human rights to recognize humankind as such. Articles 28 to 39 of the UDHR recognize duties of man toward the community and sets out new limits to civilizational values which are shared around the world.

- However, neither the 1966 International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights, explicitly recognise the rights of future generations. .

Both preambles refer to **the concept of “human family”** but all the human rights proclaimed are thought and implemented in a limited temporal matrix. There is no room for the recognition of human rights for future generations.

Nevertheless, the door was opened with the concept of ‘human family’ and various developments in international law since then confirm that there is a strong foundation for protection of future generations in human rights law, as well as environmental law and the international law on peace and security.

B. THE EXISTENCE OF AN INTERNATIONAL LAW PROTECTING FUTURE GENERATIONS

1. Several branches of international law as laws for future generations

a) International environmental law = law for future generations

There is a strong convergence of change of way of thinking international law which tend to protect future generations too in international environmental and human rights law.

- There is a wide literature on the question of the recognition of rights of future generations. For some professors, it is **a founding principle of international environmental law**¹⁷.

There is no real reason to deny to future generations any recognition of human rights in the future¹⁸.

- It is a projection through time of the concept of “interest of humankind”.

- If we make attention to the actual dissemination of environmental law from the international to national levels, it is obvious **that the imperative of respect the future is integrated and shared by a vast majority of States around the world.**

Even for those States who are reluctant to adopt national law protecting future generations, it is impossible to deny the existence international customary law which protects the environment and future generations.

- The concept of **sustainable development** implies political, social and legal choices in the very long run.

- In the 1996 advisory opinion the ICJ stated that its conclusion was "without prejudice to the obligations of States to respect and protect the natural environment"¹⁹. In other words, **States have a Duty of care and of respect toward the environment**²⁰.

- Nuclear deterrence is based on a threat to use nuclear weapons. This threat, made by all the nuclear-armed States and those under extended nuclear deterrence doctrines, establishes a situation where we are living in a state of eternal suspended war. This is why the UN General Assembly resolution on a Right to Peace,

¹⁷ In international environmental Law and encyclopedia, this is clear : the concept of future generations is foundational.

¹⁸ R. DEMOGUE, « La notion de sujet de droit- Caractères et conséquences », *RTDCiv.* 1909, p.611-655.

¹⁹ Order of 22 September 1995, I. C. J. Reports 1995, p. 306, para. 64.

²⁰ A. KISS, « Le devoir de protéger l'environnement », *Droit international et coopération internationale*, Hommage à J. A. Touscoz, France Europe Editions, 2007, pp.1239-1247.

emphasises that *‘right of peoples to peace demands that the policies of States be directed towards the elimination of the threat of war, particularly nuclear war.’* The UN Charter prohibits not only the use of force in international relations, but also the threat of force, except in response to an act of aggression. This quest for peace is the cornerstone of the UN Charter. The threat to use nuclear weapons, which is inherent in their possession violates both the Right to Peace and the UN Charter. Indeed the UNGA has on numerous occasions affirmed that the threat or use of nuclear weapons would be a violation of the UN Charter and a Crime Against Humanity.²¹

On can ask: how can we just still today discuss the legitimacy of the threat or use of nuclear weapons when the States are engaged to pursue an objective of sustainable development? This seems contrary to the principle of good faith.

b) International humanitarian law = law for future generations

Several principles and founding concepts of International Humanitarian Law should be analysed through a transgenerational perspective.

-> **The Principle of distinction** is violated by the threat of use or use of nuclear weapons which impact on combatants and non-combatants alike. In addition, nuclear weapons cannot distinguish between humans (combatants) and non-human living beings, which are also non-combatants and are protected under environmental and international humanitarian law. Finally, and this is an area of application that has arisen with the concept of trans-generational application of law, the threat or use of nuclear weapons cannot distinguish between current and future generations. They impact illegally on the offspring of combatants, as well as those of non-combatants. And they create catastrophic impact over cosmic timescales on ‘common goods’ (environmental assets) such as the oceans, the atmosphere...

²¹ See, for example, UN General Assembly resolution A/RES/70/62, adopted on December 7, 2015 with a vote of 130 in favour, 48 against and 8 abstaining which affirms that ‘any use of nuclear weapons would be a violation of the Charter of the United Nations and a crime against humanity’.

-> **The Principle of non-discrimination** is violated because of the trans-temporal and trans-spatial effects due, notably to radioactive contamination and impact on the climate.

→ The obligation of prevention of shortages **of goods essential to the survival of the population**. This include: foodstuffs, agricultural areas, crops, livestock, drinking water installations and supplies. **With radioactive contamination, there is obviously an attempt to essential goods to the survival of present and future population.**

2. Identification of several gaps between traditional legal logics and the protection of future generations by international law

- Gap between international environmental law in 2016 and the 1996 ICJ Advisory opinion:

§28. Some states argued « that the principal purpose of environmental treaties and norms was the protection of the environment in time of peace. It was said that those treaties made no mention of nuclear weapons. It was also pointed out that warfare in general, and nuclear warfare in particular, were not mentioned in their texts and that it would be destabilizing to the rule of law and to confidence in international negotiations if those treaties were now interpreted in such a way as to prohibit the use of nuclear weapons

In 2016, this cannot be argued anymore! Indeed, the legal imperative to protect the environment is now inscribed in many constitutions around the world. There are now binding duties to respect the environment, and the development of fundamental rights of humanity and the environment to a protected environment. **These are symmetrical legal protections which can only be recognized and implemented by instituting these legal duties toward the environment and future generations.** There is still a need to transpose into our institutions the full implementation of these responsibilities and the full protection of such rights²²

²² E. GAILLARD, « Vers une démocratie transgénérationnelle ? », 2009, available on academia.edu

This cannot be all the more asserted, since there is a strong process of transformation which tend to recognize the right to a healthy environment, and the right to the environment as new major human rights.

This is reinforced by the concept of dignity and rights of future generations. Briefly, this very original and specific link between dignity and future generations has been initiated by the 1972 Stockholm Declaration.

If we make the intellectual conversion to integrate the long term in our analysis it becomes obvious that international human rights law has been ‘greened’!

- Gap between the recognition by the 1996 ICJ Advisory opinion of a possible catastrophe and the very concept of catastrophe:

§29 : “The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment”.

⇒ Here, the ICJ qualifies the threat and the use of nuclear weapons of « CATASTROPHE ». This concept was reinforced by the States Parties to the nuclear Non-Proliferation Treaty in 2010 when they adopted the following: ‘*The Conference expresses its deep concern at the **catastrophic** humanitarian consequences of **any use** of nuclear weapons.*’

⇒ **A catastrophe has a very precise definition: it changes our human condition because when it occurs, there is a “REVERSE of History”!**

This means that the future has no more future!

In other terms, there is an anthropological gap between an accident or a destructive act (both of which are reversible and leave open the way to resilience) and a catastrophe (which closes the horizons of future and, in the meantime, any process of resilience).

I shall quote the philosopher Jean-Pierre Dupuy who explains that there is a paradox inscribed into the very concept of catastrophe:

Catastrophes are characterized by this temporality that is in some sense inverted. As an event bursting forth out of nothing, the catastrophe becomes possible only by "possibilizing" itself and that is precisely the source of our problem. For if one is to prevent a catastrophe, one needs to believe in its possibility before it occurs. If, on the other hand, one succeeds in preventing it, its non-realization maintains it in the realm of the impossible, and as a result, the prevention efforts will appear useless in retrospect »²³.

In other terms,

- We have the moral obligation to prevent catastrophes.
- In order to make it possible, we have to trust in their very possibility.
- Still, if the anticipation is correctly done, it can appear retrospectively of no use!

These paradox has to be kept in mind with the case of preventing the threat or use of nuclear weapons! The paradox creates a false sense of security in the reliance on nuclear deterrence, and instils an attitude of complacency in the face of risks of an unprecedented nuclear catastrophe. This analysis proposed by the philosopher should be integrated in international environmental law in order to create a real international law for the prevention of nuclear catastrophe.

- Gap between the international law Principle of non harmful use of the national territory environment and the conclusions of the 1996 ICJ Advisory opinion:

§. 27, “the use of nuclear weapons is unlawful by reference to existing norms relating to the safeguarding and the protection of the environment “

²³ J-P. DUPUY, *Pour un catastrophisme éclairé. Quand l'impossible devient certain*, Seuil, 2004, 214p.

This paragraph refers to a binding principle of international law: States have a duty « to ensure that activities within their jurisdiction or control do not damage to the environment of other States or of areas beyond the limits of national jurisdiction ». In other words, no State shall authorize the exploitation of any activity on its territory which can cause a damage to the environment of another State.

There is still today, a short time analysis and a bias in analysis concerning the use of nuclear weapons. By virtue of this principle, it is not only the use of nuclear weapons that should be forbidden but also all nuclear power-plants because they are synonymous of activities which can cause damage to the environment of other States

- First example: the Tchernobyl's nuclear cloud didn't know any boundaries in space nor in time! **Today we have still to deplore contaminated zones for cosmic timescales!**
- Second example, Fukushima is a dramatic school case which is currently and will still be at work in "time of peace". Even though in the preamble of the 2015 Sendai Declaration, article 1 stated that the organization of the third UN conference World Conference on Disaster Risk Reduction, (...) in Sendai City of Miyagi Prefecture in Japan, has demonstrated a vibrant recovery from the Great East Japan Earthquake in March 2011". Japan is now facing a terrible nuclear contamination of its country.

For example, balls of micrometers of glass with cesium 134 and 137 has been found in dust in Tokyo²⁴. Japanese children are developing cancers. This is the terrible reality of nuclear contamination: the concept of History is already reversed in this country! It is a process, still occurring...

- In international law, the *Sendai Framework for Disaster Risk Reduction adopted for 2015-2030* aims at protecting both present and future generations. Still, it is **grounded on the postulate of resilience of nations and of communities**. I made

²⁴ http://www.lemonde.fr/energies/article/2016/07/06/l-accident-de-fukushima-a-disperse-des-billes-de-cesium-radioactif-jusqu-a-tokyo_4964380_1653054.html

a statement in Sendai in order to recall that in a context of a nuclear catastrophe, there is no resilience at all, and forever!

FUTURE GENERATIONS, HUMAN RIGHTS & DISASTER RISK REDUCTION (DRR)

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Based on my thesis in 2008 entitled Future Generations and Law. Towards the recognition of a Law for Future Generations. My research continues to focus on the topic of « the recognition of Human Rights of Future Generations » .

The concept of Future Generations is part of the definition of sustainable development and has a wide recognition from the international legal rules to national constitutions throughout the world. This concept has the power to disclose our way of thinking in law on issues which happen presently but also in the long term.

Until now, there was a dominant paradigm by which we considered that the Law of the Future would take care of the Future. However, in many instances this is not the case any longer.

It is possible to propose a transgenerational analysis of Human Rights: the right to health is also a right of Future Generations, The right to a healthy environment is at the same time an individual, a collective and a transgenerational human right.

We now have to go further and to implement a transgenerational framework of legal rules in order to assure a safe environment and healthy life for our children and grandchildren.

We are here today to think about global solidarity in a disaster context. In this context I would like to emphasize the fact that there are situations in which there is a reversal of History : This specific situation can be qualified « The tragedy of Human Rights » i.e. the tragedy of human rights not being made available to everybody, in particular to people coming after us.

The main idea of this concept is the following : whenever a return to the status quo is impossible i.e. whenever conditions for life are adversely affected, the very concept of Human Rights makes no more sense

There is an urgent necessity to give respect for a future legal framework and implement it. That would mean, that if we want to enforce a meaningful DRR we also need to enrich our legal framework by anticipatory rules. As an example : the Precautionary principle, which asks among other things for further research, due to new technologies, is very valuable in the situation of DRR.

Finally, I would like to focus on the particular situation of nuclear disasters. Unfortunately, this is a model where the Human Right to life of the Future Generations is infringed upon.

May the persons who disrespect the long term and the rights of future generations, be it by ignorance or greed, face their historic responsibilities.

It is clear that in case of nuclear disasters there is no resilience at all !

Some studies tend to assert that even a small exchange of nuclear weapons between two States could lead to a CLIMATE MEDIATED NUCLEAR FAMINE.

Statement Andreas Nidecker : Climate Mediated Nuclear Famine

IPPNW (International Physicians for the Prevention of Nuclear War), March 17, 2015

« Recent meteorological research by Roebuck & Toon (University of Colorado/USA), based on new climate models indicates that even a limited nuclear war e.g. in south Asia, with a few nuclear weapons, would lead to a significant soot, dust and ash amount lifted into the atmosphere to create a major filtering effect for sunlight lasting up to ten years. This would have the effect of measurable shortening of the agriculture growth times in the entire Northern hemisphere.

As a consequence this could lead to a major decrease of the rice and grain reserves of the affected countries which would provoke widespread famine for up to 1 billion people. Thus, the term « nuclear famine » was coined.

We suggest that « climate mediated nuclear famine » should be included in the context of « man made disasters ».

- Gap between the nuclear damages and the defence of human rights :

With an exchange of nuclear weapons, we enter into the possibility to close the horizons of future, to downgrade the very concept of human rights into obsolescence. **This can be named as the TRAGEDY OF HUMAN RIGHTS : no more human rights can exist in case of nuclear catastrophe.**

In the 1996 advisory opinion, the ICJ recognized that the specificity of the threat or use of nuclear weapons was synonymous of a risk of catastrophe. It did not draw the consequences of its own ascertainment.

The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.

The ICJ ruled that the environment represents the living space of future generations too ! By stating that, it should have ruled that the right to life, the right to a healthy environment are transgenerational human rights.

In other terms, condemning the living space, the quality of life and the very health of future generations SHOULD NOT BE ALLOWED at anytime !

By itself, this sentence can just lead to the conclusion that the threat of use and the use of nuclear weapons is an infringement of the human rights of future generations.

The responsible answer of the law to face a catastrophe is an imperative of respect of the survival of humankind and the environment.

II. TOWARDS THE RECOGNITION OF NEW LEGAL FRAMES PROTECTING THE ENVIRONMENT IN INTERNATIONAL LAW?

Two paths of new legal frames could highlight differently the question of the threat or use of nuclear weapons: the recognition of new crimes (A) and the enhancement of anticipatory rules in international law (B)

A. GERMS OF NEW CONCEPTS OF CRIMES IN INTERNATIONAL LAW

The threat or use of nuclear weapons leads undoubtedly to an ecocide (1) and a crime against future generations (2).

1. Germs of the concept of ecocide in international law & emerging law forces

There are already germs of the idea of ecocide, implicitly in international law. For instance, Article 1. of the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) states that : “Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party”.

- The explicit origins of the concept of ecocide are launched at Article 19 of the project of the International Law Commission: it proposes a definition of international crime which could includes environmental crimes.

- In the 1996 ICJ Advisory opinion, this idea was identified:

§30. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality. This

approach is supported, indeed, by the terms of Principle 24 of the Rio Declaration, which provides that :

"Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary."

- The concept of ecocide is widely studied by law professors:

There are several declinations from criminology to environmental criminal law studies. New concepts are names such as : ecoviolence or ecocriminals²⁵. There are a range of ecocrimes to ecocide which tend to be developed by law professors. Many influential writers of doctrine are militating in favour of recognising ecocide in international law as a means of penal defence against violent ecological harm²⁶.

Others envisage this as a way of rendering human rights operational. According to these articles, sometimes it is a matter of recognising ecocide as a new international crime against the environment, peace and future generations. Sometimes considering only the harm inflicted in wartime, or by carrying out a collective and focused plan against the whole or part of a population (such as a crime against humanity).

Above all, the question of the extent of responsibility is regularly raised: if, for some writers crimes against the environment are the responsibility of the State, it is clear that for others that actions by private individuals and particularly by multinational bodies must be taken into account. It seems fairly obvious that ecocide cannot be only a matter of law relating to war.

- Ecocide was initially inscribed in the Rome Statute which institute the International Criminal Court.

More and more people are asking for the adoption of amendments to the Rome Statute in order to allow the ICC to judge these specific crime.

²⁵ T. F. Homer-Dixon, J. Blitt, *Ecoviolence : links among environment, population and security*, Rowman & Littlefield, 1998, 238p. ; L. Westra, *Globalization, violence and world governance*, Brill, 2011, 237p. ;

²⁶ P. Higgins, *Eradicating Ecocide : laws and governance to prevent the destruction of our planet*, Shephard-Walwyn, 2010, 202p. ;

For example, End Ecocide on Earth (EEE)²⁷ is a grass-roots initiative (citizen movement) which aim to recognize the crime of ecocide in international criminal law, as the fifth crime prosecutable before the International Criminal Court in the same manner as the crime against humanity, genocide crime, war crimes or crime of aggression.

Ecocide is the destruction of the global environment. End Ecocide on Earth is therefore defining Ecocide crime as “an extensive damage or destruction which would have for consequence a significant and durable alteration of the global commons or ecosystem services upon which rely a group or sub-group of a human population” in compliance with the known planetary boundaries.

End Ecocide on Earth means by global commons: the oceans and seas beyond territorial waters, the atmosphere, outer atmosphere and their respective chemistry, Arctic, Antarctica, cross-border rivers and lakes, ground water, migratory species, biogeochemical cycles, genetic heritages. These spaces and species, which belong to no one, and called Res nullius in law, should no longer be the scene of pollution and abusive predation. This would further the protection of the global ecosystem, and in any case the principle of national sovereignty should not be claimed to shirk all liability when they are impacted.

EEE also consider that the destruction of an ecosystem service on which rely a human community to live, as a whole or as a sub population is equal to a crime against humanity. Thus, this type of ecocide should not be excluded from an international jurisdiction in the name of national sovereignty, nor be traded through market instruments and trading rights

- Proposal of application of the concept of ecocide in case of threat or use of nuclear weapons:

In the 1996’s ICJ Advisory opinion:

²⁷ <https://www.endecocide.org/>

§35. By its very nature, that process, in nuclear weapons as they exist today, releases not only immense quantities of heat and energy, but also powerful and prolonged radiation. According to the material before the Court, the first two causes of damage are vastly more powerful than the damage caused by other weapons, while the phenomenon of radiation is said to be peculiar to nuclear weapons.

These characteristics render the nuclear weapon potentially catastrophic.

The destructive power of nuclear weapons cannot be contained in either space or time.

They have the potential to destroy all civilization and the entire ecosystem of the planet.

This paragraph is foundational and could provide the basis for the recognition and the development of a legal standing for catastrophe and ecocide in international law.

It can also provide the legal basis for the recognition of the risk of threat and destruction of Humankind & future generations which cannot be acceptable under any circumstances.

Indeed, if Paul Valery stated that « we now know that civilizations are mortal», there is a major difference with the threat or use of nuclear weapons : we are, in the same time, putting into danger our civilisation but also future civilisations.

>> Ecocide is at the confluence of the various branches of international law.

We can find various provisions in international law that can lead to the recognition of ecocide.

2) Germs of the concept of crimes against future generations

- **Recognising crimes against future generations**²⁸ is to start a quest for a new juridical indicator, that is to say a new conceptual category to define particularly serious types of harm.

²⁸ World Future Council, Crimes against future generations : <https://www.worldfuturecouncil.org/crimes-against-future-generations/>

E. GAILLARD, « Crimes against future generations », epublica : <http://e-publica.pt/crimes-against-future-generations.html>

If this aspiration is now acknowledged, it is precisely because the scope of crimes against future generations is plural in nature: our actions have acquired a hitherto unknown dimension whose effects can endanger our whole future. Crimes against future generations are among those going beyond the traditional conceptual, temporal and spatial limits of law.

When actions endanger the environment are taken in a context of certainty : we are undoubtedly facing a case of crimes against Future Generations. According to the philosopher G. Anders this is NUCLEAR TOTALITARIM.

In other words, thinking in terms of crimes against future generations tend to turn all the more necessary to propose a transgenerational lecture of human rights.

- **Avoiding the Tragedy of Human Rights²⁹**: It is possible to analyse through the question of recognizing human rights for future generations and plead for the defence of their dignity and fundamental rights to life, to a healthy environment too.

For instance, in the 1996's Advisory Opinion of the ICJ has to analyse the infringement of the right to life.

In paragraph 24, the question of arbitrary deprivation of life is considered as contrary to article 6 of the International Covenant on Civil and Political Rights.

To our point of view, the right to life of future generations can be proposed as a limit to the threat or use of nuclear weapons. But we have to make an intellectual conversion and to accept the recognition of rights of future generations, duties of humankind towards future generations. In order to help to make this intellectual shift, it can be said that whenever the threat or use of nuclear weapons lead to transgenerational damages, then, the legal imperative of responsibility should be of transgenerational scales. This means that we have to integrate the defence of rights of future generations and of the environment

²⁹ See : E. GAILLARD, « Avoiding the tragedy of human rights », 2015 available : <https://books.google.fr/books?id=E9OjCwAAQBAJ&pg=PT44&lpg=PT44&dq=avoiding+the+tragedy+of+human+rights&source=bl&ots=NR2JGtn-nC&sig=WrlLHd2kmU8I30pbAM6qVvj3JeI&hl=fr&sa=X&ved=0ahUKEwjj1Yy-paDOAhWEFxQKHdB7ADgQ6AEILjAB#v=onepage&q=avoiding%20the%20tragedy%20of%20human%20rights&f=false>

We are dealing with transpatial, transtemporal contamination of the food chain, of the human and non-human livings.

We need to recognize an imperative of respect of the integrity of the livings and of safety of the planet.

In my thesis, I propose two founding principles for the law of future generations³⁰:

- ⇒ principle of temporal non-discrimination: their non existence doesn't mean that they do not have the right to be protected by law.
- ⇒ principle of dignity of future generations: it is now legitimate to protect future generations by law, all the more in international human rights law

- The German philosopher Günter Anders shall be quoted here. To his point of view, Nuclear technology introduces a disruption in the history of Humankind and has the potentiality to introduce a disruption in the very concept of History.

- ⇒ an exchange of nuclear weapons will destroy human societies,
- ⇒ an small exchange of nuclear weapons can lead to a « nuclear famine» causing major and systemic infringement of human rights through time and space
- ⇒ a major exchange of nuclear weapons can lead to the destruction of a part of our civilization
- ⇒ a mega exchange of nuclear weapons (intentionally or not- there are some places where the nuclear weapons are stocked ! just imagine what could be a multiple disaster with nuclear weapons !) => destruction of humankind but also of all the livings at cosmic timescales !

³⁰ For a short presentation in english, E. GAILLARD, « French Constitutional Law and Future Generations- Towards the implementation of transgenerational principles ? », p. 39 : <https://books.google.fr/books?id=E9OjCwAAQBAJ&pg=PT44&lpg=PT44&dq=avoiding+the+tragedy+of+human+rights&source=bl&ots=NR2JGtn-nC&sig=WrlLHd2kmU8I30pbAM6qVyj3JeI&hl=fr&sa=X&ved=0ahUKEwjj1Yy-paDOAhWEFxQKHdB7ADgQ6AEILjAB#v=onepage&q=avoiding%20the%20tragedy%20of%20human%20rights&f=false>

⇒ the simple threat of use of nuclear weapons is an “insult” to decades of building of :

- international environmental law,
- international human rights law,
- international humanitarian law,
- international criminal emerging law (crimes against future generations/Genocide)
- international war law

⇒ more than ever we need to think and to implement new legal frames and develop new legal logics in order to enhance an anticipatory international law.

B. Enhancement of anticipatory international law => the application of the precautionary principle

- **Reparation is of no use in case of nuclear war.** The environment, all livings are contaminated at cosmic timescales. The only way is to pave the way to a higher level of anticipation of nuclear catastrophe.

- I think that we know have enough knowledge's to ask for the implementation of the prevention principle, prior to the source of the nuclear danger by eliminating nuclear weapons.

- In **International Law there is a foundational principle of environmental law which can be applied: the Precautionary Principle.** It has not been yet held by the ICJ at the level of international principle. Nevertheless, the international Tribunal for the Law of the Sea has recognised that the approach of precaution as a principle of international law. There is a wide process of dissemination of the precautionary principle throughout the world. For instance in France, it is, in the same time a general principle of environmental law and, since 2004, a principle of constitutional value. It is a principle of environmental and sanitary law in EU law. The International Court of

Justice will have, for sure, to qualify and to apply this principle, particularly necessary for our times.

- The question of the Anticipatory framework has to be precised:

- **In a context of uncertainties, that is to say of scientific controversies, it is the precautionary Principle which shall found the anticipating legal frame.** To our point of view, the main idea is to put into force the recognition of an environmental and health obligation of due vigilance.
- **In a context of certainties of transgenerational damages, it is the principle of prevention, which has to be applied.** Undoubtedly, the threat or use of nuclear weapons will certainly causes transgenerational, ecological damages.

Conclusion

In 1996, the UN General Assembly was convinced that the complete elimination of nuclear weapons is the only guarantee against the threat of nuclear war.

One's may recall that everything which is under our power shall not automatically be done! We have to integrate a higher level of conscience of responsibility towards Humankind, Future Generations, the Environment and all the non human livings.

The threat or use of nuclear weapons is an infringement of the right to life for present and future generations, an ecocide and a crime against future generations. It will be the recognition of the impossibility to prevent humankind from a catastrophe.