

Remarks on Judge Bedjaoui's Keynote Address

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It is a great honor for me to make a few comments about the magisterial paper which Judge Bedjaoui has prepared for our symposium. It was his judicial diplomacy which managed to pull from the jaws of a likely defeat a victory which, although not complete, gave great encouragement to civil society in its dedication to a nuclear-weapons-free world.

I have had the privilege of reading and studying Judge Bedjaoui's 45 page paper. I consider it to be an extremely important contribution both to the history of the International Court of Justice and to a fresh and expanded analysis of the 1996 advisory opinion. A contribution as well to the progressive development of international law, which is mentioned in paragraph 12 of the Advisory Opinion as one of the bases for the Court's acceptance of jurisdiction over the General Assembly's question.

I will now take the liberty of highlighting what seem to me some of the most important elements of Judge Bedjaoui's paper.

- (1) The entire paper is infused with the notion that the function of international law is not merely to be a kind of traffic code or operations manual, but, as we are told on the very first page, it is "to uphold some of the most essential values of humanity." Anyone who sees international law from this perspective would find it difficult to defend a continuing, even an unlimited, role for nuclear weapons in the strategic doctrine of his or her country, or to speak of "obliterating" another country, as one of the presidential candidates in my own country has recently done. It is also what allowed the judge, in his separate declaration appended to the opinion in the nuclear weapons case, to refer to these weapons as "the absolute evil."
- (2) Judge Bedjaoui speaks at some length about "the uncertainty of the Court." He attributes the Court's inability to declare the threat and use of nuclear weapons to be clearly illegal under international law in all circumstances to the suggestion, made by some countries in their pleadings, that technological advances could lead at some point to the manufacture of "clean," or at least low-yield, nuclear weapons. And he gives an irrefutable demonstration of the unfounded nature of this concern: a totally clean weapon, he says, is, by definition, not a nuclear weapon, while a low-yield weapon is, also by definition, still a nuclear weapon,

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characterized by the emission of ionizing radiation uncontrollable in time or space. In this respect the judge has perhaps been a little too kind to his former colleagues. Unconstrained as I am by considerations of collegiality I venture to say that the unwillingness of some judges to side with an unqualified prohibition of nuclear weapons may have had more to do with realpolitik than with speculation about technological advances. In support of this proposition I would cite my favorite footnote in the entire 600 page Advisory Opinion. It occurs at page 170 of Judge Shahabuddeen's declaration, where he tells us, quoting Herodotus, that when King Cambyses consulted the learned judges of Persia whether he could marry his sister, he was told that "though they could discover no law which allowed brother to marry sister, there was undoubtedly a law which permitted the king of Persia to do what he pleased." If the Court had mustered the courage which Judge Bedjaoui displays in his paper, it could have easily disposed of the argument which "some states" advanced—and we know which states they were—that a low-yield weapon used in a place far removed from civilian populations would not necessarily violate the principle of discrimination. It could simply have said, "Perhaps, but such a scenario would still violate the rule against causing unnecessary suffering to combatants."

- (3) I would also respectfully submit that the uncertainty to which Judge Bedjaoui refers and which Judge—now President—Higgins in her declaration calls a non-liquet, is perhaps ameliorated, if not entirely overridden, by other parts of the opinion. There is, for instance, paragraph (2)D of the dispositif, in which the Court declares unanimously that "a threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law." Putting aside the somewhat ambiguous use of the verb "should," it is nevertheless difficult if not impossible to reconcile the threat and use of nuclear weapons, due to their "unique characteristics," enumerated in paragraphs 35 and 36 of the Opinion, with the basic principles of humanitarian law. In fact, the Court says as much in paragraph 95, where it holds that the use of nuclear weapons is "scarcely reconcilable" with "the principles and rules of law applicable in armed conflict—at the heart of which is the overriding consideration of humanity." As Judge Bedjaoui reminds us, the Court went out of its way to emphasize—in paragraph 104—that the Opinion must be read in its entirety, i.e. without giving priority to one holding over another. It follows that the "unfortunate," as the judge rightly calls it, clause 2 of paragraph (2)E of the dispositif, referring to the extreme circumstance of self-defense, does not "trump" paragraph D. Indeed, to use a phrase that appears elsewhere in the Opinion, subparagraph D "seems scarcely reconcilable" with the second clause of subparagraph E.
- (4) Be that as it may, the most fortunate part of the Opinion is paragraph F, which unanimously declares that "there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control." Here the paper under discussion makes its major contributions by analyzing in depth the good faith elements in the obligation. Let me summarize them briefly:

- The disarmament obligation, of which nuclear disarmament is such an essential part, applies not only to the member states of the Non-Proliferation Treaty, but, by virtue of the United Nations Charter and of a multitude of General Assembly resolutions, to the international community as a whole.
 - This obligation, which existed in customary law since the adoption of the UN Charter, became a treaty obligation, with specific reference to nuclear disarmament, with the enactment of Article VI of the NPT in 1968.
 - Article VI NPT is a *pactum de negociando* of a particular kind, in that it requires a special kind of conduct by the parties, and not only negotiations, but negotiations with the purpose of achieving a specified objective, i.e. total nuclear disarmament.
- (5) The last point is of particular importance, since the nuclear weapon states, when confronted with the obligation to negotiate, have a habit of saying “well, that's what we're doing,” without mentioning the specified purpose of the negotiations, or, at best, mentioning it as some ultimate goal, to be reached in some far, far distant future. Note, in this connection, the recent statement by General Kevin Chilton, who took charge of the United States Strategic Command, with jurisdiction over nuclear weapons policy, on October 17, 2007, that the US would have to rely on nuclear weapons for deterrence for at least another 100 years.
- (6) Judge Bedjaoui, in chapter III of his paper, examines the anatomy of the good-faith element in negotiations, based on a number of ICJ precedents. He tells us, *inter alia*, that a lack of good faith includes unjustified breaking off of negotiations, abnormal delays (is twelve years abnormal?), failure to abide by agreed procedures, and systematic refusal to take adverse interests into account (like ignoring all those UN resolutions?). He cites, *inter alia*, the holding in *North Sea Continental Shelf*, that, in a negotiation, “the parties 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” (which sounds like a pretty good description of the attitude of the nuclear weapon states toward the non-nuclear weapon states at present). And I would add that, *a fortiori*, the complete denunciation of a previously agreed position must be a grievous violation of good faith, as was the case when “some states”—and we know which states they were—said at the 2005 NPT Review Conference that they no longer considered the 13 steps toward nuclear disarmament agreed at the 2000 Review Conference legally valid.
- (7) In chapter IV of the paper, Judge Bedjaoui comes to terms with the principal subject of our symposium, the nature of good faith in negotiations. He begins by quoting Georg Schwarzenberg to the effect that good faith is so fundamental a principle that its removal from international law is tantamount to the destruction of international law itself. *Pacta sunt servanda*, says the judge, must really be read as *pacta sunt servanda bona fide*. Good faith, we are told, is the guarantor of international stability. It is also, and this is of crucial importance, the generator of legitimate expectations and the creator of rights in the negotiating party. Thus, the failure of the nuclear weapon states to perform their part of the NPT bargain disappoints the legitimate expectations of the non-nuclear weapon states; it demonstrates the bad faith of the former and eradicates the rights of the latter.

- (8) Finally, Judge Bedjaoui takes us on a tour of confidence-building measures necessary for good faith to operate. Lack of transparency creates further lack of transparency and leads to arms races, while transparency generates greater transparency. Subjectivism must be reduced and replaced by objectivism based on monitoring. He ends with an appeal for a larger role in nuclear disarmament for the United Nations and for “the coherent and democratic conduct of an integral process of nuclear disarmament, with a realistic and reasonable schedule.”

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A realistic and reasonable schedule. Is that too much to ask, when what is at stake is the survival of megacities, perhaps of entire countries, and, in a worst case scenario, of humanity itself?

Two examples of how real the danger of a nuclear exchange is, so long as nuclear weapons are in the arsenals of great or small powers, are these: at the time of the Cuban missile crisis in 1962, President Kennedy, after several days of agonizing reflection, overruled the plans of senior U.S. military figures to take the Soviet missiles out of Cuba by force. Soviet General Anatoly Gribkov later commented: “Nuclear catastrophe was hanging by a thread ... we weren't counting days or hours, but minutes.” And just yesterday, the National Security Archive in Washington released information that at the time of the Taiwan Straits crisis in 1958, President Eisenhower countermanded plans by the U.S. air force to drop 10 to 15 kiloton nuclear bombs on a series of targets in mainland China.

As Judge Weeramantry said at the end of his exemplary dissenting opinion, “international law could contribute significantly towards rolling back the shadow of the mushroom cloud, and heralding the sunshine of the nuclear-free age.” Judge Bedjaoui has given us the directions by which the world community is to embark on the path toward this goal: they consist of negotiations conducted in a specific way and pointed toward a specific objective, total nuclear disarmament. And doing so in good faith, without which negotiations are just so many words, blowing in the wind.