

THE LEGAL IMPERATIVE OF GOOD FAITH NEGOTIATION ON THE NUCLEAR DISARMAMENT OBLIGATION OF NPT ARTICLE VI

Elizabeth Shafer, J.D., Vice-President, Lawyers Committee on Nuclear Policy
April 2, 2014

Paper prepared for “Law’s Imperative: A World Free of Nuclear Weapons” educational forum, April 2, 2014. Summarized in part and updated from papers given at conferences: IALANA (International Association of Lawyers Against Nuclear Arms), San Jose, Costa Rica, 2008; and The Simons Foundation and IALANA Conference, Vancouver, 2011.

First of all, I’d like to say what an honor it is to talk on good faith at this event for Peter Weiss, who has devoted so much of his life to working in good faith for human rights and for a world free of nuclear weapons.

1. The concept of good faith as found in historical sources and varied traditions

Good faith is paradoxically elusive to define except by its absence. It has been recognized as a concept, however, and practiced by most traditions since ancient times. It is suggested that good faith, in the sense of trust, evolved from prehistoric times. A minimum of human co-operation and tolerance is necessary if group living is to emerge and survive. Membership of any human group involves obligations, and even the earliest human groups must have required the performance of obligations assumed or imposed on the members of those groups. The notion of obligation postulated here can be expressed in the sense that a member of the group was ‘trusted’ (that is, relied upon) to perform whatever task was ‘entrusted’ to him”(1).

In ancient India, the concept of good faith is implicit in the Sanskrit word dharma. There is no single word that conveys all meanings of dharma, but ‘duty, law’, ‘obligation’, ‘proper action’ and ‘right behavior’ have been used. Dharma was part of Hindu, Buddhist, Jain, and Sikh traditions, referring to the Vedas on legal and religious duties, and codified in the Hindu text Dharmasastra. The Sanskrit term ahimsa, non-violence, practiced in Buddhist, Hindu, and especially in Jain traditions, may also be viewed as related to good faith and dharma: as was said in the Mahabharata, “Whatever is attended with ahimsa, that is dharma.” (2).

In ancient China, good faith may be inferred in tenets of Confucianism equating individual morality with good government. As Confucius said, “to govern (‘cheng’) is to set things right (‘cheng’). If you begin by setting yourself right, who will dare to deviate from the right?”(3). In Japan, Prince Shotoku (574--622), influenced by Buddhism and Confucianism, wrote that “good faith is the foundation of right”(4). Good faith is implied in the flexibility of the Chinese word fazhi, which means both “rule of law and ‘rule by law.’”(5).

In ancient Iran, good faith may be inferred in the Avestan peoples’ observance of asha, with its ethical implications for conduct that included truth, honesty, and loyalty. Lawmakers and priests upheld the sacredness of a man’s given word, and the importance

of this as a vital aspect of *asha*. Two kinds of promises were recognized: *varuna*, a solemn oath, and *mithra*, a mutual agreement between two parties.

In an Islamic tradition from the 14th century, good faith may also be inferred in certain tenets of *Fiqh* (jurists' law) which is "independent of the state, has as object individual conscience and acts, aims for transcendent truth but is aware of multiple...alternative estimations of that truth, enforces one in specific cases while acknowledging the potential truth of others."(6)

In Jewish tradition, the Hebrew term *tom lev* conveys the concept that good faith may be shown even if a wrong act is based on an honest mistake of fact. "Tom lev... forms a central part of.. modern, Israeli law...most important of [these being the Contracts, with two specific laws on good faith] yet extends the duty to act in good faith...to legal acts other than contracts and to obligations that do not arise out of a contract." (7).

European concepts of good faith originated in the teachings of Greek philosophers and Roman jurists. Heraclitus of Ephesus invoked *Diké*, goddess of Justice, in support of good faith: "she shall overtake the artificers of lies and false witnesses". Socrates, as Cicero said, was "the first to call philosophy down from the heavens and set her in the cities of men." Good faith is also implicit in *The Laws*, in which Plato wrote that knowledge of the Good is discoverable through reason. He applied this doctrine to the law of the State in the sense of a fundamental law of right. Tenets of Greek Stoic thought were important for good faith, such as that the world is a product of reason, and that all laws of nature aim to reasonable ends. Also, while all men are free and equal individuals, they are also members of a common humanity."(8).

In ancient Rome worship of the goddess *Fides*, personifying Trust, was tied to the keeping of pacts and treaties. There were two strands, public and private; the former, *fides publica*, focused on public and international aspects. The latter, *fides*, focused on the old idea of honor. In the 3rd century B.C. a system evolved in Rome allowing a magistrate to adjudicate a claim by the principle of contractual good faith (*ex fide bona*). From c. 27 B.C. *bonae fidei iudicia* (the laws of good faith) were accepted as part of the *ius civile* (civil law). The general standard of *bona fides* was linked to concepts of natural law and to *ius gentium* (law of the people or country). The rules of good faith were seen as belonging to the *ius gentium* and introduced into positive law rules observed in nations generally. *Pacta sunt servanda* ('pacts are to be observed') was regarded as a universal rule, dictated by natural reason, and formulated by the jurist Justinian as: "What is so suitable to the good faith of mankind as to observe those things which the parties have agreed upon." (9)

Christianity absorbed Hellenism, Oriental law and ancient philosophy, notably Platonism. Tertullian, a Roman jurist, is viewed with Clement and Origen as early Christian apologists...the synthesis of Judeo-Christianity with Graeco-Roman philosophy...was important for good faith.. The association of Christianity with *bona fides* invested the Roman concept with elements of the greater earlier civilizations...because of the debt which Christianity owed to Judaism and the Hebrew prophets. The civilizations of

Egypt, Sumeria, and Babylon also valued the concept of good faith. A key aspect of bona fides becoming Christianized was the idea of good conscience. Canon law, developed by the Church for its own governance, coexisted with Roman civil law, but there was overlapping jurisdiction, and before the Reformation it was common to find ecclesiastical courts exercising civil jurisdiction. (10)

Sources of canon law were collected in 1139 in the *Decretum* by Gratian at Bologna; and generally used in universities and Church courts. *Lex naturae* (the law of nature) for Church Fathers was both natural and of divine origin. Canon law, developed over the next centuries, continued to be concerned with concepts of good faith and equity which early canonists took from Roman jurists and applied to their theory of contracts. Scholasticism developed in the twelfth century; St. Thomas Aquinas, viewed as the greatest Scholastic, posited the doctrine of an obligation of the natural moral law. It was Francisco Suarez (1548--1617), however, whose views on good faith contributed more to modern legal theories of good faith. Suarez held that the observance of good faith pertains to natural law and that an obligation imposed by good faith relates to its proper subject matter. At the close of the Middle Ages good faith was perceived in Western Europe as a universal ethical principle in philosophy, derived from natural law. In positive law, it was reflected in specific rules incorporating good conscience, fairness, equitable dealing and reasonableness.(11)

Hugo Grotius (1583--1645) the great Dutch jurist, praised good faith in the aftermath of the Thirty Years' War. He was influenced by thinkers of antiquity, yet greatly advanced natural law concepts of modern public international law. Grotius wrote that "good faith should be preserved.. for other reasons [and] that the hope of peace may not be done away with", for not only is every state sustained by good faith, as Cicero declares, but also that greater society of states. Aristotle truly says that if good faith has been taken away, all intercourse among men ceases to exist... [in] Seneca's phrase , 'it is the most exalted good of the human heart... This good faith supreme rulers of men ought...to maintain, as they violate it with greater impunity; if good faith [is] done away with, they will be like wild beasts whose violence all men fear... Augustine says that it is right to maintain the pledge of faith given to an enemy, for under the character of enemies men do not lose their right to the fulfillment of a promise, a right from which every one possessed of reason is capable of.'"(12)

In African customary law the principle and practice of good faith is deeply ingrained in dealings between tribes, in customary law relating to warfare and peace negotiations. In New Zealand, Maori law also has a strong tradition of good faith in relation to the observation of treaties(13). Good faith is also integral to Native American traditions in which "Justice and equality were woven, like the strands of a blanket, deep into the fabric of traditional society by such great teachers as Aionwantha (Hiawatha), the Peacemaker and Jikonshaseh of the Hodenasaunee (Iroquois Confederacy), the Kaienerekowa, the Great Law of Peace..." (14)

The idea and practice of good faith has such long and deep roots in prehistoric and historic times and throughout varied traditions that the foregoing brief account is merely descriptive rather than comprehensive.

2. Negotiation in good faith as interpreted by international arbitration and in cases brought to the International Court of Justice (ICJ).

The element of good faith, in the judicial context of international negotiations, has been more difficult to define and uphold. A conduct of good faith is implicit in the duty to negotiate (i.e. any negotiation is invalid without this) and yet an objective standard to uphold this duty of conduct has remained refractory. Judicial concerns about specific aspects of good faith negotiation, however, may be seen in a review of the following five cases, either settled by international arbitration or brought before the ICJ.

Flexibility, willingness to compromise, and a temporary suspension of parties' rights during negotiation were aspects of good faith valued by the arbitration tribunal in *Lac Lanoux* (1957). In this case, a project for the use and diversion of stream waters, the tribunal built its whole decision around the concept of negotiations in good faith, in the context of neighborhood law. The fundamental process of negotiation in good faith is described by the tribunal as one whose purpose is placed in equilibrium with the interests in the conflict (15). "The State has, by rules of good faith, the obligation to take into consideration the different interests in attendance, to look to them to give all satisfaction compatible with the pursuit of their own interests and to show that it has, as its subject, a real care to reconcile the interests of the other riparian owner with its own interests. It is a norm that, when taking into consideration adverse interests, one party not show intransigence on all these rights..for a negotiation to unfold in a favorable climate, it is necessary that the parties agree to suspend, during the negotiation, the full exercise of their rights.(16). The tribunal also described traits of the converse, bad faith: "The reality of the obligations thus undertaken is incontestable and sanctions can be applied in the event..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."(17)

A concern for substance and purpose, not mere formalism, as an aspect of good faith in negotiation was emphasized by the ICJ in the *North Sea Continental Cases* (1969). The Court was asked to indicate the rules and principles of applicable international law for the delimitation of the Continental Shelf, between states whose shores were adjacent. The Court considered that by virtue of customary law the parties' first duty was to negotiate an accord, and stated further that "[t]he parties are held to the promise of a negotiation with a view to realizing an accord and not simply to proceed with a formal negotiation as a sort of preliminary condition, to the automatic application of a certain method lacking in agreement; the parties have an obligation to conduct themselves in such a manner that the negotiation has meaning, which is not the case when one of them insists on its own

position without envisaging any modification.”(18).

Fairness between the parties and consideration for each others’ laws and interests were focused on by the ICJ, as aspects of good faith in negotiation, in the cases of the *Competence in the Matter of Fisheries* (1974), which concerned disputes between Iceland, the United Kingdom and Germany over fishing rights. The Court directed the Parties to negotiate and stated that they “had the duty to conduct their negotiations in such a spirit that each one was obligated, in good faith, to take reasonable account of the laws of the other...to arrive at a fair distribution of ocean resources, based on the data of the local situation, and taking into consideration the interests of other states who have well-established fishing rights in the region”(19).

Sustained maintenance of significant negotiations was an aspect of good faith valued by the tribunal in the *Arbitration between Kuwait and the American Independent Oil Company* (AMINOIL) (1982). In this case the tribunal identified good faith as part of general principles to which parties, when embarking on a negotiation, are bound to comply when carrying out an obligation to negotiate, namely “good faith as properly to be understood: sustained upkeep of negotiations over a period appropriate to the circumstances, awareness of the interests of the other party, and a persevering quest for an acceptable compromise”.(20)

The good faith of parties to a treaty, to apply its terms reasonably and in such a way that its purpose can be realized, was a central concern of the ICJ in the *Case Concerning the Gabčíkovo-Nagymaros Project* (1997). This case concerned, among other things, a treaty between Hungary and Slovakia on a joint project of locks and dams, and protracted disputes between the two countries after unilateral termination of this treaty by Hungary. The Court invoked the precepts of flexibility and comprehensiveness that it had emphasized in the North Sea Continental Cases, in its directives to the parties: “It is for the Parties themselves to find an agreed solution that takes into account the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law.”(21)

The Court then turned to its interpretation of the requirements of Article 26 of the Vienna Convention of the Law of Treaties of 1969 (VCLT) in this context, and focused on the second element of good faith: “What is required in the present case by the rule *pacta sunt servanda*, as reflected in Article 26 of the VCLT, is that the parties find an agreed solution within the cooperative context of the Treaty. Article 26 combines two elements, which are of equal importance. It provides that “Every treaty in force is binding upon the parties to it and must be performed by them in good faith. This latter element, in the Court’s view, implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the parties to apply it in a reasonable way and in such a manner that its purpose can be realized.”(22)

The conduct of the parties during negotiations was addressed by the ICJ in

Macedonia v. Greece in 2011. The Court said that “Whether the obligation has been undertaken in good faith cannot be measured by the result obtained. Rather, the Court must consider whether the parties conducted themselves in such a way that negotiations may be meaningful”. (23)

Such traits of good-faith negotiation are egregiously absent in the context of the disarmament obligation of NPT Article VI.

3. Statutory Sources related to Good Faith

All Members shall fulfill in good faith the obligations assumed by them in the present Charter.

--- Article 2(2), United Nations Charter(1945)

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

-- Article 26, The Vienna Convention on the Law of Treaties (1980)

A treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context, and in light of its object and purpose.

--Article 31(1), The Vienna Convention on the Law of Treaties

There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions

b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation

c) any relevant rules of international law applicable in the relations between the parties.

--Article 31(3), The Vienna Convention on the Law of Treaties

4. Good Faith and the Negotiating History of the NPT

In 1945 good faith was a bedrock principle of the U.N. Charter, as noted above, and imposed on all member states a general obligation of disarmament. In 1946 the first resolution of the U.N. General Assembly called for a commission for the elimination of atomic weapons and other weapons of mass destruction. There were similar General Assembly resolutions in 1954, 1963 and 1965.

In 1968 the element of good faith was explicitly set forth in Article VI of the Nuclear Non-Proliferation Treaty, which states:

“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.”

The placement of the term ‘in good faith’ directly after the word ‘negotiations’ points to a clear interpretation of the former as modifying the latter, as an adverbial phrase directing how negotiations are to be pursued, i.e. in a specific way: in good faith. Moreover, good faith negotiation as an integral part of the subject matter of all three objectives—effective measures relating to 1) cessation of the nuclear arms race 2) nuclear disarmament and 3) a treaty on general and complete disarmament—should be interpreted as extending to the second and third obligations in which good faith is implied, as well as the first, in which good faith is explicitly stated. This would comport with the good faith requirement of the first part of Article 31(1) of the VCLT, that a treaty should be interpreted “in accordance with the ordinary meaning to be given to the terms of the treaty in their context.”

By 1964 five states--the U.S, the Soviet Union, France, the U.K, and China--had nuclear weapons. In negotiating the NPT, good faith was necessary among all parties--states possessing nuclear weapons, and those without them--if a treaty of such magnitude and complexity was to be concluded. The exercise of good faith, as both a hortatory standard and a pragmatic tool, was incumbent on all party representatives, as shown in U.N General Assembly Resolution 2028 in November 1965. This called on the Conference of the Eighteen-Nation Committee on Disarmament to negotiate an international treaty based on five main main principles.

While good faith was implicit in all these principles, Principle (c) : the Treaty should be a step towards the achievement of general and complete disarmament and, more particularly, nuclear disarmament; had direct relevance for nuclear disarmament. In Principle (b): the Treaty should embody an acceptable balance of mutual responsibilities and obligations of the nuclear and non-nuclear powers--the exercise of good faith was also linked, implicitly but closely, with nuclear disarmament.

Judge Mohammed Bedjaoui, president of the International Court of Justice from 1994--1997, wrote a profound essay in 2007 on good faith and nuclear disarmament. He linked good faith with equity by noting that “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 between nuclear powers and non-nuclear powers’ established by the Nuclear Non-Proliferation Treaty 1965. In 1995, which decided the extension of the NPT for an indefinite duration, the reciprocal nature of the said obligations was vigorously reaffirmed.” (24)

In 1996 the obligation of good faith negotiation in Article VI of the NPT was significantly strengthened by the International Court of Justice in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* 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.”

The imperative to negotiate in good faith, as well as the need for flexibility, can be inferred by the Court’s interpretation 1) that good-faith negotiation goes beyond an obligation of conduct to one leading to a precise result and 2) an obligation of good faith negotiation is required--found in the NPT and in evolving customary law norms of non-possession-- on all aspects of nuclear disarmament. Two significant aspects of latter are that for the first time the Court clarified that this obligation a) is to achieve the complete elimination of nuclear weapons, without any precondition of comprehensive demilitarization and b) extends to all states, even those currently non-parties to the NPT.

Regarding the obligation to conclude negotiations, “the Court relied [in Article VI] on a distinction in international law between two kinds of obligations. [the first is one of] conduct, which refers to performing or refraining from a specific action. The second...is [one] of result: a state by which some means of its choice is required to bring about a certain outcome. The ICJ said that Article VI involves both kinds of obligation”. ¶199 of the Opinion, stated that “the legal import of that obligation goes beyond that of a mere obligation of conduct: the obligation involved here is an obligation to achieve a precise result, nuclear disarmament in all its aspects, by adopting a particular course of conduct, namely the pursuit of negotiations in good faith.” (25)

5. The imperative of good-faith negotiation on Article VI in intervening and subsequent agreements and commitments.

The 1995 NPT Review Conference adopted Principles and Objectives to measure compliance with the disarmament obligation pursuant to the Treaty’s indefinite extension. These included the negotiation by 1996 of a Comprehensive Test Ban Treaty, commencement of negotiations on a Fissile Material Cut-Off Treaty, and the “determined pursuit by the NWS of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goal of eliminating those weapons”.

The 2000 NPT Review Conference adopted Thirteen Practical Steps, including “an unequivocal undertaking by the NWS for the total elimination of their nuclear arsenals, the urgency of an early entry into force of the CTBT, the need for a body in the Conference on Disarmament to deal with nuclear disarmament and to start negotiations on an FMCT, further progress by all NWS on nuclear disarmament by specific steps such as increased transparency, irreversibility, and a diminishing role for nuclear weapons in security policies. Acceptance of these and other steps is inferred by their inclusion in a Final Document and by prior agreement of NPT Article VIII, to review the operation of the Treaty to assure that the objectives of the Preamble and the Purposes of the Treaty are being realized.”

In 2005 the “Renewed Determination” of the 2005 U.N. General Assembly

Resolution, restated approvals of the principles of transparency and irreversibility from the 2000 Review Conference and made new statements such as the need for a reduction of the operational status of nuclear weapons systems.

Lack of good faith is clear in such aspects as the blatant disregard by the NWS of ‘systematic and progressive efforts’ to comply with their ‘determined pursuit’ of good-faith negotiations from the 1995 NPT Review Conference, and their continuing disregard of their pledge from the 2000 NPT Review conference of an ‘unequivocal undertaking for the total elimination of their nuclear arsenals.

6. Statutory and Scholarly interpretations of Good Faith Negotiation

Statutory interpretations of good faith give relevant insights. The Special Rapporteur, in writing about the drafting of Article 26 of the VCLT on the obligation that every treaty in force must be performed by the parties in good faith, stated that in relation to this provision, “the intended meaning was that a treaty must be applied and observed not merely according to its letter, but in good faith. It was the duty of the parties... not only to observe the letter of the law but also to abstain from acts which would inevitably affect their ability to perform.” (26)

This implies that a signatory state may violate its obligation to perform a treaty even if it does not violate its literal terms. “A State may take certain action or be responsible for certain inaction which, though not in form a breach of a treaty, is such that its effect will be equivalent to a breach...in such cases a tribunal demands good faith and seeks for the reality rather than the appearance.”(27). This is certainly relevant to the lack of good faith shown by the NWS, and by the U.S in particular, in their inaction and obstructions in negotiation on nuclear disarmament since the 1996 Advisory Opinion was rendered.

Regarding Article 31(3) of the VCLT, good faith, while not explicitly stated, is implicit in the provision when the Article is read as a whole, and has particular import in interpreting the links between the obligations and performance of Article VI. One writer notes the close link in treaties “between the obligation itself and its performance—for even interpretation as presented is not an exercise in abstraction but has an essential functional role in the decision-making process of a party or of a court or tribunal as regards the performance of the obligation...[the essential function of good faith in this context] is to give a broad interpretation of the scope of equitable principles.”(28).

Antonio Cassese, a noted international law jurist, discusses distinctions between two categories of good faith obligations in international negotiations.. *Pacta de contrahendo* “[are] obligations to conclude agreements [in which] the contracting parties (1) clearly lay down an obligation to conclude an agreement, and...(2) outline the basic content of the future agreement...they make it incumbent upon the parties to agree upon a specific legal regulation of the matter outlined in generic terms in the pactum. Since the parties must act in good faith...if one of them refuses to make the agreement or finds

pretexts for delaying its conclusion, it is in breach of international law. Pacta de negotiando [are] obligations to negotiate future agreements [imposing a] binding obligation...although here the content of the obligation is [simply that the Parties are] duty-bound to enter into negotiations. However, both parties [may not] 1) advance excuses for not engaging in or pursuing negotiations or 2) to [act so as to] defeat the object and purpose of the future treaty. On this point international case law is very clear and always demands full observance of good faith.” (29).

Judge Bedjaoui interprets the obligation outlined in NPT Article VI as a pactum de negociando “but one of a particular type...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...it is also specific in its purpose insofar as it concerns...nuclear disarmament... 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. ”(30)

7. Good Faith Negotiation and International Humanitarian Law

The last few years there has seen an evolving recognition of the imperative of good-faith negotiation on NPT Article VI to uphold international humanitarian law. The latter, which evolved from the Hague Conventions of 1899 and 1907 and from the four Geneva Conventions of 1949 and their Additional Protocol of 1977, is a set of international rules established by treaty or custom, which addresses humanitarian issues directly arising from armed conflicts, and limits the rights of the parties to a conflict to use methods and means of warfare of their choice.

In 2007 Judge Bedjaoui wrote, “ 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. 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. 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.”(31)

In May 2010 for the first time the NPT Review Conference expressed for the first time its “deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons and reaffirms the need for all states at all times to comply with applicable international law, including international humanitarian law.”(32) I

In November 2011 the Council of Delegates of the International Red Cross and Red Crescent adopted a resolution in which the Council emphasized the incalculable suffering resulting from any use of nuclear weapons, the lack of any adequate humanitarian response

capacity and the absolute imperative to prevent such use. The Council also found it hard to see how any use of nuclear weapons could be compatible with rules of international humanitarian law, in particular those of those of distinction, precaution, and proportionality. (33)

The rule of Distinction prohibits the use of weapons which are unable to distinguish between combatants and civilians; and the rule of Proportionality prohibits the use of weapons whose collateral effects on civilians are disproportionate to the military advantage of the anticipated attack.

Good faith is implicit in the rule of precaution, which requires that measures be taken in advance to comply with the rules of distinction and proportionality. As stated in a 2005 study by the International Committee of the Red Cross, all feasible precautions must be taken to avoid, or at least minimize, incidental loss of civilian life and damage to the environment. (34)

A corollary of the latter is the need for good-faith negotiation on NPT Article VI to prevent ecocide: scientific studies increasingly indicate that a nuclear war--even a limited nuclear exchange between India and Pakistan--could result in massive climate changes such as tons of soot lofting into the stratosphere, depleting the ozone layer and causing "widespread damage to human health, agriculture, and terrestrial and aquatic systems...(t)he combined cooling and enhanced UV would put significant pressures on global food supplies and could trigger a global nuclear famine." (35)

The rule of precaution, as John Burroughs notes, also has wide implications for the policy of nuclear deterrence. The latter involves planning and preparation to use nuclear weapons in varied situations under great stress. Good faith in applying the rule of precaution would show that any use of nuclear weapons could not comply with rules of distinction and proportionality and thus argue for an end to reliance on nuclear weapons and for nuclear disarmament.(36)

In the U.S., however, the 2010 Nuclear Posture Review pledged billions of dollars for "sustaining a safe, secure, and effective nuclear arsenal"(37) The 2013 U.S. Nuclear Guidance reaffirmed a commitment to deterrence and Cold War policies of counterforce targeting; retaining the triad of land, air, and sea-based nuclear weapons; and retaining non-strategic nuclear weapons deployed in Europe. The outcome has been some modest reduction of nuclear weapons under the bilateral U.S./Russian New Start Treaty but continued reliance on policies that maintain and refurbish nuclear weapons through 'Life Extension Programs [LEPS] and those which develop new weapons.

Two examples are the planned Uranium Production Facility and the refurbishment of the B-61-12 bomber produced at the Y-12 nuclear facility in Oak Ridge, Tennessee. The recent 'improvement' of the latter has a new guided tail kit to increase accuracy and contravenes the 2010 NPR which pledged that "the U.S. will not develop new nuclear warheads. Life Extension Programs will use only nuclear components based on previously

tested designs, and will not support new missions or provide for new military capabilities.”
(38)

Since early 2013 Russia has modernized its nuclear forces, including the continued development and deployment of new intercontinental ballistic missiles, construction of ballistic missile submarines, development of a new strategic bomber, and deployment of tactical ballistic and cruise missiles and fighter-bombers.

There are similar nuclear weapons modernization programs in the U.K., France and China, as well as in Israel, India and Pakistan.

Such nuclear weapons modernization programs by the nuclear weapon states clearly contravenes the interpretation of VCLT that good faith obliges the parties to a treaty to apply it in such a way that its purpose can be realized, and to abstain from acts which would inevitably affect their ability to perform.

Further, a delay of more than four decades by the nuclear weapon states in undertaking or even starting negotiations on the nuclear disarmament obligation of NPT Article VI clearly indicates bad faith in “abnormal delays” as described by the Lac Lenoux tribunal, as the NWS have shown a blatant regard for substantive and procedural aspects of good-faith negotiation: “sustained upkeep of significant negotiations” outlined in the AMINOIL arbitration.

A common view now is that states like Iran and North Korea are acting in bad faith regarding their nuclear plans, but a wiser and more realistic approach would be to take a long-term view of recognizing the complete lack of good faith of the nuclear weapon states for more than four decades in complying with the nuclear disarmament obligation of NPT Article VI.

Good faith, in the sense of trust, is a core value of civilization and essential to any negotiation. It is key to further negotiation on NPT Article VI, which is an urgent and essential international obligation. The continued existence of weapons, which inflict unique injury and unnecessary suffering, are unnecessary for security purposes, risk environmental catastrophe and ecocide, use vast amounts of the world’s resources that could otherwise be used for humane purposes and prevent the attainment of a more equitable world--is an annihilation of good faith principles, is a major challenge to the very existence of international humanitarian law, as Bedjaoui writes--and undermines all international law.

Good faith negotiation on NPT Article VI is thus essential to uphold international humanitarian law and urgently needed to lead to a verifiable, equitable and irreversible Nuclear Weapons Convention for the attainment of a fair and sustainable world free of nuclear weapons.

ENDNOTES

1. O'Connor, J.F. *Good Faith in International Law* (Dartmouth, Aldershot, 1991) pp. 5--6
2. Raghaven, V. et al., *Sources of Indian Tradition* (2nd ed.) Vol. I (Columbia Univ. Press, 1988) p. 217.
3. Chan, Wing-tsit et al, *Sources of Chinese Tradition*, Vol.I.(Columbia Univ. Press, 1960) p.32
4. Shotoku, "Seventeen-Article Constitution[Jushichijo Kenpo]" Online at http://www.sarudama.com/japanese_history/jushichijokenpo.shtml
5. Cao, Deborah, *Chinese Law: A Language Perspective*, Ashgate Publishing Ltd, 2004) p. 20.
6. Vogel, Frank E., (Harvard Law school) "The Islamic Legal System; Plenary, Basics of Islamic Law", p. 6: Online at <http://www.aals.org/am2004/islamiclaw/islamicmaterials.pdf>
7. Torah Mitzion, 102:19--20 (Aug 2005), Online at www.torahmitzion.org/pub/parsh/5765/vaetchanen_gen.pdf
8. O'Connor, op. cit.. pp. 9--13.
9. Ibid., pp. 17--23.
10. Ibid., pp. 23-- 25.
11. Ibid., pp. 25--30
12. Grotius, Hugo, *De Jure Belli ac pacis Libri Tres* (1625).
13. Weeramantry, Judge Christopher, remarks made during The Mayors for Peace Conference, The Hague, Netherlands, July 4-5, 2006
14. Audlin, James David, *The Circle of Life* (Clear Light Publishing, Santa Fe, 2006) p.123.
- Kolb, Robert, *La Bonne Foi en Droit International Public*, (Presses Universitaires de France, 2000) pp. 584--585.
- Reports of International Arbitral Awards, Vol XII, p. 311
17. Ibid., p. 306--307.
- North Sea Continental Cases, I.C. J. Reports, 1969, p. 47.
19. North Sea Fisheries Cases, I.C.J.Reports, 1974, ¶65, p. 201
20. Arbitration between Kuwait and the American Independent Oil Co., (AMINOIL) 21 ILM1982, 1014
21. Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (1997

- General List No 92), ¶141
22. Ibid., ¶142
23. Macedonia v. Greece (2011, General List no. 37), ¶ 134
24. Good Faith, International law, and the Elimination of Nuclear Weapons,” Judge Mohammed Bedjaoui, IALANA, 2009, p. 154.
25. Bedjaoui, Ibid.. p. 148.
26. International Law Commission, “Report of the International Law Commission Covering its 16th Session, 727th Meeting, 20 May 1964 [Yearbook of the Int’l Law Commission]
27. McNair, Arnold, The Law of Treaties (1961) , p. 540.
28. Rosenne, Shabtai, Developments in the Law of Treaties 1945—1986 (1989), p. 175.
29. Cassese, Antonio, “The Israel –PLO Agreement and Self-Determination, EJIL.(1993). 565—567
30. Bedjaoui, op. cit., pp. 148--149.
31. Bedjaoui, Ibid., p. 160.
32. Final Document of the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, NPT /CONF.2010/50 (Vol I) p. 19
33. Council of Delegates of the International Red Cross and Red Crescent Movement, Resolution I, 26 November 2011
34. Henkaerts, J.& Doswald-Beck, L, Customary International Humanitarian Law, Rules, International Committee of the Red Cross, Cambridge University Press (2009).
35. Mills, Michael; Toon, Owen; Lee-Taylor, Julia; Robock, Alan, “Multi-decadal global cooling and unprecedented ozone loss following a regional nuclear conflict,” Earth’s Future (2014) pp. 2--3.
36. Burroughs, John, “International Humanitarian Law”, Unspeakable Suffering--the Humanitarian Impact of Nuclear Weapons, Beatrice Fihn, ed, Reaching Critical Will, WILPF(2013) p. 71
37. 2010 U.S. Nuclear Posture Review, www. defense.gov, Executive Summary, iii.
38. Kristensen, Hans, FAS (Federation of American Scientists) Security Blog, 24 January 2014