

## Good Faith Negotiation for Nuclear Disarmament

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“Law’s Imperative: A World Free Of Nuclear Weapons”

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*Based on a longer paper, “The Legal Imperative of Good Faith Negotiation on the Nuclear Disarmament Obligation of NPT Article VI” , prepared for this occasion. It summarizes in part and updates two papers given at conferences: IALANA (International Association of Lawyers Against Nuclear Arms) San Jose, Costa Rica, 2008; and The Simons Foundation & IALANA Conference, Vancouver, Canada, 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.

Good faith, in the sense of trust, has always been recognized and practiced by most traditions. In ancient India, good faith was implicit in the Sanskrit word *dharma*, which connotes ‘duty, ‘obligation’, or right behavior’. In the Roman Empire good faith was also implicit in the term *pacta sunt servanda*, pacts must be observed. In the seventeenth century the Dutch jurist Hugo Grotius wrote that “good faith should be preserved, that the hope of peace may not be done away with, for not only is every state sustained by good faith, but also that greater society of states.”

In international negotiations, good faith has been more difficult to define and uphold. A conduct of good faith is intrinsic to any valid negotiation, yet objective standards to define this conduct have remained refractory. Specific traits of good faith, however, have been noted in cases settled by international arbitration or by the International Court of Justice.

In a 1957 arbitration the tribunal held that “The State has, by rules of good faith, the obligation to take into consideration different interests...one party [must] not show intransigence. The tribunal also described traits of bad faith, such as an unjustified breaking off of the discussions, or abnormal delays.

In a 1969 case the ICJ said that the parties had an obligation to conduct themselves beyond mere formalism so that the negotiation has meaning.

In a 1982 arbitration the tribunal identified good faith as sustained upkeep of significant negotiations over a period appropriate to the circumstances, awareness of the interests of the other party, and a persevering quest for an acceptable compromise.

In a 1997 case the ICJ said “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. The Court then invoked Article 26 of the Vienna Convention on the Law of Treaties, which holds “Every treaty in force is binding upon the parties to it and must be performed by them in

good faith. This latter element implies that 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.”

In 1945 good faith was a bedrock principle of the U.N. Charter, which stated that All Members shall *fulfill in good faith the obligations assumed* by them, and also imposed on all member states a general obligation of disarmament. In 1946 the first resolution of the U.N. General Assembly called for the abolition of atomic weapons and other weapons of mass destruction, followed by similar resolutions in 1954, 1963 and 1965.

In 1968 the element of good faith was explicit 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.”

In negotiating the NPT, good faith was necessary among all parties--the U.S, the Soviet Union, France, the U.K, and China, which then had nuclear weapons, and the rest of the world which did not--for a treaty of such magnitude and complexity to be concluded. The exercise of good faith was incumbent on all U.N. state representatives, which called for a Conference in 1965 to negotiate an international treaty based on five principles. One of these was that the Treaty should embody an acceptable balance of mutual responsibilities and obligations of the nuclear and non-nuclear powers.

Judge Mohammed Bedjaoui, former president of the ICJ, linked good faith to equity by noting that “in substance, in the spirit of the NPT negotiators, Article VI, 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.’ In 1995, which extended the NPT for an indefinite duration, the reciprocal nature of these obligations was vigorously reaffirmed.”

In 1996 the obligation of good faith negotiation in Article VI was greatly strengthened by the ICJ in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, by its unanimous statement 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 can be seen in the Court’s interpretation that good-faith negotiation goes beyond an obligation of *conduct* to one leading to a precise *result*.

For the first time the Court clarified that this obligation is to achieve complete abolition of nuclear weapons without any precondition of comprehensive demilitarization, and that it extends to *all* states, even those currently non-parties to the NPT.

The 1995 NPT Review Conference adopted Objectives to measure compliance with the disarmament obligation pursuant to the Treaty's indefinite extension. These included the determined pursuit by the nuclear weapon states of *systematic and progressive efforts* to reduce nuclear weapons globally .

The 2000 NPT Review Conference adopted Thirteen Practical Steps, including an *unequivocal undertaking* by the nuclear weapon states for the total abolition of their nuclear arsenals, and further progress by all nuclear weapon states with increased transparency, irreversibility, and a diminishing role for nuclear weapons in security policies.

In 2005 a U.N. General Assembly Resolution restated its approval of principles of transparency and irreversibility, with new statements such as the need for a reduction of the operational status of nuclear weapons systems.

The lack of further progress in good faith negotiation on Article VI, even after subsequent agreements, violates Article 33(3) of the Vienna Convention, which provides in relevant part that “there shall be taken into account, together with the context: any *subsequent agreement* between the parties regarding the interpretation of the treaty or the application of its provisions.

There is a growing recognition of the nexus between good-faith negotiation on Article VI and international humanitarian law. The latter is a set of international rules which addresses humanitarian issues arising from armed conflicts, and limits the rights of parties to a conflict to use methods of warfare of their choice.

Judge Bedjaoui described nuclear weapons as 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 a major challenge to the very existence of humanitarian law. 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 has with respect to the others a right, created by good faith, not to be deceived in these expectations..”

In May 2010 the NPT Review Conference described 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.”

In November 2011 the International Red Cross and Red Crescent adopted a resolution stressing 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. They

also found it hard to see how any use of nuclear weapons could comply with international humanitarian law rules of distinction, precaution, and proportionality.

The rule of Distinction prohibits the use of weapons which cannot 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 rules of distinction and proportionality. The International Committee of the Red Cross held that all feasible precautions must be taken to avoid, or at least minimize, incidental loss of civilian life and damage to the environment.

A corollary is the need for good-faith negotiation on Article VI to prevent ecocide: scientific studies indicate that even a limited nuclear exchange could result in massive climate changes causing widespread damage to human health, agriculture, and aquatic systems...(t)he combined [effects] would put significant pressures on global food supplies and could trigger worldwide famines.

Precaution 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.

In the U.S., however, the 2010 Nuclear Posture Review pledged billions of dollars for deterrence: what it calls sustaining a safe, secure, and effective nuclear arsenal. 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.

Two examples are the planned Uranium Production Facility and the refurbishment of the B-61-12 bomber produced at the Y-12 nuclear facility. The latter has a new design to improve accuracy, contravening the NPR pledge that "the U.S. will not develop new nuclear warheads." The former contradicts the NPR statement that Life Extension Programs will not support new missions or provide for new military capabilities.

Since early 2013 Russia has modernized its nuclear forces, including development and deployment of new ICBMs. There are similar nuclear weapons modernization programs in the U.K., France and China.

Such modernization programs by the nuclear weapon states contradicts the precept that good faith obliges parties to a treaty to abstain from acts which would inevitably affect their ability to perform its terms.

Further, a delay of forty-four years by the nuclear weapon states in undertaking or even starting negotiations on the nuclear disarmament obligation of NPT Article VI clearly contravenes temporal constraints such as “abnormal delays’.

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