

International Humanitarian Law and the Nuclear Disarmament Obligation of NPT Article VI: Good Faith as Key in a Concerted Contextual Commitment to Abolition
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“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.*”

--Judge Mohammed Bedjaoui, “Good Faith, International Law, and Elimination of Nuclear Weapons”
IALANA (2008) [italics in original]

The first paragraph of the above was written by Bedjaoui as ¶ 20 of his individual Declaration, as President of the International Court of Justice (ICJ) when its Opinion on Nuclear Weapons was rendered (Advisory Opinion of 8 July 1996; Gen'l List No. 95). This paragraph was included with the second and the rest of Bedjaoui's profound, extended essay cited above on good faith, international law and the abolition of nuclear weapons. .

Good faith: its origin and practice as seen in historical sources and varied traditions; its interpretation in cases brought before international arbitration tribunals and the ICJ; its role in the negotiating history of the Nuclear Non-Proliferation Treaty (NPT); and its essential role in negotiating the disarmament obligation of NPT Article VI-- are the subjects of an essay I wrote in 2008.[1] Briefly, it is thought that good faith, in the sense of trust, evolved from prehistoric times; the concept has been recognized and practiced by most traditions since ancient times.[2] Implicit in all negotiations are the duty and conduct of good faith, without which the process and outcome of any negotiations are meaningless. Objective standards of good faith have been refractory to define and uphold judicially; however, in cases brought to international arbitration tribunals and before the ICJ., specific traits or characteristics of good faith negotiation have been identified. Among these are flexibility and a temporary suspension of parties' rights during negotiation; a concern for substance and purpose, not mere formalism; fairness between the parties and consideration for each others' laws and interests; sustained maintenance of significant negotiations; and the good faith of parties to a treaty to apply its terms reasonably and in such a way that its purpose can be realized. Vis-a-vis treaties, good faith is integral to the Vienna Convention on the Law of Treaties: “Every treaty in force is binding upon the parties to it and must be performed by them *in good faith*” (§ 26)... “A treaty shall be interpreted *in good faith* ... in the light of its object and purpose.” (§. 31[1]). Good faith is invoked in NPT Article VI: “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....” This

1970 treaty commitment to good-faith negotiation on nuclear disarmament was significantly strengthened in 1996 by the ICJ, which held unanimously in § 105 (2) (F) of its Advisory Opinion that “there exists an obligation to pursue *in good faith* and *bring to an conclusion* negotiations leading to nuclear disarmament in *all its aspects* under strict and effective international control.” [italics added throughout].

In this paper I will first focus on good faith as essential to the NPT commitment, in its 2010 Review Conference, to comply with international humanitarian law (IHL). I will then try to note how good faith initiatives are integral to both IHL and international human rights law (IHRL). Finally, I would like to suggest that concerted, contextual commitments to good faith negotiation on the nuclear disarmament obligation of NPT Article VI are needed, to further evolving norms of non-use and non-possession, whether the approach is preliminary negotiations on a framework of separate mutually reinforcing instruments or negotiation on the adoption of a unified Nuclear Weapons Convention (NWC), to achieve verifiable, irreversible and enduring abolition of nuclear weapons.

Good faith is implicit in and key to Principles and Objectives in the Final Document of the 2010 NPT Review Conference, which states: “ The Conference expresses 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.”[3]

An urgent appeal for action in good faith on nuclear disarmament imbues the holistic and momentous statement by Jacob Kellenberger, President of the International Committee of the Red Cross (ICRC), in its influential initiative preceding the Conference:

“ The International Committee of the Red Cross firmly believes that the debate about nuclear weapons must be conducted not only on the basis of military doctrines and power politics. The existence of nuclear weapons poses some of the most profound questions about the point at which the rights of States must yield to the interests of humanity, the capacity of our species to master the technology it creates, the reach of international humanitarian law, and the extent of human suffering we are willing to inflict, or to permit, in warfare...in 1996 the ICRC welcomed the fact that the ICJ, in its Advisory Opinion on nuclear weapons, confirmed that the principles of distinction and proportionality found in IHL are ‘intransgressible and apply also to nuclear weapons... [which are] unique in their destructive power, in the unspeakable human suffering they cause, the impossibility of controlling their effects in space and time, in the risks of escalation they create, and in the threat they pose to the the environment, to future generations, and indeed to the survival of humanity..the ICRC finds it hard to envisage how any use of nuclear weapons could be compatible with IHL..

In the view of the ICRC, preventing the use of nuclear weapons requires fulfillment of existing obligations to pursue negotiations aimed at prohibiting and eliminating such weapons through a legally binding international treaty.”[4]

Good faith adherence to IHL principles of Distinction: prohibiting the use of weapons unable to distinguish between combatants and civilians-- and Proportionality: prohibiting the use of weapons whose collateral effects on civilians are disproportionate to the military advantage of the anticipated attack-- are explicit factors of the above statement. Adherence in good faith to the IHL principle of Necessity: the rule that a state may only use such level of force necessary to achieve the military objective of a

particular strike: is signalled by Kellenberger's warning on "the risks of escalation that [nuclear weapons] create". Good faith adherence to the IHL principle of Controllability: the corollary rule that a state may not use a weapons whose effects it cannot control-- imbues Kellenberger's allusion to radiation as the ultimate harm unique to nuclear weapons in "the unspeakable human suffering they cause, the impossibility of controlling their effects in space and time.... and in the threat they pose...to future generations" ..

Essentially IHL evolved from the Hague Conventions of 1899 and 1907 and from the four Geneva Conventions of 1949 and their Additional Protocol of 1977. IHL is " a set of international rules, established by treaty or custom, which are specifically intended to solve humanitarian problems directly arising from...international and non-international armed conflicts ...[it] protects persons and property that are, or may be ...[so] affected...and limits the rights of the parties to a conflict to use methods and means of warfare of their choice." [5]

Good faith is also inherent in international human rights law. IHRL is "a set of international rules, established by treaty or custom, on the basis of which individuals and groups can expect and/or claim certain behavior or benefits from governments. ..IHRL main treaty sources are the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (1966) as well as Conventions on Genocide (1948), Racial Discrimination (1965) Discrimination Against Women (1979), Torture (1984) and the Rights of the Child (1989)".[6]

Good faith principles are integral to both IHL and IHRL. While these two branches of international law have had different origins and foci, their intersections are significant and suggest their increasing convergence, as Peter Weiss and John Burroughs have noted: "The initial division of the branches...arose from the newness of *international* human rights law and a desire...to focus on the maintenance of peace through the U.N. Charter and on respect for human rights during peacetime. The two branches also have differing approaches: one focuses upon the articulation of *rights* held by individuals vis-a-vis states; the other imposes *duties* upon states and their personnel in inter-state conflicts as well as in internal conflicts with organized armed forces. As human rights law grew in prominence, and as the necessity was recognized of limiting the ravages of war, especially internal conflicts...it became impossible to ignore the core idea held by the two branches: the protection of the human person.[7]

A core human right, the right to life, is upheld by the International Covenant on Civil and Political Rights (ICCPR), which provides in §6(1) that every human being has the inherent right to life which shall be protected by law, and that no one shall be arbitrarily deprived of life. An initiative promoting good faith in the context of IHRL and abolishing nuclear weapons was made in 1985 when the U.N. Human Rights Committee, the entity charged with overseeing implementation of the ICCPR, issued a General Comment on nuclear weapons and the right to life. This Comment provided that

"It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. this threat is compounded by the danger that the actual use of such weapons may be brought about, not only in the event of war, but even through human or mechanical error or failure.

Furthermore, the very existence and gravity of this threat generate a climate of suspicion and fear between States, which is itself antagonistic to the promotion of

universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations and the International Covenants on Human Rights....

The production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity...the Committee accordingly, in the interests of mankind, calls upon all States...to take urgent steps, unilaterally and by agreement, to rid the world of this menace.” [8]

Good faith is implicit in this urgent appeal. “[A]ll members of the Committee joined in the consensus on the final text of the Comment... [although it] was sharply criticised in the Third Committee of the General Assembly by some western states...and its language had especially strong support from international lawyers.”[9.]

Good faith also underlies the 1994 oral arguments and the 1996 Opinion of the ICJ Court in its Advisory Opinion on Nuclear Weapons, which relied on both IHL and ICRL arguments. In 1994 more than forty states invoked IHL principles like Necessity and Proportionality, social and economic arguments, as well as IHRL arguments such as that by the Solomon Islands linking “the right to life... with international law requiring global protection of human health and the environment.” [10]

In its 1996 Opinion the ICJ invoked IHL, and IHRL “primarily under the rubric of right to life ...the interpretation of the human right to life in warfare depends on applicable principles of humanitarian law [such as] forbidding the infliction of indiscriminate harm and unnecessary suffering...use of nuclear weapons would necessarily entail a massive violation of the most basic of human rights, the right to life”.[11]. IHRL principles are clear in the Court’s concern that “the environment is under daily threat and the use of nuclear weapons could constitute a catastrophe for the environment...[which] is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.[12]. The convergence of IHL and IHRL is implied by the Court’s explication of its reliance on IHL since “a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and fundamental considerations of humanity.” [13]

Strong links between good faith adherence to such IHL and IHRC principles and good faith negotiation on the nuclear disarmament obligation of NPT Article VI are suggested by Bedjaoui’s insightful statement: “In international relations...[each state] has with respect to the others a right, created by good faith, not to be deceived in [their respective legitimate obligations]. *Good faith thus gives birth to rights.*” [14]

Good faith is an essential element of the comprehensive declaration, in the Final Document of the 2010 NPT Review Conference, of the need for *all States at all times* to comply with applicable international law, including international humanitarian law. The significance of this, as John Burroughs has cogently argued, is that “NPT parties have now taken on the existing obligation of compliance with IHL with respect to nuclear weapons as an NPT *commitment* for which they are accountable within the NPT review process. That NPT commitment is embedded within the matrix of commitments for implementation of the fundamental NPT Article VI obligation of good-faith negotiation of nuclear disarmament.” [15]

Good faith negotiation is found throughout the history and in the context of this ‘matrix of commitments’. The 1995 NPT Review and Extension Conference, in

connection with the decision to extend the treaty indefinitely, adopted procedures to strengthen the review process, Principles and Objectives on Nuclear Non-Proliferation and Disarmament, and a resolution on efforts to have the Middle East be a Nuclear Weapons-Free Zone (NWFZ). Among the Principles and Objectives are ‘*systemmatic and progressive* efforts to reduce nuclear weapons globally, with the ultimate goal of eliminating those weapons’, negotiation of the comprehensive Test Ban Treaty (CTBT) by 1996, and commencement on a treaty banning production of fissile materials in nuclear weapons (FMCT). Building on these Principles and Objectives, the 2000 NPT Review conference adopted Thirteen Practical Steps for Disarmament. Among these are an *unequivocal undertaking* to accomplish the *total* elimination of nuclear arsenals; signatures and ratifications to bring the CTBT into force; negotiating a FMCT; U.S./Russian bilateral reductions of their nuclear arsenals through the START process; application of the principle of irreversibility to arms control and disarmament measures; development of verification capabilities; and a diminishing role of nuclear weapons in security policies. [16]

Lack of good faith was regrettably demonstrated in the next decade, however, by noncompliance with or rejection of these principles in the NPT review process, primarily by the nuclear weapon states and particularly by the U.S. under the G.W. Bush administration.

A resolve to reaffirm and strengthen the prior Principles promoting good faith negotiation was thus sought for the 2010 NPT Review Conference. In an outcome generally thought positive, the Final Document, in its Conclusions and recommendations for follow-on actions, contains several good faith affirmations concerning nuclear disarmament.

In addition to the expression by the Conference of its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons and [reaffirming] the need for all states at all times to comply with applicable international law, including international humanitarian law. (I.A.v.), other key provisions concerning good faith negotiation are statements that the Conference

- reaffirms the unequivocal undertaking of the nuclear weapon states (NWS) to accomplish the total elimination of their nuclear arsenals (I. A. ii)
- reaffirms the continued validity of the practical steps agreed to in 2000 .(I.A. iii.)
- reaffirms that significant steps by all the NWS leading to nuclear disarmament should...be based on the principle of increased and undiminished security for all (I.A.iv)
- affirms the vital importance of the universality of the Treaty and calls on states not party to the Treaty to accede as non- nuclear weapon states (NNWS) . (A.I. vi).

and calls for a 2012 Conference with a facilitator to promote a Middle Eastern NWFZ

- calls on all NWS to undertake concrete disarmament efforts... [and] notes the five-point proposal for nuclear disarmament of the Secretary-General of the United Nations, which proposes, inter alia, consideration of negotiations on a nuclear weapons convention (NWC) or agreement on a framework of separate mutually reinforcing agreements, backed by a strong system of verification (I. B. iii.)

- recognizes the legitimate interests of NNWS in the constraining by the NWS of the development and qualitative improvement of nuclear weapons and ending the development of advanced new types of nuclear weapons. (IB. iv)

The *context* for the IHL provision in the Final Document is important, as John Burroughs has noted: “The chapeau for Part I reads as follows:

In pursuit of the full, effective and urgent implementation of Article VI of the NPT and ¶¶ 3 and 4 (c) of the 1995... ‘Principles and Objectives’..and building upon the practical steps agreed to in the final document of the 2000 NPT Review Conference, the Conference *agrees* on the following *action plan* on nuclear disarmament which includes *concrete steps* for the total elimination of nuclear weapons...The agreement set forth in Part I was reached in the context of ...a review conference authorized by Article VII of the NPT ‘to review the operation of this Treaty with a view to assuring that the purposes of the Preamble and the provisions of the treaty are being realized.” [17]

Upholding the principle of good faith negotiation underlies the contextual basis of all these affirmations and negotiations, even if the action plan of the 2010 NPT Review conference is not legally binding *per se*. “*It represents states parties’ collective understanding of the appropriate means for implementation of Article VI*”. [18]

Concerted, contextual commitments to further good faith negotiation on the nuclear disarmament obligation of NPT Article VI are essential. “[G]ood faith would be demonstrated by implementing NPT commitments agreed to at the 2000 and 2010 Review Conferences--among them bringing the test ban treaty into force, negotiating a treaty banning production of fissile materials for nuclear weapons, and accomplishing verified, irreversible reductions leading to elimination. Good faith also requires refraining from actions undermining the achievement of the disarmament objective [such as modernization of nuclear forces and infrastructure by the U.S. and other NWS].” [19]

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 and urgently needed for the attainment of a verifiable, irreversible, and enduring nuclear-weapons-free world.

ENDNOTES

1. Shafer, E.J., “Good Faith Negotiation, the Nuclear Disarmament Obligation of NPT Article VI. and Return to the International Court of Justice”, IALANA 2008
2. O’Connor, J.F., Good Faith in International Law (Dartmouth, Aldershot, 1991) pp. 5--6.
3. NPT/ CONF.2010/50 (Vol. I)

4. Kellenberger, Jakob, President, ICRC, “Nuclear Weapons: Statement to the Geneva Diplomatic Corps, ICRC Headquarters, Geneva, 20 April 2010
5. ICRC, “International Humanitarian Law and International Human Rights Law: Similarities and Differences”, Advisory Service, 1/03
6. Ibid.
7. Weiss, P. & Burroughs, J., “Weapons of Mass Destruction and Human Rights”, *Disarmament Forum*, (Vol 3, 2004), p. 28
8. U.N. Human Rights Committee, General Comment No. 14 (Article 6), “Nuclear Weapons and the Right to Life”, 23rd Session, 1984
9. Bennoune, K., “The Intersection of Nuclear Weapons and International Human Rights Law: Implications for the Good-Faith Obligation to Negotiate Nuclear Disarmament”, IALANA 2008, p. 210.
10. Weiss, P & Burroughs, J., op. cit., p.29
11. Ibid., p. 30
12. *Legality of the Threat or Use of Nuclear Weapons*, General List No. 95 (Advisory Opinion of 8 July 1996), Para 29
13. Weiss, P. & Burroughs, J., op. cit., p. 30.
14. Bedjaoui, Mohammed, op. cit., pp. 140 & 160
15. Moxley, C., Burroughs, J. Granoff, J. “Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty.” 34 *FORDHAM INT’L L.J.* p.70.
16. Ibid., pp. 70--71.
17. Ibid., p.72.
18. Ibid., p.74.
19. Ibid., p. 78.