

The Imperative of Good Faith

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“Good faith is a fundamental principle of international law, without which all international law would collapse,” declared Judge Mohammed Bedjaoui, former President of the International Court of Justice, at a conference held in connection with last year’s PrepCom.¹

The Vienna Convention on the Law of Treaties provides: “*Pacta sunt servanda*: Every treaty in force is binding upon the parties to it and *must be performed by them in good faith*.”²

The Vienna Convention is relatively young, dating back to 1969, but the concept is not. Thus the Roman jurist Justinian observed: “What is so suitable to the good faith of mankind as to observe those things which the parties have agreed upon.”³

The International Court of Justice has elucidated the requirement, stating that the “principle of good faith obliges the Parties to apply [a treaty] in a reasonable way and in such a manner that its purpose can be realized.” The Court also said that “it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application.”⁴

In addition to implementation of existing obligations, good faith governs the creation of new ones, as we shall see later in this presentation.⁵

Essentially, good faith means keeping promises in a manner true to their purposes and working sincerely and cooperatively to attain agreed objectives.

The question of whether promises have been kept arises with respect to all obligations under the NPT.⁶ And compliance with provisions on non-acquisition of nuclear weapons and IAEA

¹ Mohammed Bedjaoui, Keynote Address, Conference on Good Faith, International Law, and Elimination of Nuclear Weapons: The Once and Future Contributions of the International Court of Justice, May 1, 2008, Geneva, p. 18, available at <http://www.lcnp.org/disarmament/2008May01eventBedjaoui.pdf>. He was President of the ICJ when it gave its 1996 advisory opinion on nuclear weapons.

² Article 26 (emphasis supplied).

³ Justinian, *Digest* (529-565 A.D.), Book II.XIV, in S.P. Scott, *The Civil Law* (Cincinnati, 1932).

⁴ *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), I.C.J. Reports 1997, at ¶ 142.

⁵ As stated by the International Court of Justice: “One of the basic principles governing the *creation* and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential.” *Nuclear Tests* (Australia v. France), I.C.J. Reports 1974, p. 268, at ¶ 46 (emphasis supplied).

⁶ Judge Bedjaoui stated that there is an “obligation to respect the integrity of the [NPT.] [A] treaty must be considered executory in all its provisions. Good faith prohibits selectivity according to the interests of the moment.”

safeguards undoubtedly creates an environment more conducive to compliance with the disarmament obligation. But it is the latter we will focus on here.

Pursuit of Negotiations

Article VI requires the pursuit of negotiations on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament. Has that obligation been performed in good faith?

Judging by the record since CTBT negotiations were concluded in 1996, the answer must be a resounding no. Aside from the brief US-Russian talks resulting in the 2002 Strategic Offensive Reductions Treaty, there have been no negotiations, bilateral, plurilateral, or multilateral, on disarmament measures.

Although the 1995 Principles and Objectives called for the immediate commencement of negotiations on a fissile materials treaty, and although the 2000 Practical Steps called for conclusion of negotiations on such a treaty by 2005, there have been no such negotiations.

Although the annual General Assembly resolution on follow-up to the advisory opinion of the International Court of Justice calls for immediate commencement of multilateral negotiations leading to the early conclusion of a nuclear weapons convention, there have been no such negotiations. Nor have there been official deliberations or discussions of any kind on this subject, though the Practical Steps called for the establishment of a subsidiary body at the Conference on Disarmament to “deal with” nuclear disarmament.

The Practical Steps called for implementation of the START process and endorsed the principle of irreversibility, and General Assembly resolutions – New Agenda, Renewed Determination, Nuclear Disarmament – call for further US-Russian negotiations on reductions in accordance with the principles of irreversibility, verification, and transparency. However, no such negotiations have taken place. Unlike previous US-Russian/Soviet agreements, the 2002 agreement failed to apply principles of verification and irreversibility, and comes into effect only at a single point in time, 2012.

Thus, while Article VI requires the pursuit of negotiations toward nuclear disarmament, since 1996 essentially no such negotiations have taken place. At best, most NPT nuclear weapon states could claim that they have “pursued” initiation of negotiations on fissile materials, but that effort has certainly not been vigorous. There can’t even be a plausible claim of “pursuit” on other fronts.

Nor have the disarmament commitments made in 1995 and 2000 been implemented. Thus the Weapons of Mass Destruction Commission led by Hans Blix found that the nuclear weapon

Keynote Address, *supra*, at p. 22, quoting Robert Kolb, *La bonne foi en droit international public: Contribution à l'étude des principes généraux du droit*, Publications de l'Institut universitaire des hautes études internationales, Geneva and Paris, PUF, 2000, p. 295.

states have failed “to fulfill their disarmament obligations under the [NPT] and also to honour their additional commitments to disarmament made at the 1995 and 2000 Review Conferences.”⁷

There is a respectable legal argument that as “subsequent agreements” under Vienna Convention Article 31, the Principles and Objectives and the Practical Steps supply criteria for the application and interpretation of Article VI.⁸ In this perspective, the failure to substantially implement those commitments constitutes non-compliance with Article VI.

Whether or not this view is accepted, clearly implementation of the commitments would have evidenced good faith in implementing Article VI, and no such good faith has been shown. Good faith now can be demonstrated by reaffirming and implementing the commitments, or where appropriate, agreeing upon and implementing alternative means of fulfilling Article VI.

To summarize regarding the general obligation to perform Article VI in good faith: negotiations must be pursued. The first step is to commence them. That follows from the International Court of Justice’s unanimous conclusion, largely interpreting Article VI, that: “There exists an obligation to pursue in good faith and bring to a conclusion negotiations on nuclear disarmament in all its aspect under strict and effective international control.”⁹ Negotiations obviously cannot be brought to a conclusion if they are not even commenced!

Negotiating in Good Faith

Fortunately, there are now signs that some negotiations will start. The United States and Russia will seek to agree on a START replacement treaty this year, and it seems possible that negotiations on fissile materials will begin reasonably soon in the Conference on Disarmament.

When there are negotiations on these matters, and when the international community finally gets down to negotiations on global elimination of nuclear arsenals, “good faith” comes into play in a more specific fashion. Article VI indeed requires this in stating that negotiations are to be conducted in “good faith.” There is a great deal to be found in international case law and

⁷ Weapons of Mass Destruction Commission, Final Report, *Weapons of Terror: Freeing the World of Nuclear, Chemical and Biological Arms* (Stockholm, June 1, 2006), p. 53.

⁸ See, e.g., Philippe Sands, QC, and Helen Law, “UK’s Nuclear Deterrent, Current and Future Issues of Legality”, Matrix, Gray’s Inn, London, 13 Nov. 2006, pp. 11-15 and fn. 29, online at <http://www.greenpeace.org.uk/MultimediaFiles/Live/FullReport/8072.pdf>; Peter Weiss, John Burroughs, and Michael Spies, Lawyers Committee on Nuclear Policy, “The Thirteen Practical Steps: Legal or Political?” (May 2005), online at <http://www.lcnp.org/disarmament/npt/13stepspaper.htm>. For an opposing view, see Christopher Ford, *Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons*, 14 *Nonproliferation Review* 401, 411-413 (2007).

⁹ *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 2006, I.C.J. Reports 1996, p. 226, at ¶ 105(2)F.

scholarly commentary on the meaning of “good faith” in the context of negotiations.¹⁰ It can be summarized under four headings.¹¹

1. Meaningful Negotiations

Good faith negotiations must be meaningful in nature. In *North Sea Continental Shelf*, the International Court of Justice stated that negotiating parties should “not merely . . . go through a formal process of negotiation” but rather “are under an obligation so to conduct themselves that the negotiations are meaningful.”¹² “[G]ood faith as properly to be understood,” declared the Arbitration Tribunal in *Aminoil*, requires “sustained upkeep of the negotiation over a period appropriate to the circumstances.”¹³

2. Willingness to Compromise

Good faith negotiations require willingness to compromise. According to the Arbitral Tribunal of the Agreement on German External Debts, “parties must make every effort . . . to reach a mutually satisfactory compromise, even going so far as to abandon previously inflexibly held positions.”¹⁴ The *Aminoil* Tribunal declared that good faith requires “awareness of the interests of the other party; and a persevering quest for an acceptable compromise.”¹⁵

3. Temporal and Procedural Requirements

States must not unjustifiably delay negotiations or adoption of the agreement. In *Lake Lanoux*, the Arbitral Tribunal stated that good faith would be violated “in case of unjustified breaking off of talks, of abnormal delay, [or] of failure to follow agreed procedures.”¹⁶

¹⁰ See generally Judge Bedjaoui, Keynote Address, *supra*; Elizabeth J. Shafer, “Good Faith Negotiation, the Nuclear Disarmament Obligation of Article VI of the NPT, and Return to the International Court of Justice,” presented January 26, 2008 at seminar in San Jose, Costa Rica entitled Abolition of Nuclear Weapons, War and Armed Forces sponsored by the University of Costa Rica Faculty of Law and the International Association of Lawyers Against Nuclear Arms, available at <http://www.lcnp.org/wcourt/goodfaith-shafer.pdf>.

¹¹ See “Good Faith Obligations,” Chapter 7 of *Good Faith Negotiations Leading to the Total Elimination of Nuclear Weapons: Request for an Advisory Opinion from the International Court of Justice*, 2009, International Association of Lawyers Against Nuclear Arms and International Human Rights Clinic at Harvard Law School.

¹² *North Sea Continental Shelf* (FRG v. Den.), I.C.J. Reports 1969, p. 3, at ¶ 85(a).

¹³ *Aminoil Arbitration* (Kuwait v. American Int’l Oil) 66 Int’l L. R. 578 (1982). Similarly, a World Trade Organization panel has stated that good faith “implies a continuity of efforts It is this continuity of efforts that matters, not a particular move at a given time, followed by inaction.” Panel Report, *United States- Import Prohibition of Certain Shrimp and Shrimp Products*, Recourse to article 21.5 of the DSU by Malaysia, GATT Doc. WT/DS58/RW (June 15, 2001), ¶ 5.60. The Panel Report was upheld by the Appellate Body Report dated October 22, 2001.

¹⁴ Genevieve Guyomar, *Arbitration Panel/Tribunal of the Agreement on German External Debt AFDI 1973*, in XIX, Part II, *Recueil des Sentences Arbitrales*, pp. 27-64. See also *North Sea Continental Shelf*, *supra*, at ¶ 85. The ICJ stated that compromise requires flexibility by all parties and an understanding that no party “insists upon its own position without contemplating any modification of it.”

¹⁵ *Aminoil Arbitration*, *supra*.

¹⁶ *Lake Lanoux Arbitration* (Fr. v. Spain), 12 R. Int’l Arb. Awards 281 (1957).

4. Serious Efforts to Achieve Agreement

In *Gulf of Maine*, the International Court of Justice held that parties are under a duty to negotiate with a genuine intention to achieve a positive result.¹⁷ In the NPT context, the Court explained, Article VI requires good faith negotiations as an obligation of both conduct and result.¹⁸ NPT states parties must not only negotiate with serious efforts to achieve the elimination of nuclear weapons but must actually achieve that result.

Good Faith in Broader Perspective

It has been suggested that good faith, in the sense of trust, evolved from prehistoric times, since membership in any human group involves obligations. A member of the group was relied on to perform the task “entrusted” to him or her.¹⁹ Good faith has been and is observed and upheld by the world’s cultures, tribal, ancient, and modern, and by the major religions.²⁰

In the modern era, it is essential to international relations. Good faith is the guarantor of international stability, Judge Bedjaoui explained, because it allows one state to foresee the behavior of its partner. States acting in good faith take into account other states’ legitimate expectations.²¹

At the beginning of the modern era, nearly four centuries ago, Hugo Grotius wrote: “For not only is every state sustained by good faith, ... but also that greater society of states.”²²

Within the framework of the NPT and the UN Charter, to demonstrate good faith – and to preserve and develop that “greater society” upon which so much depends - states must keep their promises, and work sincerely and cooperatively to avoid nuclear warfare, eliminate nuclear weapons globally, and build and sustain peace.

¹⁷ *Gulf of Maine* (Can. v. U.S.), I.C.J. Reports 1984, p. 246, at ¶ 87 (Oct. 12).

¹⁸ *Legality of Threat or Use of Nuclear Weapons*, *supra*, at ¶ 99.

¹⁹ See J.F. O’Connor, *Good Faith in International Law* (Dartmouth, Aldershot, 1991), pp. 5-6.

²⁰ See Remarks of Judge C.G. Weeramantry, Cities are not Targets! Report of a seminar organized by Mayors for Peace in the Peace Palace and City Hall in The Hague, Netherlands, July 4-5, 2006, pp. 11 - 12, *available at* <http://www.antenna.nl/nvmp/Verslag%20Akiba.pdf>; and Elizabeth Shafer, *supra*, and sources cited therein.

²¹ Keynote Address, *supra*, at pp. 19-20.

²² Hugo Grotius, *De Jure Belli ac Pacis: Libri Tres* (1625), trans. Francis W. Kelsey, The Classics of International Law (Oxford: At the Clarendon Press, 1925), Book III, Chapter 25.1.