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*Civil society perspectives on the second session of the
Preparatory Committee for the 2010 nuclear Non-
Proliferation Treaty Review Conference 28 April–9 May 2008*

Good Faith: A Fundamental Principle of International Law

John Burroughs, Lawyers' Committee on Nuclear Policy

“Good faith is a fundamental principle of international law, without which all international law would collapse,” declared Judge Mohammed Bedjaoui during the first week of the PrepCom. Bedjaoui was President of the International Court of Justice when it gave its 1996 advisory opinion on nuclear weapons, and more recently, Algerian Foreign Minister. He delivered the keynote address to a conference, “Good Faith, International Law, and the Elimination of Nuclear Weapons: The Once and Future Contributions of the International Court of Justice,” held on 1 May at the Warwick Hotel in Geneva.

A major portion of Judge Bedjaoui's address was devoted to the legal significance of the addition of the phrase “good faith” to NPT Article VI, which requires each state party to “pursue in good faith negotiations on effective measures ... relating to nuclear disarmament”. The phrase also figures in the Court's unanimous formulation of the obligation, based on NPT Article VI, “to pursue in good faith and bring to a conclusion negotiations on nuclear disarmament in all its aspects.” He explained that general legal principles governing good faith negotiation as applied in the NPT context include:

- sustained upkeep of the negotiation; awareness of the interests of the other party; and a persevering quest for an acceptable compromise, with a willingness to contemplate modification of one's own position
- refraining from acts incompatible with the object and purpose of the NPT; proscription of every initiative the effect of which would be to render impossible the conclusion of the contemplated disarmament treaty
- respect for the integrity of the NPT; no selectivity regarding which provisions to implement
- a general obligation of information and communication
- prohibition of abuse of process such as fraud or deceit
- prohibition of unjustified termination of negotiations

In related observations regarding “building confidence,” Judge Bedjaoui stated: “Today more than ever, it is important to attribute a more decisive role to the UN in the coherent, democratic conduct of an integrated process of nuclear disarmament, with a realistic and reasonable schedule.”

Judge Bedjaoui also offered some fascinating comments on the 1996 opinion's treatment of the question of legality of threat or use of nuclear weapons. He noted the “radical incompatibility existing in principle between the use of nuclear weapons and respect for international humanitarian law” reflected in the opinion. And he attributed the Court's failure to advise that threat or use is illegal in all circumstances to the inability of some judges to ignore the “pseudo-scientific chiaroscuro” of a “clean” nuclear bomb raised by some states and referred to in paragraph 95 of the opinion.

One of the conference panels considered the strategy of returning to the International Court of Justice to seek its advice on the legal consequences of the disarmament obligation. Phon van den Biesen, an Amsterdam-based lawyer, advocate before the Court, and vice president of the International Association of

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Lawyers Against Nuclear Arms (IALANA), observed that the nuclear weapon states “pretend there are no specific obligations” flowing from the Court’s 1996 opinion. He said it is time for civil society to rally as it did in supporting the request for the first opinion, and for the UN General Assembly to “break the stalemate and ask the Court to remind the world that international law is not just text on paper, but agreed norms and obligations.” Representatives of organizations sponsoring the conference explained the emerging “good faith” campaign. Among them was John Loretz, program director of the International Physicians for the Prevention of Nuclear War (IPPNW). He said that the initiative to return to the Court and the International Campaign for the Abolition of Nuclear Weapons (ICAN) complement each other.

Other speakers addressing the conference were international lawyers and law professors and NGO analysts. Peter Weiss, vice president of IALANA and of the Fédération Internationale des Droits de l’Homme, called the U.S. retrogression from the 13 practical steps for nuclear disarmament agreed at the 2000 NPT conference a “clear violation” of good faith. Professor Marcelo Kohen of the Graduate Institute of International and Development Studies, Geneva, defended the Court’s holding in the 1996 opinion that states are required to “conclude” negotiations on nuclear disarmament. While that term is not found in Article VI, it is implied by the mandate to achieve the object and purpose of the NPT.

Professor Karima Bennoune of Rutgers Law School, USA, surveyed the human rights critique of nuclear weapons, which she said has been underutilized in both the human rights and disarmament fields. She commented: “As in the area of nuclear disarmament, in the world of human rights, all too often we see clear and repeated violations of Article 26 of the Vienna Convention on the Law of Treaties which stipulates that ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’ States are rarely held accountable for these abuses.” She concluded: “Ultimately, I think that human rights and nuclear disarmament advocates should see a common interest in a vigorous defense of the principle of good faith in international legal process—as it is central to both our sets of projects.”

Ambassador Jaap Ramaker, drawing on his experience as chair of the Comprehensive Nuclear-Test-Ban Treaty (CTBT) negotiations in 1996 when the treaty was adopted, identified political and legal conditions that support successful negotiations. Among them are: prior commitments to negotiation of a treaty (both the Partial Test Ban Treaty and the NPT identify the CTBT as an objective); commitments regarding completion of negotiation (the NPT 1995 Principles and Objectives specified 1996); establishment of a proper negotiating mechanism; and clear circumscription of the scope of the negotiations.

Speaking for the New York-based Lawyers’ Committee on Nuclear Policy, I outlined the lack of compliance with the disarmament obligation in the last decade. There have been no negotiations, bilateral, plurilateral, or multilateral, on the reduction and elimination of nuclear arsenals. The only arguable exception, the two-page 2002 U.S.-Russian agreement, was more of a confidence-building measure, lacking provisions on verification or irreversibility.

Jacqueline Cabasso, executive director of the California-based Western States Legal Foundation, characterized the policy of the nuclear weapon states, in particular the USA, UK, and France, as “fewer but newer,” and increasingly “capacity- based.” These states, she said, cling to the notion of “deterrence” while the “threat” they seek to deter is an unknown and uncertain future. They are modernizing and qualitatively improving their “enduring” nuclear arsenals, both warheads and delivery systems.

The day-long conference attracted 90 NGOs, students, and diplomats. It was sponsored by the World Court Project to Abolish Nuclear Weapons, a civil society coalition formed by IALANA, IPPNW, International Peace Bureau, World Court Project UK, International Network of Engineers and Scientists for Global Responsibility, Mayors for Peace, and other groups, and by the World Federation of United Nations Associations, the Simons Foundation, and the Stiftung Europäische Friedenspolitik. A report and speakers’ papers will be available on www.lcnp.org. •

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