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## **Good Faith Negotiation, the Nuclear Disarmament Obligation of Article VI of the NPT, and Return to the International Court of Justice**

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•some views expressed in these papers are my individual ones and may not necessarily reflect all official views of the Lawyers’ Committee on Nuclear Policy, of which I am a Board Member and Vice-President

## I. Good Faith in Negotiation on the Nuclear Disarmament Obligation of NPT Article VI

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

Good faith, which is paradoxically elusive to define except by its absence, has been recognized as a concept and practiced since ancient times by most traditions. It has been 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"<sup>1</sup>

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*..."<sup>2</sup>

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?"<sup>3</sup> In Japan, Prince Shotoku (574--622), influenced by Buddhism and Confucianism, wrote that "good faith is the foundation of right"<sup>4</sup>. Good faith may be inferred in the flexibility of the Chinese word *fazhi*, which means both "rule of law and 'rule by law.'<sup>5</sup>

In an Islamic tradition from the 14<sup>th</sup> 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*."<sup>6</sup> [italics used subsequently for emphasis throughout].

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."<sup>7</sup>

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.' In *The Laws* Plato applied his doctrine that knowledge of the Good is discoverable through the use of reason

to ‘the common law of the State’ in the sense of a fundamental law of ‘right reason’. 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.”<sup>8</sup>

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 3<sup>rd</sup> 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 *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.*”<sup>9</sup>

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.<sup>11</sup>

Hugo Grotius (1583--1645) the great Dutch jurist who praised good faith in the aftermath of the Thirty Years' War, 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 fulfilment of a promise, a right from which every one possessed of reason is capable of.*"<sup>12</sup>

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.<sup>13</sup> 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..."<sup>14</sup>

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 just descriptive.

## 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 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.<sup>15</sup> "*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*"<sup>16</sup>. This phrase has been cited in isolation and can lead to confusion. The tribunal considered that agreements bearing on the suspension of the exercise of rights must be concluded but without having a judicial obligation to do this. "One party is never obligated to suspend, from the fact of the dispute, the exercise of its jurisdiction, except the obligation of its share."<sup>17</sup> The adverb 'never' is without a doubt too absolute, but the principle is incontestible, because its absence would permit an always-applicant State to block the whole project by its own request for negotiations and to delay it indefinitely by maintaining them. <sup>18</sup>

Flexibility and concern for substance and purpose, not mere formalism, as aspects of good faith in negotiation were 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 "The 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."<sup>19</sup>

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.*"<sup>20</sup>

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*"<sup>21</sup>

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*

*Gabcikovo-Nagymaros Project* (1997) This case was, among other things, about 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....*”<sup>22</sup>

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.*”<sup>23</sup>

Objective standards to identify, measure, or uphold the obligation of good faith in negotiation is not possible to extrapolate from the above cases. One writer on this subject has concluded that “[t]here is no juridical obligation of good faith in international law”.<sup>24</sup> One may turn from this extreme pessimism, however, and lean more toward the view of another such scholar whose pessimism is at least more qualified: “that which seems certain is that from the general duty to negotiate there cannot *alone* be derived a principle of good faith....the *scope* of obligations in good faith must depend on the judicial and factual agreement that forms the basic rapport between the parties and on which comes to be built the fact of negotiation”<sup>25</sup>

Specific qualities of good faith valued by the Court in international negotiation can be seen in its deliberations, however, in the above cases. These include fairness, openness, impartiality, flexibility, concern for substance and purpose, cooperation, reasonableness, reciprocity or willingness to consider each other’s positions, sustained upkeep of negotiations and (in cases of parties to a treaty) acting so as to further the purpose of the treaty

### 3. Some Key Texts: Statutory sources related to good faith

All Members shall *fulfil 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

Good faith was necessary among all parties negotiating toward the NPT—both states then possessing nuclear weapons and non-nuclear states - 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 (XX) on 19 November 1965. This called on the Conference of the Eighteen-Nation Committee on Disarmament [ENDC] to negotiate “an international treaty to prevent the proliferation of nuclear weapons”, based on five main principles.

While good faith in general was implicit in all these principles, the exercise of good faith in the negotiation of two of these principles had the most direct relevance for nuclear disarmament. These were principle (c): the treaty should be a *step towards the achievement of general and complete disarmament and, more particularly, nuclear disarmament.* and principle (e): Nothing in the treaty should adversely affect the *right of any group of States to conclude regional treaties in order to ensure the total absence of nuclear weapons in their respective territories.* 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, and, along with principles (c) and (e), had the most potential for causing tension between the nuclear weapons states (NWS) and the non-nuclear weapon states (NNWS)..

Unfortunately, the discrepancy between the principle of good faith as an advisory

standard, and the exercise of good faith during negotiations, grew wider and more strained, often leading to tensions between the nuclear weapon states) and particularly between the NWS and the NNWS.

#### 5. The obligation of good faith in negotiation on Article VI of the NPT

Good faith, an element that is essential to and implicit in any negotiation, is explicitly set forth in the text of Article VI of the NPT, 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...”

The obligation of good faith negotiation found in Article VI of the NPT was significantly strengthened by the concise statement unanimously made in §105(2)(F) of the *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (1996 ICJ General List No. 95) 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 of the good faith obligation to negotiate on nuclear disarmament, 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-party 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”<sup>26</sup>, in ¶99 of the Opinion, which 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*.”

Aspects of good faith interpreted by the ICJ and arbitration tribunals as important in negotiation may be extrapolated from the cases summarized above and applied to standards for compliance with the 1996 Advisory Opinion. These include traits of flexibility from *Lac Lanoux*; a concern for substance and purpose from the *North Sea Continental cases*, fairness and consideration for other parties’ interests from the *Fisheries* case; a sustained maintenance of meaningful negotiations from the AMINOIL case., and the need for negotiating parties to act so as to further the purposes of a treaty, as held in the *Gabciko-Nagimoros* case.. Such considerations can form useful norms, such as the need for sustained meaningful negotiations for trust and confidence-building, and standards related to the interpretation of treaties which, particularly with regard to the *Gabcikovo-Nagymaros* case, be a helpful guide for us as we prepare to return to the ICJ.

Statutory interpretations of good faith can also give relevant insights. The Special Rapporteur, in writing about the drafting Article 26 of the VCLT regarding 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...”<sup>27</sup>

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.”<sup>28</sup>. This is certainly relevant to the lack of good faith shown by the NWS in their inaction and obstructions in negotiation on nuclear disarmament since the 1996 Advisory Opinion was rendered almost twelve years ago.

Regarding Article 31(3) of the VCLT, good faith, while not explicitly stated, is implicit in the provision when 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...”<sup>29</sup>

Good faith is a core aspect of all categories of obligations in international law negotiations. Cassese, a noted international law jurist, discusses two of these categories and some distinctions between them. *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.<sup>30</sup>”

Thus, whether the obligations found in Article VI and strengthened in the 1996 ICJ Opinion are categorized as *pacta de negotiando* or *pacta de cotrahendo*, the obligation of good faith is essential and integral to all negotiations on nuclear dsarmament.

Further, an evolving awareness of the urgency to comply with such negotiations in good faith can be seen in intervening and subsequent obligations and commitments. Good faith in negotiation is implicit in the 1995 Principles and Objectives, commitments to measure compliance with the disarmament obligation of Article VI pursuant to the Treaty’s indefinite extension. These commitments included the negotiation by 1996 of a Comprehensive Test Ban Treaty (CTBT), commencement of negotiations on a Fissile Material Cut-Off Treaty (FMCT), and the ‘*determined pursuit by the NWS of systemmatic and progressive efforts to reduce nuclear weapons globally, with the ultimate goal of eliminating those weapons*’. Lack of good faith is clear in the gulf between the precept of ‘good faith as properly to be understood: sustained upkeep of negotiations’ from the AMINOIL arbitration--and the blatant disregard of ‘systemmatic and progressive efforts’ by the NWS to comply with their ‘determined pursuit’ of good-faith negotiations in the Principles and Objectives of the 1995 NPT Review Conference.

The obligation to negotiate in good faith is also implicit in the Thirteen Practical Steps adopted by the 2000 NPT Review Conference. These include “an *unequivocal* undertaking by the NWS to accomplish the *total* elimination of their nuclear arsenals, the *urgency* of an early entry into force of the CTBT, the need to create a subsidiary body in the Conference on Disarmament (CD) with a mandate to deal with nuclear disarmament and to *start negotiations on an FMCT on a non-discriminatory and internationally verifiable basis, 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 in good faith to these and other steps may be inferred by their inclusion in a Final Document in 2000 and to the prior agreement by states parties in the context of NPT Article VIII, to review the operation of the Treaty “with a view to assuring 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, sponsored by Japan, restated

approvals of the principles of transparency and irreversibility from the 200 Review Conference and made new statements such as the *need for a reduction of the operational status of nuclear weapons systems*.

These statements and General Assembly resolutions, when taken together with the practice of states to press increasingly for nuclear disarmament, and applied to general precepts of treaty interpretation upholding the legality of subsequent statements and practices between states parties to indicate their agreement—all point to evolving norms of customary law on the nonpossession and nonuse of nuclear weapons.<sup>31</sup> Good faith negotiation is a core element in the attainment of this objective.

## II. Crossing a Fjord: a Contextual over a Contractual Approach to the Nuclear Disarmament Obligation, and Compliance in Good Faith with Article VI of the NPT

### 1. Critical Contentions by Christopher Ford on NPT Article VI

Christopher Ford, U.S. Special Representative for Nuclear Non-Proliferation in the U.S. Department of State, wrote an article: “Debating Disarmament: Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons”, published in the *Nonproliferation Review* (Vol. 14, No. 3) in November 2007. Ford summarized this article in a shorter piece in remarks he prepared for a forum that was organized to discuss his article, at the Center for Non-Proliferation Studies on November 29, 2007. Following are his basic contentions:

a) The ‘plain language’ of NPT Article VI requires no specific disarmament measures beyond an obligation to ‘pursue negotiations in good faith’ toward the stated disarmament objectives. *If* [sic] they do and such efforts fail to produce results they would not be in violation of the Treaty.

b) The *dipositif* (a ‘passing comment’ ‘tacked on’) to the 1996 ICJ Opinion interpreted Article VI in a way inconsistent with its plain language ; moreover,

i. was made in a non-binding advisory opinion

ii. was made merely as [obiter] *dictum*

iii since the Court addressed a question not formally asked of it, as required under its Statute, its comment may have been *ultra vires*, beyond its powers

c) As a guide to assess the compliance of any state with its Article VI obligations, the Court’s reading is unworkable as it would hold each State legally responsible for things beyond its powers, such the good faith of its negotiating partners”.

d) The record of the negotiating history of the NPT clearly demonstrates the failure of Article VI to impose specific, concrete disarmament steps.

e) Nothing has happened since the Treaty came into force to change or add to the meaning of Article VI. The ICJ’s ‘ill-reasoned *dictum*’ could not change the meaning of Article VI. Nor did the 1995 and 2000 NPT Review conferences reach a ‘subsequent agreement’ within the meaning of Article 31 of the VCLT that could shape interpretations of Article VI.

f) The United States has made great progress in achieving [nuclear] disarmament. The nuclear arms race now most threatening to international peace and security is from countries like Iran racing to acquire nuclear weapons in violation of their NPT obligations.

## 2. Some rebuttals to Ford's claims, in the context of good faith

Ford's views on NPT Article VI and on the ICJ's interpretation of Article VI are basically flawed and shallow, plausible only if read in a narrow textual or contractual mode rather than in a broad and deep way, in the context of and consonant with the history and purpose of the NPT. The means by which he reads Article VI is hostile to and fundamentally undermines the principle and practice of good faith, on which any progress in negotiations toward nuclear disarmament can be made.

Good faith is both explicit in the text of Article VI: the obligation for each of the parties "to pursue in good faith negotiations on effective measures" relating to the three subject matters of the objectives. Good faith is also implicit in Article VI in the obligation of conduct that is fundamental to any negotiation.

The obligation of good faith was significantly and *legally* strengthened in ¶99 of the Opinion, which preceded, bolstered, and formed contextual support for its unanimous dispositive, interpreting the *legal* import of Article VI obligation as going beyond an obligation of conduct, to one of achieving a precise *result*: nuclear disarmament in all its aspects, by adopting a particular course of conduct: the pursuit of negotiations on this matter *in good faith*.

Good faith is implicit in the Court's approach to procedural or jurisdictional issues on which Ford makes dismissive claims (that the Opinion, as Advisory, has no binding legal force; that the dispositive is irrelevant as dicta; and that the Court, in not following its statutory rules, may have acted beyond its powers).

While ICJ advisory opinions are not binding in a strict legal sense, they have great legal value and moral weight, and "may be more influential than judgements in contentious cases because they affect the general interpretation of international law for all States rather than just for the parties to an individual opinion."<sup>32</sup>

The Court's dispositive, far from being a 'passing comment' or 'mere dictum' is-- as its unanimous statement emanating from its deliberations on complex issues such as the threat as well as the use of nuclear weapons—its most important holding.

In ¶¶10—22 of the Opinion the Court deliberated with great care on its competence and discretion under its Statute and decided to exercise its jurisdiction to address the question by the U.N. General Assembly on the threat or use of nuclear weapons (unlike the earlier case on nuclear weapons brought by the World Health Organization (W.H.O.) when the Court declined to exercise its jurisdiction). That the Court, in considering the deeper implications of the question formally addressed to it, may have acted beyond its powers in its dispositive, is a formalistic and untenable position and, like Ford's other dismissive claims on procedural or jurisdictional grounds, undermines the care and good faith of the Court in its approach to these

issues.

Good faith is also implicated in Ford's contention that "Most importantly", the Court's reading of Article VI is "unintelligible and unworkable as a guide to assessing the compliance of any country because it would hold each State legally responsible for things beyond that state's power—not least the good faith and seriousness of its negotiating partners." *Since the U.S. is the NWS whose good faith has been most in doubt concerning compliance with its Article VI obligations*, Ford's contentions in this regard seem just a periphrastic and disingenuous rationale made to justify the continuing grave noncompliance of the U.S. with its disarmament obligations.

Good faith is also important in the negotiating history of the NPT. Concerning Ford's claims in this regard, the record may seem clear only if read in a narrow textual way. Contrary to Ford's contentions, the record is far from clear when viewed in the context of NPT's negotiating history. The divergent expectations and assumptions of the parties, particularly those of the NWS and the NNWS, led to tensions and disagreement on all topics, and whose compromises, especially on Article VI that were necessary for resolution and completion of the Treaty, had profound implications for good faith.

Mohamed Shaker, a member of the Egyptian delegation to the ENDC during the time of the negotiations and the author of a 3-volume work on the origins and implementation of the NPT, has commented on the general background that "the international agreement was to be based on certain basic obligations on the part of both the NWS and the NNWS ...the whole idea of the Irish Resolution [to prevent proliferation of nuclear weapons]was based on the assumption that the nuclear weapon states themselves were going to disarm in the foreseeable future. Its support by the [General] Assembly cannot therefore be interpreted as implying approval of the quantitative and qualitative arms race by the nuclear weapon states.."33

As noted earlier, three of the five underlying concerns or principles in negotiation of the NPT, three were most relevant in negotiating Article VI. These were principle b) that such a treaty should be an acceptable balance of mutual rights and obligations of the NWS and NNWS; principle (c) that it should be a step toward the achievement of general and complete disarmament and more particularly, nuclear disarmament; and principle (e) that nothing should adversely affect the right of any group of states to conclude regional treaties establishing Nuclear Weapons-Free Zones. .

Principle (b) was invoked by Fahmy, U.A.R. Representative to the ENDC, that "it is abundantly clear that the very nature, scope, and import of the treaty, and the future of both the Nuclear Powers and the Non-Nuclear Powers, make it necessary that the legal, political, and other obligations should constitute an acceptable balance of mutual obligations and responsibilities between Nuclear and Non-Nuclear Powers. Otherwise the treaty provisions would lack the main force necessary for its validity."34

Principle (c) is examined by Shaker in close conjunction with the application of principle (b) in his analysis of Article VI and its corresponding ¶4 of the NPT Preamble [ in which the

ENDC and the NWS are ‘urgently’ requested to pursue negotiations specified in Article VI]. Shaker writes that “the two principles are closely linked. The achievement of arms control and disarmament measures by the NWS is a goal which is looked upon by the NNWS not only as a step towards the achievement of general and complete disarmament, but also as a step towards a more equitable balance of obligations of the NWS and NNWS party to the NPT.”

As part of his analysis of Article VI, Shaker examines the parties and the obligations of the negotiations. Regarding the former, he writes that “the nature of the measures envisaged in the Article (VI) left no doubt that the NWS were implicated by the obligations. Both the U.S. and the Soviet Union admitted, in fact, their primary responsibility [which] was looked on by the NNWS not only in the context of achieving a more secure world but as a *quid pro quo* for the latter’s renunciation of weapons. [Although] the NNWS were unable...to produce nuclear weapons by their own means ...their renunciation was felt to be meaningless if it was not met by a definite commitment on the part of the NWS in the field of disarmament and arms control.”<sup>35</sup>

Regarding the obligations of Article VI, Shaker writes “*the obligation to pursue negotiations in good faith was lukewarmly admitted by a number of States, as the only solution acceptable to the two Superpowers. The obligation was not admitted without deep regrets, severe criticism or broad interpretation of its implications. It was generally felt that negotiating was not an end in itself but a means to achieving concrete results at the earliest possible date.*”<sup>36</sup>

Qualities like fairness and reciprocity, essential aspects of good faith in negotiation, seem utterly lacking here, resulting in ‘deep regrets’ and ‘severe criticism’ about the vague obligation imposed by the NWS as ‘the only solution acceptable to the Superpowers’. This hardly sounds like the application of good faith in accord with the principle of ‘an acceptable balance of mutual rights and responsibilities’. Thus Ford’s contention that ‘the record is clear’ is only tenable if read in a textual, narrow, results-based manner.

Ford’s claim that “[n]or has anything occurred since the Treaty came into force to change or add to the meaning of Article VI.’ only makes sense if one ignores or discounts the importance of agreed-upon obligations such as the “Principles and Objectives adopted by the 1995 NPT Review Conference, the “Thirteen Practical Steps” accepted by the 2000 NPT Review Conference and the “Renewed Determination” expressed in the 2005 resolution of the U.N. General Assembly. These, together with the many other resolutions of the General Assembly indicating an increasing groundswell of world opinion favoring the elimination of nuclear weapons., and with reference to Article 32(3) of the Vienna Convention on the Law of Treaties providing that subsequent statements and practices of parties to a treaty indicate their agreement—all point to evolving norms of customary law that indicate the illegality of the possession or use of nuclear weapons .

Ford’s contention-- that provisions of the VLTC (1980) are inapplicable to the NPT (1970) because the latter came into force before the former-- can be countered by the “2004 Opinion of of Rabinder Singh QC and Professor Christine Chinkin of Matrix Chambers, London [which] cite the Vienna Convention and give considerable weight to the [13] Practical

Steps in analysing the NPT.”<sup>37</sup>

Finally, Ford’s allusion to his article “spel[ling] out what the United States has been doing ...to go an unprecedented way toward *achieving*” nuclear disarmament is empty rhetoric since the assumptions on which his article are based on the illusion that the U.S. is in excellent compliance with its Article VI obligations when in fact its record is dismal.

Regarding compliance of the U.S (as well as the other NWS) in this regard, U.S. Ambassador Thomas Graham notes, “[t]he [NPT] Review Conferences proved to be a great disappointment to the NPT non-nuclear weapon states. The 1980 and 1990 Review Conferences failed over Article VI issues, principally the nuclear test ban [CTBT], and the 1975 and 1985 Review Conferences simply papered over profound differences on the same subject. A majority of the parties believed that the NWS had not lived up to their disarmament commitments. I witnessed much of this during my long career with the U.S. government, in which I participated in a senior capacity in every major arms control and nonproliferation negotiation in which the United States took part from 1970 to 1997, and specifically during my role as special representative of the president for arms control, nonproliferation, and disarmament.”<sup>38</sup>

As part of his false claims about U.S. compliance with its Article VI obligations, Ford focuses his argument on the numerical reduction by the U.S. government since the Cold War, of its nuclear weapons arsenal. Yet he conveniently omits any reference to the current and ongoing ‘Reliable Replacement Stockpile Weapons Program, under which the U.S. government continues to build new nuclear weapons systems at its Weapons Labs, in contravention of its disarmament obligations.

### 3.A Contextual over a Contractual approach as superior in assessing the need for good faith in negotiation on NPT Article VI

In rebutting Ford’s claims during a forum discussing his article, John Burroughs, Executive Director of the Lawyers’ Committee on Nuclear Policy, correctly took a contextual approach in explaining how arguments for the groundswell of world opinion, favoring the elimination of nuclear weapons, dovetail with evolving norms of customary law and with universal compliance in good faith with the disarmament obligation of Article VI. “Part of the reason is found in the context of the ICJ Opinion...[T]he ICJ unanimously agreed that the threat or use of nuclear weapons is strictly limited by generally accepted laws and humanitarian principles that restrict the use of force... international law, and with it the stability of the international order...are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons... complete nuclear disarmament [appears to be the best result].’ When viewed in this context, the Court’s statement of the disarmament obligation [includes and goes beyond] the meaning of good-faith negotiation; it’s about the unacceptability of nuclear weapons in light of international humanitarian law, and the need for true international law—that is law that applies to all equally.”<sup>39</sup>

In reacting to Ford’s article, Ambassador Thomas Graham wrote that Ford’s views are

tenable if “Article VI is analysed like a provision in a contract or indeed an ordinary article in a treaty...[h]owever... Article VI should be viewed largely through the prism of political analysis as part of the NPT’s central bargain of nonproliferation in exchange for nuclear disarmament (and peaceful nuclear cooperation referred to in Article IV)...The NPT is not a gift from the Treaty’s 182 non-nuclear states to the 5 nuclear weapon states; it is a political and strategic bargain....Article VI should be reassessed in that light...”<sup>40</sup>

Thus Graham seems to view Article VI, and the NPT as a whole, as a contractual and contextual hybrid; as ‘ a strategic and political bargain’, yet one made in the context of an immensely complex treaty involving continuing problems of equity and good faith. . This approach seems to comport with the views of one writer who suggests “different bases for the obligatoriness of contractual undertakings. As Michael Sandel points out: ‘One is the ideal of autonomy, which sees a contract as an act of will, whose morality consists in the voluntary character of the transaction. The other is the ideal of reciprocity, which sees the contract as an instrument of mutual benefit...contracts bind not because they are willingly incurred, but because (or insofar as) they tend to produce results that are fair.’”<sup>41</sup>

Ford seems to view Article VI, and the NPT as a whole in the former mode in a narrow contractual way--rather than in a wider contextual way as a treaty whose provisions are imbued with principles of equity and reciprocity. But Article VI is far more than a contract provision, and more complex and important than an ordinary article in a treaty. The world can ill afford views such as Ford’s, which fundamentally undermine principles of good faith in negotiations toward nuclear disarmament. Yet we need to continue contending with, and countering, such narrow and shallow views, with a contextual approach to crossing a deep and wide fjord toward nuclear disarmament as we prepare to return to the World Court.



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