



# General Assembly

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## Open-ended Working Group taking forward multilateral nuclear disarmament negotiations<sup>1</sup>

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Item 5 of the agenda

**Taking forward multilateral nuclear disarmament negotiations**

### Obligation and opportunity: Negotiations in good faith

#### Submitted by the World Council of Churches

1. The mandate and task of the Open-ended Working Group invite an open examination of the obligation to negotiate nuclear disarmament in good faith. This paper addresses the need to exercise that obligation, to assess the current record and to apply good-faith practices to multilateral nuclear disarmament negotiations.

#### Exercise obligations

2. All states, not only nuclear-weapon states, are under general and specific obligations to negotiate nuclear disarmament in good faith. The Charter of the United Nations, various General Assembly resolutions and Article VI of the Treaty on Non-Proliferation of Nuclear Weapons oblige all governments to do so. The 1996 decision of the International Court of Justice affirms the task as a double obligation – an obligation to negotiate and an obligation to bring to conclusion.

3. Good-faith obligations to negotiate the prohibition and elimination of nuclear weapons are further reinforced by the strengths of the law on which the obligations are built—the principles of humanity and the dictates of the public conscience in the Martens Clause, the principles of distinction, proportionality and necessity in the Geneva Conventions and protocols, and other key tenets governing armed conflict and the use of force.

4. The exercise of this obligation is highly relevant to the success of the Open-ended Working Group.

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<sup>1</sup> Established pursuant to resolution 70/33 of the General Assembly of the United Nations.



## Assess results

5. Numerous examples indicate that good-faith negotiation of nuclear disarmament has become rather scarce. Certain processes consist of repetitious speeches instead of genuine debate; some are stalled indefinitely; others have never started. Conclusive negotiations are rare. Even when there are agreements, results are often meagre compared to rhetoric. Examples include the outcomes from the Conference on Disarmament and the Disarmament Commission; the proposals for a fissile materials treaty, a fissile materials cut-off treaty, prevention of an arms race in outer space, a Middle East nuclear-weapon-free zone, comprehensive negative security assurances and de-alerting agreements; the entry-into-force of the Comprehensive Test Ban Treaty; and certain commitments from Treaty on Non-Proliferation of Nuclear Weapons Review Conferences, especially those related to disarmament.
6. The global context and timing of the Open-ended Working Group make it a highly appropriate forum in which to break this pattern by working in the “comprehensive, inclusive, interactive and constructive” manner cited in its mandate.

## Practice good faith

7. Good faith is a fundamental working principle of international law, one without which international law may collapse. Current chronic failures to take forward nuclear disarmament may therefore be understood as a collapse of law in this field.
8. Good faith also generates legitimate expectations. Regrettably, nuclear-armed states have chosen not to participate in the Working Group so far (or in much of the humanitarian initiative). This may be seen as an aversion to dealing with the legitimate expectations of other states. If that is the case it would indicate a serious breach of good faith.
9. Good faith supports negotiation through to a successful conclusion, sustains awareness of the interests of other parties and perseveres until constructive compromise is reached.<sup>2</sup>
10. The Vienna Convention on the Law of Treaties implies that good faith is a general obligation of cooperation among all states which are party to a treaty.<sup>3</sup>
11. The obligation to negotiate in good faith is an obligation to adopt a certain behavior in order to achieve a certain result.<sup>4</sup> The legally binding bargain at the heart of the Treaty on Non-Proliferation of Nuclear Weapons shows this clearly. The Treaty on Non-Proliferation of Nuclear Weapons obligation to negotiate nuclear disarmament in good faith is the “necessary counterpart to the commitment by the non-nuclear-weapon states not to manufacture or acquire nuclear weapons”.<sup>5</sup> The obligation requires:
  - (a) The behavior of negotiating in good faith. Such behavior is a legitimate expectation of the non-nuclear majority of NPT signatories in return for their fulfillment of the reciprocal obligation not to acquire nuclear weapons.
  - (b) Good-faith negotiations which achieve a certain result. In the case of the Treaty on Non-Proliferation of Nuclear Weapons, the long-pending result is “effective

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<sup>2</sup> Aminoil Case, Kuwait v. Independent Oil Co., 1982 International Legal Reports, vol. 66, pg. 578

<sup>3</sup> “Good Faith, International Law and the Elimination of Nuclear Weapons”, lecture by Judge Mohammed Bedjaoui, Geneva, 1/5/2008, p. 28 (English-language translation of French original).

<sup>4</sup> Ibid, p. 22.

<sup>5</sup> Ibid, p. 24.

measures relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament”.

### **Make substantive progress**

12. Collective efforts undertaken since the NPT Review Conference in 2010 have generated substantive and ground-breaking outcomes which enjoy the support of growing majorities of states and civil society organizations. The broad support is due in part to the fact that states and civil society examined and debated with good faith the essential problem with nuclear weapons, their catastrophic impact. What is more, these outcomes have rekindled the majority will to do what only a majority can do multilaterally, that is, make new law in order to close the existing legal gap around nuclear weapons.

13. The Open-ended Working Group itself faces a good-faith test on two levels:

(a) Are the negotiations open to all and block-able by none? Early indications on this count are positive.

(b) Will the outcomes help to ensure the universal humanitarian obligations and protections which nuclear weapons put at grave risk? Various working papers propose specific legal measures for precisely that purpose.<sup>6</sup>

14. United Nations General Assembly resolution 70/33 calls for action on “concrete effective legal measures that will need to be concluded to attain and maintain a world without nuclear weapons”. The international community will be especially well served by the Open-ended Working Group addressing the following provisions:

15. First, the legal provisions necessary for an explicit, comprehensive and binding prohibition of nuclear weapons. Judging from other similar legal instruments, these will include a ban that applies to development, production, possession, acquisition, deployment, stockpiling, retention and transfer.

16. Second, prohibitions against assistance or inducements to carry out the prohibited actions. The scope should include participating in or financing nuclear weapons programs; claiming or accepting protection from nuclear weapons; the stationing of nuclear weapons on the territory of a non-nuclear-weapon state; hosting another state’s nuclear weapons; participation in preparations for use; assisting with nuclear targeting; supplying nuclear-capable delivery vehicles; supplying fissionable material without comprehensive safeguards; and stockpiling weapons-grade fissile material.

17. Negotiating in good faith is concomitant with substantive progress on these essential measures.

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<sup>6</sup> Including WP 4, 5, 8, 10, 13; NGO 1, 2.