

Good Faith, Achieving Nuclear Zero, and Protecting the Climate Draft, November 6, 2014, John Burroughs

Remarks of John Burroughs, Executive Director, Lawyers Committee on Nuclear Policy

Some of you have no doubt heard the phrase “nuclear famine”. That refers to projections by Physicians for Social Responsibility and others of widespread starvation resulting from nuclear explosions in numerous urban areas. They would generate soot and smoke that would circulate in the atmosphere on a scale causing global cooling and a subsequent decline in agricultural production.¹

So that’s one connection between nuclear weapons and climate change! But I will focus on another.

Nuclear disarmament and climate protection are both global political and legal processes. They both involve implementation of obligations contained in international legal agreements, the Nuclear Non-Proliferation Treaty and the UN Framework Convention on Climate Change. In both cases, a central question is whether the United States and other countries are complying with their obligations – whether they are keeping their promises.

This is an important question first of all because of the imperative of ending the threats posed by climate change and nuclear weapons. If there is compliance, problem solved! It’s important also because upholding international commitments is key to a decent and livable world order – on war and peace, economy, health, biodiversity, and much more.

I’ll explain first the **Marshall Islands Nuclear Zero cases in the International Court of Justice**.

On April 24, 2014, the Republic of the Marshall Islands filed applications in the International Court of Justice against the nine nuclear-armed states, claiming they have violated their nuclear disarmament obligations under the Non-Proliferation Treaty and customary international law. The respondent states are the United States, United Kingdom, France, Russia, China, India, Pakistan, Israel, and North Korea. The RMI also filed a companion case against the United States in U.S. federal court in San Francisco.

This is the first time the International Court of Justice (ICJ) has been asked to address issues relating to nuclear weapons since its 1996 advisory opinion. In that opinion, interpreting Article VI of the NPT, the Court unanimously concluded 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."

¹ See Robock and Toon, “Self-assured Destruction: The Climate Impacts of Nuclear War,” Bulletin of the Atomic Scientists 2012, <http://climate.envsci.rutgers.edu/pdf/RobockToonSAD.pdf>; Physicians for Social Responsibility, “Nuclear Famine: Two Billion People at Risk,” <http://www.psr.org/resources/two-billion-at-risk.html>.

Three of the nine states possessing nuclear arsenals, the UK, India, and Pakistan, have accepted the general jurisdiction of the Court when the opposing state has done so, as the Marshall Islands has. The cases are proceeding as to those states.

As to the other six states, RMI is calling on them to accept the jurisdiction of the Court in these cases and to explain to the Court their positions regarding the nuclear disarmament obligations. However, China has already notified the Court that it declines to accept the Court's jurisdiction in this matter.

The claims in the ICJ cases are for:

- 1) breach of the obligation to pursue in good faith negotiations leading to nuclear disarmament, by refusing to commence multilateral negotiations to that end and/or by implementing policies contrary to the objective of nuclear disarmament;
- 2) breach of the obligation to pursue negotiations in good faith on cessation of the nuclear arms race at an early date, including by engaging in modernization of nuclear forces and in some cases (Pakistan, India) by quantitative build-up as well;
- 3) breach of the obligation to perform the above obligations *in good faith*, by planning for retention of nuclear forces for decades into the future;
- 1) failure to perform obligations relating to nuclear disarmament and cessation of the nuclear arms race in good faith by effectively preventing the great majority of non-nuclear weapon states from fulfilling their part of those obligations.

For the NPT nuclear-weapon states, the U.S., UK, France, Russia, and China, the claims are made under both the NPT and customary international law.

For the four states possessing nuclear arsenals outside the NPT, India, Pakistan, Israel, and North Korea, the claims are made under customary international law only. The customary obligations are based on widespread and representative participation of states in the NPT and the long history of United Nations resolutions on nuclear disarmament, and reflect as well the incompatibility of use of nuclear weapons with international law. Customary international law is based on the practices of states coupled with a sense of legal obligation.

The relief requested is a declaratory judgment of breach of obligations relating to nuclear disarmament and an order to take, within one year of the judgment, all steps necessary to comply with those obligations, including the pursuit, by initiation if necessary, of negotiations in good faith aimed at the conclusion of a convention on nuclear disarmament in all its aspects under strict and effective international control.

The ICJ has set briefing schedules in the three active cases. The Marshall Islands will file opening briefs in December (India), January (Pakistan), and March (UK). Hearings on preliminary issues – whether the cases are suitable for decision by the Court – probably will take place by late 2015 or early 2016. If the cases go on to the merits, that could take another two or three years.

For the filings in the ICJ, media coverage, and presentations, see www.nuclearzero.org and www.lcnp.org/RMI.

Good faith: I have mentioned good faith several times, and it is essential to both the nuclear disarmament and climate protection.

Good faith means: Keep your promises, and to do so in a way true to the purposes of the promises.

“Good faith is a fundamental principle of international law, without which all international law would collapse,” declared Judge Mohammed Bedjaoui at a conference we organized in 2008. Bedjaoui was President of the International Court of Justice when it gave its 1996 advisory opinion on nuclear weapons.

First of all then, good faith requires implementation of agreed commitments. NPT Article VI requires pursuit of negotiations on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament – the elimination of nuclear weapons. But there are now no negotiations on ending nuclear arms racing and eliminating nuclear weapons. And there have not been for many years, dating back to negotiation of the Comprehensive Nuclear Test-Ban Treaty (CTBT) in the early 1990s, except for modest bilateral agreements on reductions between the US and Russia.

Second, good faith requires that a government not take actions incompatible with the achievement of agreed objectives. But nuclear-armed states are planning and preparing and executing the maintenance and modernization of nuclear forces and their infrastructure for decades to come. That is incompatible with the objective of achieving a world free of nuclear weapons – especially when no negotiations are underway and there are no signs of serious work on establishing such a world.

Third, when there are negotiations, as there will be on a climate agreement in 2015, good faith requires among other things awareness of the interests of other parties; and a persevering quest for an acceptable compromise, with a willingness to contemplate modification of one’s own position.

The International Framework for Climate Protection

The 1992 UN Framework Convention on Climate Change (UNFCCC) sets out general obligations and also envisages further cooperative action, including the adoption of additional agreements.

It states that its “ultimate objective” is “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic [human-caused] interference with the climate system.”

In Article 4 (2), the developed country Parties commit themselves specifically as follows:

- (a) Each of these Parties shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs.

Pursuant to the UNFCCC, in 1997 the Kyoto Protocol was adopted. It is also a treaty, a supplementary agreement to the UNFCCC. Pakistan and Brazil never become parties. It provides that developed countries will reduce their collective emissions of greenhouse gases by 5% by 2010 compared to the year 1990. The United States never became a party, and China and other large parties were considered a developing countries not bound by the reduction requirement. Voluntary commitments have also been made at annual meetings of the parties to the Framework Convention.

The amount of reduction required by the Kyoto Protocol is far from adequate, but some parties to the treaty found the targets hard to meet until the Great Recession reduced economic growth rates. In the case of the United States, a non-party, as of 2012 there was a 5.4% increase in greenhouse gas (GHG) emissions, instead of a 5% decrease, compared to 1990.

As to voluntary commitments, the recent regulatory plan adopted by the Obama administration represents an effort to meet its voluntary commitment to reduce GHG emissions by 17% by 2020 compared to 2005. Under that regulation, states in the United States will be required to reduce power plant emissions by 26% by 2020 and by 30% by 2030. The Obama administration in September also announced that it has obtained agreements from some of the country's largest companies to reduce or phase out their use of hydrofluorocarbons (HFCs), used in air conditioning and refrigeration. HFCs contribute greatly to warming compared to carbon, but also disintegrate after 15 years.²

Now there is a process to create a post-Kyoto agreement, still under the umbrella of the UNFCCC. A meeting in Lima in December will work on a draft text, and the final agreement is supposed to be adopted in Paris late next year. Even the form the agreement will take is up for grabs. It could be a protocol, a legally binding supplementary agreement to the Framework Convention, like the Kyoto Protocol. It could be another legal instrument. Or it could be "an outcome with legal force".³

The Obama administration may prefer the latter, because of the difficulty of gaining Senate approval of a legally binding agreement, a treaty. An outcome document could reaffirm basic Framework Convention obligations and set out political commitments regarding reductions of emissions, policies of adaptation to climate change, and financial support for developing countries.⁴

In the same vein, the Obama administration could seek a legally binding agreement that would be treated as an "executive agreement" in the United States. That means that it would not have to be approved by the Senate; it would not be in US terms a "treaty", though it would be legally binding. In this approach, the agreement probably would reaffirm existing legal obligations and set out procedural requirements such as reporting and meetings. But it would not contain new substantive obligations regarding emissions and other matters. These would be handled as non-legally binding political commitments.

² Coral Davenport, "U.S. Moves to Reduce Global Warming Emissions," New York Times, September 16, 2014.

³ See "Durban: Towards full implementation of the UN Climate Change Convention," http://unfccc.int/key_steps/durban_outcomes/items/6825.php.

⁴ Cf. Coral Davenport, "Obama Pursuing Climate Accord in Lieu of Treaty," New York Times, August 26, 2014.

You can see that the allergy developed by strong factions within the US government and establishment to multilateral treaties is causing huge problems for climate protection. The same is true of nuclear disarmament. A CTBT would be the first global nuclear treaty imposing uniform obligations and verification on all states, including the United States. But the Senate failed to ratify the treaty in 1999. Despite its proclaimed support for the treaty, the Obama administration does not seem to think it could win in the Senate and therefore will not risk putting it forward.

If a formula can be found for the United States to join in a climate agreement – even a mostly political one – next year, and if the commitments are sufficiently strong, and if the commitments are implemented, and if that results in climate protection, all to the good. But you can see that it's a long string of ifs.

So is the United States in compliance with the UN Framework Convention on Climate Change? It did not meet initial Kyoto objectives but has a good chance of meeting voluntary commitments it undertook in the Framework Convention process. But the ultimate objective of the Convention is the stabilization of GHGs to prevent human interference with the climate. That objective is not being met. It is also a serious strike against the United States that it refused to ratify Kyoto and is opposing adoption of a legally binding substantive agreement next year. So a deep change of attitude – a move to constructive participation, to good faith - is required in the United States, on both nuclear and climate policies, negotiations, and agreements.