

# Human Rights Versus Nuclear Weapons: New Dimensions



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Commentary and Analysis regarding UN Human Rights Committee General Comment no. 36; the Treaty on the Prohibition of Nuclear Weapons; Human Rights, Democracy, and Nuclear Weapons

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## Preface

We are witnessing a resurgence of interest in the application of international human rights law to one of the principal threats to the human future: nuclear weapons. A general comment issued by the UN Human Rights Committee in 2018 finds the threat or use of nuclear weapons to be incompatible with respect for the right to life. The Treaty on the Prohibition of Nuclear Weapons adopted a year earlier is suffused with a humanitarian perspective, protects the rights of victims of testing and use of nuclear arms, and cites human rights law and the principles of humanity in its preamble.

Lawyers Committee on Nuclear Policy (LCNP) twice brought together leading lawyers, law professors, and analysts to reflect on these developments. The first event, held on Human Rights Day, December 10, 2018, at the Bahá'í United Nations Office in New York City, was entitled “The Right to Life Versus Nuclear Weapons: A Bold Intervention by the UN Human Rights Committee,” and was co-sponsored by the Sorensen Center for International Peace and Justice, CUNY Law. It featured Roger Clark, a distinguished international law professor; Ariana Smith, CUNY Law student at the time of the event and current LCNP Executive Director; and Peter Weiss, a pioneering human rights lawyer and LCNP President Emeritus.

The second event, held May 1, 2019 at the United Nations on the side of a Nuclear Non-Proliferation Treaty meeting, was entitled “Human Rights, Democracy, and Nuclear Weapons.” It featured Daniel Rietiker of the University of Lausanne and Suffolk University Law School; Bonnie Docherty of the Harvard Law International Human Rights Clinic; and Andrew Lichterman, Senior Research Analyst, Western States Legal Foundation. Videos of both events are available at [www.lcnp.org](http://www.lcnp.org).

Then serving as LCNP Executive Director, I had the privilege of moderating the two events. I was struck by the knowledge, insight, and commitment of the speakers. They indeed did illuminate new dimensions of the application of human rights law to nuclear weapons. That is an important contribution. Human rights are about the sanctity of the human person, anytime, anywhere. Their basis, however it is characterized, ultimately does not lie in actions and agreements of governments. Human rights are an indispensable tool in the work of ensuring the non-use of nuclear weapons and accomplishing their elimination—tasks that cannot be left to governments alone.

This publication collects papers based on the speakers' remarks. Roger Clark, Ariana Smith, Peter Weiss, and Daniel Rietiker examine and reflect upon the significance and implications of the finding of the UN Human Rights Committee. Bonnie Docherty addresses human rights aspects of the Treaty on the Prohibition of Nuclear Weapons. Andrew Lichterman explores how human rights discourse could be a terrain for making connections between disarmament movements and other movements for a more fair, democratic, and ecologically sustainable society. I heartily recommend each of the papers.

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# **The Human Rights Committee, The Right to Life, and Nuclear Weapons: The Committee's General Comment no. 36 on Article 6 of the Covenant on Civil and Political Rights\***

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I shall address two main themes exemplified by the Human Rights Committee's (HRC) Comment; one is the way in which international law and the practice of international bodies such as the HRC develop by accretion and cross-fertilization from discrete areas of material. Think of my remarks on this theme as a sketch of the intellectual history of the ideas on nuclear weapons that find themselves in General Comment 36,<sup>1</sup> adopted, as is the Committee's practice, by consensus.<sup>2</sup> Nuclear weapons are dangerous to human beings and other living things, dangerous to the very survival of Spaceship Earth itself. How to put that in legal language?

My second theme is institutional. The proposition is that if someone sets up a constitutional document, whether as a structure for government or as, say, an International Bill of Rights, it will take on a life of its own, both procedurally and substantively. This is especially true if one devises a body such as a Court or a Committee to oversee in some way; that body will get creative and develop the instrument in ways of which the founders may never have dreamed. If you build it, they will come!

Article 6 is the first substantive provision in the Covenant on Civil and Political Rights. Its opening paragraph states, succinctly, that "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." Perhaps indicating the preoccupations of the drafters, this paragraph is followed by four, wordier, paragraphs cabining in the exercise of capital punishment.<sup>3</sup>

This is the third time that the Committee has addressed the right to life. In its (page and a half) Comment No. 6 of 1982,<sup>4</sup> it insisted, abstractly, that it is a "right which should not be interpreted narrowly," that "war and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year," that the "protection against arbitrary deprivation of life ... is of paramount importance," that states should take "specific and effective measures to prevent the disappearance of individuals,"<sup>5</sup> and it encouraged progress towards abolishing or limiting the application of the death penalty.

Adding to this in its General Comment No. 14, of 1984, entitled "The Right to Life and Nuclear Weapons",<sup>6</sup> the Committee discussed the dangers of nuclear weapons. It then offered some suggestions, in language less emphatic than General Comment 36:

3. While remaining deeply concerned by the toll of human life taken by conventional weapons in armed conflicts, the Committee has noted that, during successive sessions of the General Assembly, representatives from all geographical regions have expressed their growing concern at the development and proliferation of increasingly awesome weapons of mass destruction, which not only threaten human life but also absorb resources that could otherwise be used for vital economic and social purposes, particularly for the benefit of developing countries, and thereby for promoting

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\* Based on remarks made December 10, 2018 at a Human Rights Day event, "The Right to Life Versus Nuclear Weapons: A Bold Intervention by the UN Human Rights Committee," Bahá'í United Nations Office, New York City.

and securing the enjoyment of human rights for all.

4. The Committee associates itself with this concern. It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. This threat is compounded by the danger that the actual use of such weapons may be brought about, not only in the event of war, but even through human or mechanical error or failure.

5. Furthermore, the very existence and gravity of this threat generates a climate of suspicion and fear between States, which is in itself antagonistic to the promotion of universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations and the International Covenants on Human Rights.

6. The production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity.

7. The Committee accordingly, in the interest of mankind, calls upon all States, whether Parties to the Covenant or not, to take urgent steps, unilaterally and by agreement, to rid the world of this menace.<sup>7</sup>

Unlike the 1984 Comment which related solely to nuclear weapons, the 2018 version, now 23 pages, covers the whole range of the Committee's concerns about the right to life. Heavily footnoted, Comment 36 sources its content to other general comments; its Concluding Observations on state reports; its Views issued under the Optional Protocol to the Convention; other human rights, environmental, and law of war treaties; material emerging from other treaty bodies; material from the UN General Assembly, WHO, the European Court of Human Rights, the Inter-American Court of Human Rights, the African mechanisms on Human and Peoples' Rights; instruments produced under the auspices of what is now the UN Office on Drugs and Crime (UNODC); Special Rapporteurs and other Mechanisms; the ICTY and the ICTR.

The Comment begins with some general philosophical points. The right is described as "the supreme right from which no derogation is permitted even in situations of armed conflict." "It is most precious for its own sake as a right that inheres in every human being, but it also constitutes a fundamental right whose effective protection is the prerequisite for the enjoyment of all other human rights and whose content can be informed by other human rights." "The right to life," reiterating what it said in 1982, "is a right which should not be interpreted narrowly." Comment 36 also contains detailed provisions on abortion, safeguards surrounding assisted suicide, safeguards on the imposition of the death penalty, enforced disappearance, special protections for the lives of children, environmental degradation, climate change and unsustainable development (described as "some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life"), and use of force in armed conflict (including autonomous weapons systems).

The Comment concludes with the striking proposition (new in the context of Article 6) that states parties "engaged in acts of aggression as defined in international law, resulting in the deprivation of life, violate *ipso facto* article 6."<sup>8</sup>

The part of General Comment No. 36 dealing with nuclear weapons<sup>9</sup> reads:

66. The threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and are of a nature to cause destruction of human life on a catastrophic scale is incompatible with respect for the right to life and may amount to a crime under international law. States parties must take all necessary measures to stop the proliferation of weapons of mass destruction, including measures to prevent their acquisition by non-state actors, to refrain from developing, producing, testing, acquiring, stockpiling, selling, transferring and using them, to destroy existing stockpiles, and to take adequate measures of protection against accidental use, all in accordance with their international obligations. [273] They must also respect their international obligations to pursue in good faith negotiations in order to achieve the aim of nuclear disarmament under strict and effective international control. [274] and to afford adequate reparation to victims whose right to life has been or is being adversely affected by the testing or use of weapons of mass destruction, in accordance with principles of international responsibility. [275]<sup>10</sup>

Each sentence packs several ideas together; all of them have intellectual antecedents.

The first sentence opens with the reference to threat or use of weapons of mass destruction. “Weapons of mass destruction” seems to have been coined first as a way to describe the massed bomber attack which destroyed Guernica during the Spanish Civil War.<sup>11</sup> That usage solidified in the very first resolution of the UN General Assembly in 1946 which created a Commission to make “specific proposals,” *inter alia*, “for the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction.”<sup>12</sup> The emphasis there was on nuclear weapons, although biological and chemical ones were encompassed also. GC 36 contains footnote references to the later treaties of 1972 and 1992 on those topics. “Weapons of mass destruction” has substantial rhetorical force but is not a legal term of art.

“Threat or use” finds its origin in the question asked by the General Assembly in requesting an Advisory Opinion on the legality of nuclear weapons from the International Court of Justice.<sup>13</sup> The Court insisted<sup>14</sup> that “If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to law.” “Threat” does not, on the other hand, appear in the Rome Statute of the International Criminal Court, or, in spite of some desultory discussion during the drafting<sup>15</sup> and some tentative musings by the International Law Commission,<sup>16</sup> in the crime of aggression which became part of the Court’s Statute in July of this year.

When, however, in July 2017, the Committee was preparing its first reading version of GC 36, “threat” was seating itself in the Treaty on the Prohibition of Nuclear Weapons (TPNW).<sup>17</sup> The Committee placed “threat” in brackets at that point and several commentators supported the removal of those brackets. The reference to “indiscriminate effect” is to the laws of armed conflict. “Of a nature to cause destruction of human life on a catastrophic scale” is also an echo of the similar thought in the 1899 Hague Convention (“of a nature to cause superfluous injury”). “Respect for the right to life” combines the thoughts of Article 6 of the Covenant with Article 2’s reference to respecting and ensuring the rights in the Covenant.<sup>18</sup> “Incompatible” is a stronger statement than the ICJ’s proposition that nuclear weapons are “scarcely reconcilable” with the laws of armed conflict.<sup>19</sup> The assertion that the threat or use “may amount to a crime under international law”<sup>20</sup> is both tentative and ambiguous. Unlike, for example, the GA resolution in 1946 that asserted bluntly that “genocide *is* a crime under international law,”<sup>21</sup> the word here is “may.” Does “may” mean that some cases are crimes and some are not?<sup>22</sup> Or is it an acknowledgement that the law is not quite there yet? And is the reference to individual criminal responsibility or to some notion of state criminal responsibility? Note, in this respect, that it had not been possible to include a prohibition of the employment of nuclear weapons in the Rome Statute.<sup>23</sup>

The second sentence begins by addressing non-proliferation, of all weapons of mass destruction, not only nuclear ones, and to measures that all parties to the Covenant “*must take.*” The footnote refers to the 1968 NPT, the Comprehensive Test Ban Treaty, the TPNW and the Biological and Chemical Conventions. The

little phrase “including measures to prevent their acquisition by non-state actors” is a direct use of “non-state actors” which is probably a blunter version the Prohibition Treaty’s “transfer to any recipient whatsoever.”<sup>24</sup> The obligation to refrain from developing, producing, testing, and the like is essentially the list of prohibitions in the TPNW.<sup>25</sup> The obligation to “destroy existing stockpiles” goes beyond what the nuclear powers have accepted and is a bone of contention for them. The reference to taking “adequate measures of protection against accidental use” sits a little strangely with an obligation to destroy existing stockpiles, as does the phrase “all in accordance with their international obligations.” Is this a reference to customary obligation enshrined in the Comment? Or, do different parties to the Covenant have different obligations depending on which weapons treaties they have ratified?

The third sentence contains two thoughts. One is that parties “must also respect their international obligations to pursue in good faith negotiations in order to achieve the aim of nuclear disarmament under strict and effective international control.” I take it this is a reference both to the treaty obligation under Article VI of the NPT and the corresponding customary law obligation to the same effect, which is asserted in the Nuclear Weapons Advisory Opinion.<sup>26</sup> The nuclear powers have failed dismally in fulfilling that obligation and, to my great regret, the effort by the Marshall Islands to enforce it in the ICJ was rejected by a bare majority of the Court on procedural grounds, based on jurisprudence that is frankly incoherent.<sup>27</sup>

The other is the obligation “to afford adequate reparation to victims whose right to life has been or is being adversely affected by the testing or use of weapons of mass destruction, in accordance with principles of international responsibility.” Victim assistance and environmental remediation is an important aspect of the TPNW,<sup>28</sup> but this is not where the endnote to this sentence refers. Rather, it cites the Committee’s 2015 Concluding Observations concerning France. The relevant section in the Observations notes that some 98.3 percent of claims relating to damage suffered during the French tests in Moruroa and Fangataufa between 1966 and 1996 had been rejected and urges something more effective.<sup>29</sup> Article 6 of the TPNW speaks of “assistance” to those under a state party’s jurisdiction who are affected by the use or testing of nuclear weapons. This is exactly the situation of the inhabitants of French Polynesia. The Comment’s term “reparation” is perhaps a little stronger than the TPNW’s “assistance,” and “victims” would surely include people in neighboring states or those involved militarily in testing activities.

Keep that thought about the French Concluding Observations as I turn to my procedural theme. Article 40 is the primary “enforcement” provision in the Covenant on Civil and Political Rights.<sup>30</sup> It requires states parties to make reports, which are to be examined by the Human Rights Committee. The Committee is empowered to make “general comments.” “General comments,” as the Covenant was being finalized in the mid-1960s, was consistent with the human rights practice of the United Nations: with a few exceptions like South Africa, name no names. Some general themes could be drawn from state reports. Pretty soon those pesky NGOs began to slip in material or counter-reports to the governmental ones. This became a significant cottage industry—and Committee members read them. It took a few years, but eventually the point was accepted that the members of the Committee could make some quite specific comments on the basis of the contents of (or omissions in the) reports and of the dialogue with states. Don’t you love the bland title, “Concluding Observations”? Meanwhile, general comments took on a life of their own.

This is demonstrated dramatically by GC 36. The Committee had begun the process of drafting it in 2015 with a half day of general discussion in which governments and NGOs participated. It must have then received much informal input after which it produced a first reading draft in July 2017 and invited comments. The formal response was stunning. I counted on its website 23 comments by states; seven by UN organizations, specialized agencies, and experts; 33 by academics and other professionals; three from national institutions; and 107 from NGOs.<sup>31</sup> How else to describe this than as a massive legislative lobbying effort? Many of the comments were single issue ones, like those that Daniel Rietiker and John

Burroughs prepared for the International Association of Lawyers against Nuclear Arms and the Swiss Lawyers for Nuclear Disarmament, which obviously focused on the nuclear issue,<sup>32</sup> or submissions pro and con the right to abortion. New Zealand argued that, as result of the development of the law, capital punishment should now be regarded as *per se* contrary to the prohibition of torture and of cruel, inhuman, or degrading treatment or punishment in Article 7 of the Covenant. Others, especially governments, addressed a whole range of themes. The US submissions, for example, covered twenty single-spaced pages. General Comment No. 36 emerged from this in its current form, a true “committee job.”

A final thought. What legal weight has the Comment? As the considered opinion of the body charged with the supervision of the Covenant it must have some significance. Words like “authoritative”<sup>33</sup> or “authentic” interpretation come to mind. Comments must be a standard against which individual state reports can be assessed by Committee members.<sup>34</sup> Most players in the Comment 36 drama avoided such epistemological issues and concentrated on their particular points. Yet the United States took the offensive. It challenged the authority of the Human Rights Committee to adopt some parts of this general comment, by arguing that “States Parties to the ICCPR have not given authority to the Human Rights Committee or to any other entity to fashion or otherwise determine their treaty obligations,” and that “many of the Committee’s more ambitious opinions appear to reflect an attempt to fill what it may consider to be gaps in the reach and coverage of the Covenant.... If one believes there to be gaps in a treaty, the proper approach to take under international treaty law is to **amend** the treaty to fill those gaps. It is for each Party to decide for itself, as an exercise of its sovereignty, whether it will be bound by what are, in fact, new treaty obligations.”<sup>35</sup>

A British academic surveyed the wide spectrum of views on the “legal relevance” of the Comments:

Some commentators attach no legal value to them or regard them only as valuable indications of the content of rights and the steps that state parties could or should undertake to ensure implementation, as useful signposts, or as important aids for interpretation. According to others, General Comments have “practical authority” because they represent an important body of experience in considering matters from the angle of the respective treaty. Many commentators, however, accept that General Comments have considerable legal weight. They suggest that a committee is the most authoritative interpreter of the treaty it monitors. They view the treaty body’s output as more than mere recommendations. Some even regard General Comments as “authoritative interpretations” of the rights of a treaty. General Comments also contribute to the formation of customary international law by helping to shape *opinio juris* and state practice.<sup>36</sup>

Don’t you love obfuscation!

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<sup>1</sup> U.N. Doc. CCPR/C/GC/36, 30 October 2018.

<sup>2</sup> The development of the Committee’s practice on Article 40, and especially general comments, is well rehearsed in Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* 712-752 (2<sup>nd</sup> rev. ed. 2005). He notes (at 749) that the French and Austrian experts on the Committee came close to breaking consensus on the Committee’s first foray into nuclear weapons in 1984, *infra*, but ultimately came aboard. Consensus has continued as a *modus operandi*.

<sup>3</sup> Paras 2, 4, 5 and 6. Para. 3 provides that “When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.”

<sup>4</sup> Available at <https://www.refworld.org/docid/45388400a.html>.

<sup>5</sup> The question of disappearances loomed large on the international agenda at the time. See Maureen R. Berman and Roger S. Clark, “State Terrorism: Disappearances,” 13 *Rutgers Law Journal* 531 (1982).

<sup>6</sup> Available at <https://www.refworld.org/docid/453883f911.html>.

<sup>7</sup> Philippe Sands invoked this Comment in his argument for Solomon Islands in the Nuclear Weapons Advisory Proceedings: Philippe Sands, Oral Presentation for Solomon Islands, reproduced in Roger S. Clark and Madeleine Sann, eds., *The Case against the Bomb: Marshall Islands, Samoa, and Solomon Islands before the International Court of Justice in Advisory proceedings on the Legality of the Threat or use of Nuclear Weapons* 277 (1996). In its Advisory Opinion, the Court ignored the general comment but accepted that “the protection of the International Covenant of Civil and Political Rights does not cease in times of war” and that “[i]n principle the right not arbitrarily to be deprived of one’s life applies also in hostilities.” It continued: “The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely the law applicable in armed conflict which is designed to regulate the conflict of hostilities.” The extent to which a *lex specialis* forces Article 6 from the field is highly debated. Moreover, as you know, the Court did insist that “the use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law,” and that “[t]here 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.”

<sup>8</sup> GC 36, para. 70.

States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate ipso facto article 6 of the Covenant. At the same time, all States are reminded of their responsibility as members of the international community to protect lives and to oppose widespread or systematic attacks on the right to life, [281] including acts of aggression, international terrorism, genocide, crimes against humanity and war crimes, while respecting all of their obligations under international law. States parties that fail to take all reasonable measures to settle their international disputes by peaceful means might fall short of complying with their positive obligation to ensure the right to life.

The footnote references GA Res.60/1, (World Summit Outcome) 16 Sept. 2005, para. 138-139.

<sup>9</sup> For commentary, see Alyn Ware, “UN Human Rights Committee concludes that the threat or use of nuclear weapons violates the Right to Life,” available at <http://www.unfoldzero.org/un-human-rights-committee-condemns-the-threat-or-use-of-nuclear-weapons-and-other-wmd/>.

<sup>10</sup> GC No. 36, para. 66. The relevant footnotes read:

273 See Treaty on the Non-Proliferation of Nuclear Weapons, 1 July 1968, 729 UNTS 161; Comprehensive Test Ban Treaty, 10 Sept. 1996, Treaty on the Prohibition of Nuclear Weapons, 7 July 2017 (not yet in force); Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 10 April 1972, 1015 UNTS 163; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 3 Sept 1992, 1974 UNTS 45.

274 General Comment 14, para. 7. Cf. Legality of the Threat or Use of Nuclear Weapons, 1996 ICJ 226, 267.

275 Concluding Observations: France (2015), para. 21.

<sup>11</sup> *London Times* 28 December 1937, p. 9.

<sup>12</sup> GA Res. 1 (I), para. 5 (c).

<sup>13</sup> “Is the threat or use of nuclear weapons in any circumstance permitted under international law?” Article 2 (4) of the UN Charter obligates states to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

<sup>14</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, *ICJ Reports*, 1996, 226, (“Nuclear Weapons Advisory Opinion”), para. 78 of its Opinion. See also, 1977 Protocol I to Geneva Conventions, which prohibits states “to order that there shall be no survivors, *to threaten an adversary therewith* or to conduct hostilities on this basis” (Article 40), and to refrain from “acts or threats of violence the primary purpose of which is to spread terror among the civilian population” (Article 51(2)). (Article 8 (1) (b) (xii) of the Rome Statute forbids “Declaring that no quarter shall be given.”)

<sup>15</sup> Informal Inter-session meeting of the Special Working Group on the Crime of Aggression, Doc. ICC-ASP/5/SWGA/INF.1 9-10 (2006).

<sup>16</sup> See 1991 Draft Code of Offences against the Peace and Security of Mankind, Article 16, [1991] II (2) *Yearbook of the International Law Commission*, 94, 95.

<sup>17</sup> TPNW Article 1 (d), under which each party “undertakes never under any circumstances to ... use or threaten to use nuclear weapons or other nuclear explosive devices.”

<sup>18</sup> In CCPR Article 2 (1), each party “undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>19</sup> Nuclear Weapons Advisory Opinion, para. 95:

Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets. Or which would result in unnecessary suffering of combatants, are prohibited. In view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with respect for such requirements.

<sup>20</sup> The 1984 Comment used the term “crime against humanity” rather than “crime under international law,” consistently with GA Res. 1653 (1961), which asserted (para. 1 (d)) that “Any State using nuclear and thermo-nuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization.”

<sup>21</sup> GA Res. 96 (I), in which the Assembly “*Affirms* that genocide is a crime under international law....”

<sup>22</sup> I am thinking here particularly of the ICJ’s remark in its Advisory Opinion that only mass killings with the necessary specific intent amount to genocide. “In the view of the Court, it would only be possible to arrive at such a conclusion after having taken due account of the circumstances specific to each case.” Nuclear Weapons Advisory Opinion, para. 26.

<sup>23</sup> See generally, Roger S. Clark, “The Rome Statute of the International Criminal Court and Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering, or which Are Inherently Indiscriminate,” in John Carey, William V. Dunlap and R. John Pritchard eds., *International Humanitarian Law: Challenges* 259 (2004).

<sup>24</sup> Treaty on the Prohibition of Nuclear Weapons, Art. 1 (b).

<sup>25</sup> *Id.*, Art. 1 (a), although the treaty is drafted using the infinitive form of the verb rather than the gerunds used by the GC.

<sup>26</sup> *Supra*.

<sup>27</sup> Roger S. Clark, “Pacific Island States and International Humanitarian Law,” forthcoming in Linton, McCormack and Sivakumaran eds., *Asia-Pacific Perspectives on International Humanitarian Law* (2019) at notes 90-112.

<sup>28</sup> Treaty on the Prohibition of Nuclear Weapons, Art. 6.

<sup>29</sup> Needless to say, France is not the only nuclear power to be less than fulsome in nuclear reparations. The US never properly funded the compensation of Marshall Islands victims. The UK was reluctant to recompense its casualties,

including its own military and military from Fiji, Australia, and New Zealand. See Tilman Ruff, “The humanitarian impact and implications of nuclear test explosions in the Pacific region,” 15 *International Review of the Red Cross* 775, 778 (2015); Sue Roff, *Hotspots: The Legacy of Hiroshima and Nagasaki* (1995); Friedrich Ebert Stiftung, New York Office, reports on *Addressing Humanitarian and Environmental Harm from Nuclear Weapons, on Kiritimati (Christmas) and Malden Islands, Republic of Kiribati; Kirisimasi (Christmas and Malden Island) Veterans, Republic of Fiji; Monte Bello, Emu Field and Maralinga Test Sites, Commonwealth of Australia* (2018).<sup>30</sup> Other enforcement procedures are not universally applicable to all parties as is Art. 40. Art. 41 of the Covenant is an opt-in provision that permits the Committee to hear allegations by a state, which itself accepts the article, that other states also accepting it are acting in breach of their obligations. Fifty of the 172 parties to the Covenant have accepted this power, but the procedure has never been initiated. Few states are prepared to use such procedures for fear of the diplomatic costs and the danger that skeletons in their own closets will be revealed. The Optional Protocol to the Covenant has 116 parties. It enables individual complaints to be made to the Committee and has generated much useful “caselaw”.

<sup>31</sup> The submissions are collected at <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx>.

<sup>32</sup> They made two sets of comments, one before the first reading draft and one after. The first encouraged expanding on what was then a fairly brief reference to nuclear weapons. <https://safna.org/2016/09/08/the-incompatibility-of-wmd-to-the-right-to-life-article-6-iccpr-a-submission-to-the-un-human-rights-committee/>. In the later one, reproduced on the Committee’s website, they encouraged the retention of the bracketed words “threat” at the beginning of the paragraph and the reference to reparation at the end. That happened. They also argued, unsuccessfully, for adding the word “lawful” between “necessary” and “measures” in the phrase “must take all necessary measure to stop the proliferation....” See also, Daniel Rietiker, *Humanization of Arms Control: paving the War for a World Free of Nuclear Weapons* (2018).

<sup>33</sup> Nowak, *supra* at 749 writes of the “authoritative and universal character of these interpretations.”

<sup>34</sup> The Committee’s Guidelines for the treaty-specific document to be submitted by states parties under article 40 of the International Covenant on Civil and Political Rights, UN Doc. CCPR/C/2009/1 (2010), refer to general comments as part of the framework governing state reports. See e.g. reference in the entry for Article 6 (at p. 7) to GC 14 of 1984.

<sup>35</sup> Observations of the United States of America on the Human Rights Committee’s Draft General Comment No. 36 On Article 6—Right to Life. The United States and the United Kingdom have previously contested the obligatory nature of the Committee’s opinions on the validity of reservations made by particular states. See “Observations by the Governments of the United States and the United Kingdom on Human Rights Committee General Comment No. 24 (52) relating to reservations,” available at <https://www.iilj.org/wp-content/uploads/2016/08/US-and-UK-Responses-to-the-General-Comment.pdf>.

<sup>36</sup> Kerstin Mechlem, “Treaty Bodies and the Interpretation of Human Rights,” 42 *Vanderbilt Journal of Transnational Law* 905, 929-30 (2009) (footnote omitted). Mechlem argues that given the normative significance of comments, the treaty bodies should pay more attention to sound legal methodology in formulating them, notably using the interpretive framework of the Vienna Convention on the Law of Treaties, Articles 31 and 32. In the only occasion that I have found where the International Court of Justice mentioned a general comment, it did not address the Comment’s juridical status but noted “the development of the principle of equality of access to courts and tribunals ... seen in the significant differences between the two general comments [in 1984 and 2007] by the Human Rights Committee on Article 14, paragraph 1, of the International Covenant on Civil and Political Rights of 1966. That provision requires that “[a]ll persons shall be equal before the courts and tribunals.” The Court obviously saw the comments as reflecting developments in customary law. Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion of 1 February 2012, 2012 I.C.J., para. 39.

## The UN Human Rights Committee and the Threat of Use of Nuclear Weapons\*

Ariana N. Smith

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As a law student intensely committed to wielding the law to make a safer, better world for all throughout my career, I'm honored to be here today with my co-panelists discussing the UN Human Rights Committee's recent comment on the right to life.

While opinions may differ as to just how the Committee's general comments may affect the development of international legal norms, it's quite clear that the recent Comment 36 complements the pre-existing customary norm prohibiting not only the use of nuclear weapons but their threat of use as well. The Comment reflects similarities to the interpretation of the legality of nuclear weapons offered by the International Court of Justice in its 1996 *Nuclear Weapons Advisory Opinion*. In this opinion, the Court said that the use or threat of use of nuclear weapons would be illegal in scenarios where such use or envisioned use violated international law, particularly humanitarian law.

The Human Rights Committee, in paragraph 66 of its new comment, uses language that supports the development of customary law prohibiting the threat or use of force by asserting outright that such threat or use of nuclear weapons is incompatible with respect for the right to life. The right to life affirmed by General Comment 36 also relies heavily on the humanitarian law-based rationale referred to by the ICJ decades earlier. As international humanitarian law encompasses principles like necessity and proportionality, as well as distinctions between civilians and combatants, it is very difficult to envision a scenario in which either the threat or use of nuclear weapons could be condoned under international law. The Comment takes seriously states' obligations under our current regime to both protect people from the effects of nuclear weaponry and also to pay reparations to survivors of prior nuclear attacks or testing. Coming on the heels of additional developments in our legal framework—like the Treaty on the Prohibition of Nuclear Weapons—this new comment has the potential to offer strong reinforcement of the customary norm against the use or threat of use of nuclear weapons.

The consequences of nuclear force—even through targeted, tactical weapons—are too massive, permanent, and indiscriminate to warrant any lawful use or threat; the Human Rights Committee maintains this gravity in its comment. Neither the impact of a nuclear weapon nor its lasting radiological effects distinguish between combatants and civilians—an essential requirement in humanitarian law. While the ICJ abstained from holding that nuclear weapons are by default so indiscriminate as to *always* violate humanitarian or other international laws, the court unanimously agreed that *if* such use violated humanitarian law, it would be de facto unlawful.

The Human Rights Committee maintains what the ICJ originally said in its *Advisory Opinion*: that nuclear weapons cause “untold human suffering” and indescribably harm “generations to come.” Their comment goes further in affirming that nuclear weapons intrinsically violate the right to life, and the Committee, thus

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\* Based on remarks made December 10, 2018 at a Human Rights Day event, “The Right to Life Versus Nuclear Weapons: A Bold Intervention by the UN Human Rights Committee,” Bahá'í United Nations Office, New York City.

a bit more readily than the ICJ, suggests the obvious: the threat or use of nuclear weapons cannot be lawful if we are to claim a fundamental respect for life within our global system.

The general prohibition of force codified in the UN Charter concurrently prohibits threats of force, too. The text of General Comment 36 likewise blends the two prohibitions stating, “The threat or use of weapons of mass destruction, in particular nuclear weapons...is incompatible with respect for the right to life and may amount to a crime under international law.” When considering how the comment reinforces customary norms against threats of nuclear force, it’s important to define what constitutes a threat.

While notoriously difficult to pin down legally, generally, a threat of force comprises an express or implied credible assertion, from one state to a target state, of readiness to engage in force, should the targeted state trigger a particular condition, usually within the context of a dispute. While an ongoing dispute makes the identification of a threat easier—as analyzing credibility and rationality in this context tends to be more straightforward—a threat can be made independent of any prior dispute as well.

Credibility can present a challenge in identifying unlawful threats of force generally, but the analysis is arguably simplified for threats of *nuclear* force. The credibility of a threat generally involves two elements: capability and rationality. An actor threatening force must have the ability to exert such force; and following through on the threat likely needs to make some rational sense for the threat to be deemed credible (and thus possibly unlawful).

When it comes to nuclear threats, the two elements can largely be distilled into capability alone, as, I argue, there can be no legitimate rationality in threatening such cataclysmic violence. Whether it seems reasonable to threaten force can be subjective and hard to pin down in some circumstances, but with nuclear force, it is a moot point; it is never reasonable nor rational to threaten with a nuclear weapon, particularly in a world where the right to life is non-derogable and should be construed broadly, per the Human Rights Committee’s comment. To that end, if a state has nuclear weapon capabilities—or the active backing of a nuclear weapon state—nearly any threat of nuclear force should be credible and legitimate-enough to be classified as illegal.

Some reasonably assert that an inflammatory speech alone may not constitute a legitimate and credible threat. But when an incendiary speech by a leader of a nuclear weapon state intimates nuclear force, the threat is credible-enough to constitute unlawful action. For example, many people—rightly so—took President Trump very seriously when he threatened the total destruction of North Korea in his speech at the General Assembly in 2017. As a reminder, Trump said that if the United States is “forced to defend itself or its allies, we will have no choice but to *totally destroy* North Korea.” North Korean foreign minister Ri Yong Ho responded that targeting the United States mainland with North Korea’s rockets was “inevitable” after Trump’s remarks. Both leaders’ words constitute dangerous and unlawful threats of nuclear force. While issued in the context of provocative speeches that some wrote off as political posturing by two of the world’s most volatile leaders, as threats of nuclear force by two nuclear-capable countries, their credibility is established (regardless of their rationality). Again, the indiscriminate gravity of nuclear force makes threats of this kind inherently more dangerous regardless of variations in perceived credibility.

Additionally, many find that defensive threats offer a slightly different opportunity to consider whether a threat of nuclear force is ever legal or strategically appropriate. Some scholars assert that if a threat contributes to averting actual force, then it is (or should be) lawful. The force envisaged in threats of self-defense, though, must still meet the principles of necessity and proportionality and comply with international law. The ICJ takes the position that proportionality must manifest as an expression of force *only to the extent necessary* to stop or repel an attack. A proportional attack in response need not, and likely should not, match the devastation of the initial attack. A threat of nuclear force will always then

threaten to far exceed any provoking conventional use of force and likely cannot be lawful. Many would argue that a threat of nuclear force in response to another's first use of nuclear weapons (or other weapons of mass destruction) is indeed a proportionate response, however, a threat of nuclear force remains indiscriminate to the extent that such a threat would *still* breach international law and violate the right to life.

The clarity more easily found in the context of an existing dispute when identifying unlawful threats of force, though, is evasive today, as we face escalating rhetoric and increasingly menacing acts among world leaders not yet embroiled in any declared conflict. While withdrawal from a treaty or developing nuclear arsenals alone is not unlawful per se, the exchanges of fiery language,<sup>1</sup> rejection of prior-embraced treaties,<sup>2</sup> and commitment to modernizing existing nuclear arsenals instead of disarming may constitute—or at least lay the foundation for—unlawful threats of nuclear force.

State practice that defies the black-letter law does not negate the legitimacy of the legal prohibition of threats and use of nuclear force. The Human Rights Committee's General Comment strengthens the body of thought denouncing nuclear force as a legitimate way to threaten or engage in conflict and promotes the nuclear weapon states' Article VI obligation to pursue disarmament—in stark contrast with the heightened rhetoric referenced herein.<sup>3</sup>

While there is more room for legitimate debate as to what constitutes a lawful threat of conventional force, a threat of nuclear force is never lawful when held accountable under international humanitarian law regardless of whether the threat is issued from an offensive or defensive posture—and regardless of what our political leaders would have us believe in the name of “America First.” The Human Rights Committee's revised General Comment and its emphasis on the broad and essential right to life for all people reinforces this notion and will hopefully be wielded as a tool moving forward to promote effective disarmament and the ultimate legal prohibition of nuclear weapons.

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<sup>1</sup> As in the threats between the U.S. and North Korea, discussion *supra* pp. 14-15.

<sup>2</sup> Note the suspension of the Intermediate-Range Nuclear Forces Treaty (INF) by the United States followed by the Russian Federation as well as the U.S. withdrawal from the Joint Comprehensive Plan of Action (JCPOA) preceding Iran's recent breach of the uranium stockpile limits set by the treaty.

<sup>3</sup> *Treaty on the Non-Proliferation of Nuclear Weapons*, art. VI (1970).

## Reflections on the UN Human Rights Committee's General Comment\*

*Peter Weiss*

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Those of us who were around a quarter of a century ago when we campaigned to get nuclear weapons before the International Court of Justice—it was when I first met Roger Clark because he was there for the same reason—recall that it was not easy, in fact, it was rather difficult to get the word threat into the question that we wanted and succeeded in putting to the ICJ. As you have just heard from both Roger and Ariana, threat is not an easily defined term. So, and I am repeating in part what you just said about President Trump and North Korea, but when he talked about raining “fire and fury” on North Korea, was that a threat? Or, was that one of the hyperboles that our president is so fond of?

And to complement what the president did, we can also look at what Kim Jong-un was saying and doing about his missile capability. It reminded me of a story once told to me by Selig Harrison, that great North Korean academic expert. He said that he decided to take a fairly high North Korean official to lunch. In the course of that lunch his lunch partner said, “Do you know we now have the capability to hit New York City?” Selig Harrison said, “If you’ll forgive me, I don’t think that’s a correct statement,” to which his lunch partner replied, “alright, then we’ll hit Chicago instead”. So, what was that, was that a threat, or was that a joke?

So threat is not easy to define, and I would like to make a small contribution to that definition. It takes the form of referring you to Article 120.14 of the Penal Law of New York State, which reads in part as follows: “A person is guilty of menacing in the second degree when he/she intentionally places or attempts to place another person in reasonable fear of physical injury, or serious physical injury or death by displaying a deadly weapon.” Now is that not the perfect definition of the head of a nuclear-armed state?

So perhaps it would be a good idea to expand the discussion of the term “threat” to include “menacing,” which I have just read the definition of for you in the law, which is something that you will find in the penal code of a great many countries. And menacing in that sense does not even have to be limited to situations threatening the right to life. It applies to any situation in which a nuclear-armed entity finds itself in conflict with another entity regardless of whether such use is justified by self-defense or “deterrence.” You should know that laws similar to the New York law that I have quoted to you are found in the penal codes in a great many other states of the United States.

So let me now turn to the very welcome, but somewhat mysterious, paragraph 66 of General Comment 36 on the right to life clause, which is Article 6.1 in the International Covenant. The reason I call it mysterious is that actually not a great deal has changed on the ground. There are fewer nuclear weapons right now in existence than there were in 1984 when the second comment, which Roger spoke about, was issued by the Human Rights Committee. So, what are the members of the Human Rights Committee doing here, what are they telling us? Are they saying that “we members of the HRC, or our predecessors, goofed by not referring to the complete incompatibility of nuclear weapons with the right to life in the

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\* Edited transcript of remarks made December 10, 2018 at a Human Rights Day event, “The Right to Life Versus Nuclear Weapons: A Bold Intervention by the UN Human Rights Committee,” Bahá’í United Nations Office, New York City.

1984 version of the comment”? Or, are they saying that the illegality of threat or use of nuclear weapons under customary international law is clearer today than it was in 1984? Or, are they intimating that threat, use, development, acquisition, etc. of nuclear weapons is so horrendously violative of elementary human rights standards that they must also be declared to be clearly illegal?

Knowing that the mansion of international law has many chambers, I would say it’s a bit of all of the above, but I would also add a reference to Article 38 to the Statute of the International Court of Justice, which, although it mentions only sources of law applicable to rulings by the ICJ, is in fact regarded generally in international law circles as applicable to every instance in which the term “international law” appears. In other words, you’re going to find references to the elements of Article 38 whenever a lawyer somewhere or a judge wants to defend his or her reference to Article 38 as a source of international law. These elements are not complementary, they are not a bunch of things which taken together give you international law, but any single element in Article 38 can be a source of international law and frequently is.

I will just quote some of the more relevant ones for you. Nuclear weapons could be said to be illegal under “international custom” or under the “general principles of law accepted by civilized nations.” Please don’t ask me to define “civilized nations,” although if you take seriously what I have been talking about here it would appear that countries that rely on the use of nuclear weapons are not civilized nations, and the others, the many others who consider them incompatible with international law, are the civilized ones.

The last element I want to mention to you under Article 38 reads “the teachings of the most highly qualified publicists of the various nations.” I have always liked that part a lot, because it says in effect that the most qualified publicists of international law, like Roger Clark now and Ariana at some point in the future, will not only be interpreters of international law, but they can be creators of international law. It gives great opportunities for creating international law and some of us have been trying to do that in relation to nuclear weapons for more than half a century.

So the main thing to be taken away from this discussion is that paragraph 66 in General Comment 36 adds an absolutely unqualified, unequivocal, legal condemnation of nuclear weapons and that this new condemnation is joining the long list of other condemnations of nuclear weapons as incompatible with international law. And I think you have heard from the previous two speakers that it must be taken as a necessary interpretation of the general comment that nuclear weapons are incompatible with international law and that they are also more specifically incompatible with the right to life.

One comment I would also make is about why this is happening now, this general comment, when it hasn’t happened before. Christopher Weeramantry, the great Sri Lankan international law expert, said on occasion (and by the way Judge Weeramantry was a very active member of the organizations that we represent here and we miss him—he died about a two years ago) that “the law does not necessarily change, but the interpretation of the law changes.” I think we can think of the new general comment in those terms.

Before I yield the floor for the general discussion, I just want to remind you on this 70<sup>th</sup> anniversary of the Universal Declaration of Human Rights what Eleanor Roosevelt, who was one of the creators, perhaps even the principal one, of the Universal Declaration, said about human rights. She said “human rights begin in the home.”

# **The Relevance of Human Rights for Use of Nuclear Weapons and Their Utility in the Fight Against Those Weapons—With Particular Attention Paid to “Civil” Rights\***

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## **General introduction**

The purpose of the present contribution is, first, to prove the relevance of human rights in the event of nuclear weapons use and, second, to offer some thoughts and ideas on how governments and civil society can use human rights law in their fight against those weapons. The relevance of human rights for nuclear weapons has very recently been acknowledged officially, namely through the adoption of the new Treaty on the Prohibition of Nuclear Weapons, in New York on 7 July 2017. Indeed, in several paragraphs, this treaty refers explicitly to human rights: first of all, in its preamble, where it states that:

The States Parties to this Treaty (...) Reaffirming the need for all States at all times to comply with applicable international law, including international humanitarian law and international human rights law.<sup>1</sup>

Moreover, in its Article 6 on “victim assistance and environmental remediation,” it states:

1. Each State Party shall, with respect to individuals under its jurisdiction who are affected by the use or testing of nuclear weapons, in accordance with applicable international humanitarian and human rights law, adequately provide age- and gender-sensitive assistance, without discrimination, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion.
2. Each State Party, with respect to areas under its jurisdiction or control contaminated as a result of activities related to the testing or use of nuclear weapons or other nuclear explosive devices, shall take necessary and appropriate measures towards the environmental remediation of areas so contaminated. (...).

Apart from those explicit references to human rights law, there is other language within this treaty, such as “victims” of nuclear weapons, including “hibakusha,” that are closely linked to human rights violations. In brief, the new treaty prohibiting nuclear weapons confirms the close link between human rights law and nuclear weapons.

Only for practical reasons does the author concentrate, within the present analysis, on so-called “civil” rights in the sense of civil and political rights, as opposed to economic, social, and cultural rights. This distinction derives, *inter alia* from the two 1966 International Covenants, one on civil and political rights (ICCPR), and the other on economic, social, and cultural rights (ICESCR). The author has extensively addressed the relevance of economic, social, and cultural rights in a recent, more comprehensive study on nuclear weapons.<sup>2</sup> Within this publication the importance of those rights—in particular the right to the highest standard of health and to a healthy environment, and the right to an adequate standard of living, including the right to food and to water—has been highlighted.<sup>3</sup> The author finds it important to underline that it is purely for practical reasons that he does not address those rights within the present contribution,

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\* Based on remarks made May 1, 2019 at an NPT side-event, “Human Rights, Democracy, and Nuclear Weapons,” held at United Nations, New York City.

being convinced that they add an important layer of protection against the destructive power of nuclear weapons.

The present analysis is divided into three parts. In the first part, the advantages of human rights law will be explained (I); the second part is devoted to the right to life, the most obvious right to be addressed in the context of nuclear weapons (II). Therein, the recent adoption of General Comment no. 36 by the UN Human Rights Committee (HRC) will be discussed more in detail. In the third, the relevance of other human rights for the debate, namely the prohibition of inhumane and degrading treatment, the right for respect of private and family life and home, as well as the right to property, will be briefly explained (III).

## **I. The added value of human rights law for the use of nuclear weapons**

Even though humanitarian law is generally more specific and has normally been considered the primary source applied to nuclear weapons, human rights law adds another significant layer to the protection of the human being. It has, in particular, the following advantages.

First, human rights instruments apply basically in all circumstances. As a result, the cumbersome question of whether the threshold of an armed conflict has been reached in a concrete situation does not have to be addressed, while it does in applying humanitarian law. One exception is relatively rare in practice but nevertheless should be mentioned, namely the right of states parties to a human right treaty to make use of so-called derogation clauses. One of the major regional human rights treaties, namely the European Convention on Human Rights (ECHR), provides for such a derogation clause in its Article 15:

Article 15 (Derogation in time of emergency):

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from article 2, except in respect of deaths resulting from lawful acts of war, or from articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

This clause contains a series of important limitations on the freedom of states to suspend certain rights. The first one is that there are rights from which no derogation is permitted, namely the prohibition of inhuman and degrading treatment, including torture (Article 3 ECHR), the prohibition of slavery and servitude (Article 4, para 1 ECHR), and the principle of no punishment without law (Article 7 ECHR). Perhaps surprisingly, the right to life can be derogated from under Article 2 ECHR, contrary to Article 6 ICCPR, but only in respect to “deaths resulting from lawful acts of war.” In other words, in order to rely upon Article 15 ECHR with a view to derogating from Article 2 ECHR, a state would have to prove that the use of nuclear weapons would be compatible, *inter alia*, with IHL.<sup>4</sup>

Whereas all the other rights can a priori be derogated from, such derogations have to be strictly construed and do not give a *carte blanche* to the state invoking them. The extraordinary situation must involve a “public emergency threatening the life of the nation” and the derogations must be limited “to the extent

strictly required by the exigencies of the situation.” Moreover, the words “measures...not inconsistent with its other obligations under international law” would imply that a state, affected by the use of a nuclear weapon, could rely on Article 15 ECHR to derogate from its obligation under the ECHR but would still have to comply with IHL. As has just been explained, this author is convinced that the use of nuclear weapons would be contrary to fundamental IHL norms and principles. In addition, there are certain formal requirements that have to be fulfilled according to paragraph 3 of Article 15 ECHR. In practice, probably due to the strict material and formal conditions to comply with, as explained, declarations under Article 15 ECHR have been very rarely made.<sup>5</sup> Finally, it is important to state that it is up to the Court to examine, within an individual application, whether those conditions have been met in a specific situation.

Second, while human rights have traditionally been considered to protect the individual against arbitrary interference into a protected right, the more recent, dynamic jurisprudence of international human rights courts imposes on states parties the duty to take effective measures in order to protect the persons under their jurisdiction against harmful acts of other persons or private entities.<sup>6</sup> This type of “positive” obligation of the state to secure rights of individuals against infringements originating from private actors are today well established in the jurisprudence of human rights bodies and are recognized in various areas such as domestic violence,<sup>7</sup> violence between prisoners,<sup>8</sup> or environmental pollution by private companies.<sup>9</sup> This aspect is noteworthy in the present debate insofar as such positive obligations also exist in the field of nuclear disarmament, for example, the duty to negotiate in good faith towards general and complete disarmament (Article VI NPT), the duty to assist victims of use or testing of nuclear weapons or to provide for environmental remediation (Article VI TPNW, mentioned above), as well as in the nuclear field more broadly, for instance the duties imposed by the Convention on the 1980 Physical Protection of Nuclear Material, as amended in 2015, with a view, *inter alia*, to protecting those materials from being stolen and used by terrorist groups.

Third, the particular nature of certain human rights has also to be stressed. It is important to mention that—and here human rights law follows humanitarian law—certain norms of human rights law have to date attained customary status, therefore applying also to states not having ratified the relevant treaties.<sup>10</sup> Moreover, the normative supremacy of certain human rights has to be emphasized too. In other words, certain rights cannot be derogated from, which is a strong indication for their peremptory nature (*jus cogens*).<sup>11</sup> The ILC in its *Articles on the Responsibility of States for Internationally Wrongful Acts* made it clear that the circumstances precluding wrongfulness contained in Chapter V of Part One of these Articles do not authorize or excuse any derogation from a peremptory norm of general international law.<sup>12</sup> In other words, even a state taking countermeasures may not derogate from such a norm. For example, a genocide cannot justify a counter-genocide.<sup>13</sup>

In addition, the obligation to refrain from a breach of such a norm is also one that is of *erga omnes* nature. In the case of *Barcelona Traction, Light and Power Company, Limited*, the ICJ defined these obligations as “obligations of a State towards the international community as a whole (...)” adding that “[b]y their very nature the former are the concern of all States (...) and all States can be held to have a legal interest in their protection.”<sup>14</sup> The Court furthermore gave a number of examples, such as the norms outlawing aggression and genocide, and certain human rights principles such as those prohibiting slavery and racial discrimination.<sup>15</sup> Professor Doswald-Beck claims that the geographical extent of damage caused by a nuclear weapon’s explosion is likely to affect more than just one state, as well as common areas such as the high seas and international air space.<sup>16</sup> Therefore, it would constitute violations of various international obligations that are of *erga omnes* nature. The most important consequence of a breach of an obligation of *erga omnes* nature lies in the possibility of any state to invoke the responsibility of the state causing the damage, independently of whether or not that state is directly injured by such a breach. The condition for such an *erga omnes* invocation is that the “obligation breached is owed to the international community as a whole.”<sup>17</sup> As a result, accepting that a nuclear attack would entail significant human rights violations, it can be suggested that if State A attacks State B with nuclear weapons, all other states would be considered

as having a legal interest to act on behalf of State B and could invoke State A's responsibility.

Fourth, human rights treaties are formulated in terms of actual rights that the individual can invoke against interference in its rights by the state. Other branches of international law, including IHL, are formulated more often in terms of obligations of states owed to other states parties.<sup>18</sup> They might therefore not be directly relied upon by an individual. This aspect is closely linked to the—probably—most significant advantage of human rights law, namely its institutional dimension. In practice, victims of human rights violations, including victims of a potential nuclear weapons use, can rely on treaty bodies and mechanisms providing for legal remedies.<sup>19</sup> This aspect distinguishes human rights law sharply from humanitarian law, which is much less institutionalized, relying largely on the goodwill of the states parties in implementing its rules and principles on the national level. For instance, what makes the ECHR so special and effective is that individual applicants have the right—as set out in Article 34 ECHR—to seek redress directly from an independent judicial body examining allegations of serious human rights violations (so-called “right to individual application”).<sup>20</sup> Moreover, the judgments of the Court are binding upon the states parties and have to be implemented by the states, a procedure which is supervised by the Committee of Ministers of the Council of Europe.<sup>21</sup>

To sum up this chapter, it is undeniable that human rights law has a lot of advantages that might turn out beneficial in the fight against nuclear weapons and, as a result, should be used by civil society and governments engaged in this field. The purpose of the next section is to list and explain the most relevant human rights in the context of use of nuclear weapons, beginning with the right to life.

## **II. The right to life**

### **A. General remarks**

The right to life is the most fundamental human right. The ICJ, in its 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, confirmed the applicability of the right to life in time of armed conflict and, moreover, observed that the test of what is an “arbitrary deprivation of life,” within the meaning of Article 6 § 1 of the ICCPR, has to be determined in light of international law governing armed conflict, in particular humanitarian law.<sup>22</sup> As has been mentioned above, under the ICCPR, the right to life right is non-derogable, even in the event of a “public emergency which threatens the life of the nation” by virtue of its Article 4, contrary to Article 2 ECHR, as explained above. The right to life seems relevant in many respects in the context of the use of nuclear weapons. To name just four situations:

First, the most obvious observations is that nuclear weapons have the potential to take the life of tens and hundreds of thousands of people within a couple of seconds and are not being capable of distinguishing between enemy combatant and civilians, not even taking into account the high number of people who would die years and decades after as a consequence of exposure to radiation.<sup>23</sup> If this does not constitute “arbitrary deprivation” of life within the meaning of Article 6 of the ICCPR, what else would?

The ECtHR had to deal with cases introduced by relatives of civilians who had died during combat operations against rebel groups. In order to ensure that the use of force was no more than “absolutely necessary,” the test under Article 2 ECHR, the Court examined whether the planning of the operation was such as to “avoid” or at least “minimise deaths.” In a case against Russia concerning air operations against rebels during the Second Chechen War, the ECtHR basically accepted that Russia had no other choice than to carry out aerial strikes in order to regain a town that was defended by well-equipped rebels. The Court nevertheless concluded that there had been a violation of the right to life, in particular for having exceeded what was necessary in the concrete situation:

180. Against this background and in the light of the principles stated in paragraph 178

above, the Court may be prepared to accept that the Russian authorities had no choice other than to carry out aerial strikes in order to be able to take over Urus-Martan, and that their actions were in pursuit of the aim set out in paragraph 2 (a) of Article 2 of the Convention, as alleged by the Government. It is, however, not convinced, having regard to the materials at its disposal, that the necessary degree of care was exercised in preparing the operation of 19 October 1999 in such a way as to avoid or minimise, to the greatest extent possible, the risk of a loss of life, both for the persons at whom the measures were directed and for civilians (see McCann, cited above, § 194).<sup>24</sup>

In this case, the Russian operation resulted in 16 injuries, and 13 houses destroyed, caused by the use of high-explosive fragmentation bombs of caliber 250-270 kg. These weapons were considered “indiscriminate weapons” by the Court, which concluded that the use of such bombs in inhabited areas was “manifestly disproportionate” to the aim of dislodging the extremists.<sup>25</sup> From this author’s point of view, the large number of deaths likely to be caused by a nuclear explosion would not meet the high standards of the ECHR and the ICCPR regarding the right to life. In light of the uncontrollable effects of a nuclear weapon’s use and the numerous victims, it seems impossible to administer the proof that sufficient precaution had been taken to “avoid or minimize” incidental loss of life.

Second, it has been shown, in recent research, that one of the aspects that make nuclear weapons so fatal is the fact that no adequate rescue and medical response is possible due to the complete destruction of infrastructures, the death of medical personnel and the long-lasting radioactivity rendering access to the area very difficult. The presence of radiation after a nuclear attack would seriously hamper the ability to search for, to rescue, and to care for the wounded.<sup>26</sup> This could, according to Doswald-Beck, amount to a violation of the right to life by the attacking state.<sup>27</sup>

Third, the right to life encompasses the duty to “avoid or minimize” loss of life, civil as well as among the enemy combatants *hors de combat*. The duties inherent in the right to life do, however, not stop there since a state might be under the obligation to provide adequate medical care in response to a harmful event.<sup>28</sup> The significance of subsequent medical care to prevent loss of life as well as the duty to investigate the whereabouts of missing persons—soldiers or civilians—have been examined, in particular by the ECtHR. A concrete example is the case of *Varnava and Others v. Turkey*, where the Court held that in a zone of international conflict, states are under an obligation to protect the lives of those not, or no longer, engaged in hostilities, and that this duty also extends to the provision of medical assistance to the wounded.<sup>29</sup> From the author’s point of view, it would be virtually impossible, in the aftermath of a nuclear weapon’s explosion, to comply with this duty.

Fourth, the Court further found, in the same case, that where combatants have died, or succumbed to wounds, the need for accountability would necessitate the proper disposal of remains and require the authorities to collect and provide information about the identity and fate of the persons concerned, or authorize institutions such as the ICRC to do its work in this field.<sup>30</sup> It concluded that “Article 2 therefore imposes a continuing obligation on the respondent Government to account for the whereabouts and fate of the missing men in the present case (...).”<sup>31</sup> Due to the presence of radiation, this obligation would also turn out very difficult to comply with after the explosion of a nuclear weapon. In light of what precedes, it can be argued that the right to life plays a significant role in the context of nuclear weapons and even long after the detonation of such a weapon.

## **B. General Comment No. 36 on the right to life**

### *1. Earlier general comments on the right to life and preparatory work to the General Comment No. 36*

On 30 October 2018, the UN Human Rights Committee (HRC), which is in charge of the implementation of the ICCPR, adopted its General Comment no. 36 relating to the right to life (Article 6 ICCPR). It is in many respects a remarkable document and a new example for bridge- building between nuclear arms control/disarmament and human rights. The HRC considers the threat and use of WMD, in particular nuclear weapons, incompatible with the right to life and reiterates the duties of the states parties in the field of nuclear disarmament and non-proliferation.

The General Comment no. 36 is a detailed and lengthy document of 70 paragraphs. Even though other paragraphs are certainly relevant too for the present debate, comments will be made only on the clause relating to WMD, in particular nuclear weapons.

Prior to the General Comment no. 36, the HRC issued already two general comments on the right to life. The HRC adopted its General Comment no. 6 in 1982 and, more relevant, its General Comment no. 14 in 1984, where it held as follows:

4. It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. This threat is compounded by the danger that the actual use of such weapons may be brought about, not only in the event of war, but even through human and mechanical error or failure...
6. The production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity.
7. The Committee accordingly, in the interest of mankind, calls upon all States, whether Parties to the Covenant or not, to take urgent steps, unilaterally and by agreement, to rid the world of this menace.

The HRC was criticized by some commentators and certain states, in particular by France, for allegedly having overstepped its mandate by commenting on issues of nuclear weapons.<sup>32</sup>

A couple of years ago, the HRC began its consideration of a new general comment on the right to life, which became ultimately General Comment no. 36. A first proposal was considered incomplete and unsatisfactory for many reasons.<sup>33</sup> A second draft, much more elaborated and appropriate on WMD, was presented in 2017.

## *2. Preliminary comments on General Comment no. 36 as adopted on 30 October 2018*

On 30 October 2018, the final draft of General Comment no. 36 was adopted by the HRC. The clause devoted to weapons of mass destruction, in particular nuclear weapons, became paragraph 66 and reads as follows:

66. The threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and are of a nature to cause destruction of human life on a catastrophic scale is incompatible with respect for the right to life and may amount to a crime under international law. States parties must take all necessary measures to stop the proliferation of weapons of mass destruction, including measures to prevent their acquisition by non-state actors, to refrain from developing, producing, testing, acquiring, stockpiling, selling, transferring and using them, to destroy existing stockpiles, and to take adequate measures of protection against accidental use, all in accordance with their international obligations. They must also respect their international obligations to pursue in good faith negotiations in order to achieve the aim of nuclear disarmament under strict

and effective international control and to afford adequate reparation to victims whose right to life has been or is being adversely affected by the testing or use of weapons of mass destruction, in accordance with principles of international responsibility.<sup>34</sup>

The author considers the adopted draft very noteworthy and valuable. At this stage, he limits himself to a couple of brief remarks. First of all, the HRC expresses that not only actual use, but also *threat* of weapons of mass destruction, in particular nuclear weapons, is incompatible with the right to life. This reflects, *inter alia*, the core prohibitions of the Treaty on the Prohibition of Nuclear Weapons (TPNW), set out in Article 1(d), which bars states parties from using and *threatening to use* such weapons. Both clauses are powerful statements against the threat of nuclear weapons.

Second, the HRC considers nuclear weapons as indiscriminate in effect and of a nature to cause destruction of human life on a catastrophic scale and, therefore, incompatible with right to life. The ICJ, in its 1996 Advisory Opinion, stated that “[t]he destructive power of nuclear weapons cannot be contained in either space or time.”<sup>35</sup> In the same line, the preamble of the TPNW reads as follows:

*The States Parties ... Cognizant that the catastrophic consequences of nuclear weapons cannot be adequately addressed, transcend national borders, pose grave implications for human survival, the environment, socioeconomic development, the global economy, food security and the health of current and future generations, and have a disproportionate impact on women and girls, including as a result of ionizing radiation...*<sup>36</sup>

Third, the general comment considers that use and threat of use of nuclear weapons may amount to crimes under international law. This author explained elsewhere why he is of the opinion that different provisions of war crimes and crimes against humanity under the Rome Statute may come into play regarding the use of nuclear weapons.<sup>37</sup> He also suggested that such use could amount to genocide, if denoting a specific intent to destroy, in whole or part, one of the groups mentioned in Article 6 of the Rome Statute.<sup>38</sup>

Fourth, the HRC reiterated that states parties must take all necessary measures to stop the proliferation of weapons of mass destruction, including measures to prevent their acquisition by non-state actors, to refrain from developing, producing, testing, acquiring, stockpiling, selling, transferring, and using them; to destroy existing stockpiles; and to take adequate measures of protection against accidental use, all in accordance with their international obligations. This is a valuable reminder of the duties deriving from the Treaty on the Non-proliferation of Nuclear Weapons (NPT), the Comprehensive Test Ban Treaty (CTBT), as well as the TPNW. The two latter treaties have not yet entered into force, but some of their provisions are considered to reflect customary international law regarding certain acts, in particular testing of nuclear weapons.<sup>39</sup>

Fifth, the HRC also recalls that states parties must also respect their international obligations to pursue in good faith negotiations in order to achieve the aim of nuclear disarmament under strict and effective international control. This duty derives, for all states, from Article VI NPT, confirmed by the ICJ in 1996.<sup>40</sup>

Sixth, the general comment also recalls that states are under an obligation to afford adequate reparation to victims whose right to life has been or is being adversely affected by the testing or use of weapons of mass destruction, in accordance with principles of international responsibility. This is a significant reminder of the responsibility of states for internationally wrongful acts, nowadays codified in the 2001 ILC draft Articles,<sup>41</sup> which may apply to situations of states having tested or used nuclear weapons in or against other states. Moreover, it is noteworthy to recall that Article 2 § 3 of the ICCPR imposes on states parties the duty to provide the victims for an effective remedy.<sup>42</sup> In addition, paragraph VII of UNGA

Resolution 60/147, adopted on 16 December 2005, states the right of victims of gross violations of international human rights law and serious violations of international humanitarian law to “adequate, effective and prompt reparation for harm suffered.”<sup>43</sup>

As a matter of delimitation, it is also relevant to recall Article 6 of the TPNW which provides for victim assistance and environmental remediation. Its paragraph 1, dealing with victim assistance, reads as follows:

Each State Party shall, with respect to individuals under its jurisdiction who are affected by the use or testing of nuclear weapons, in accordance with applicable international humanitarian and human rights law, adequately provide age- and gender-sensitive assistance, without discrimination, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion.

It derives from the wording of Article 6 § 1 TPNW that the duty to assist victims of use and testing of nuclear weapons shall primarily be dealt with by the states on whose territory such use and testing have occurred. This is different from the duties deriving from state responsibility, which addresses the states having tested or used nuclear weapons, as explained above. In other words, the scope of application of these two mechanisms is different.

Seventh, perhaps the main value of the general comment, from a strictly legal point of view, lies in the fact that general comments of UN human rights bodies are generally considered as authentic interpretation of the relevant treaty provisions and, as a result, of the duties of states parties deriving from those instruments. Under certain circumstances, they might even reflect customary international law or, at least, as state practice, contribute to the establishment of such law. It is noteworthy to mention, in this regard, that all states that are recognized as possessing nuclear weapons under the NPT are parties to the ICCPR, with the exception of China, which has at least signed that treaty.<sup>44</sup> It is also remarkable that the Human Rights Committee, when adopting the General Comment no. 36, was composed not only of independent experts from non-nuclear weapons States, but also of members from nuclear weapons states, namely France, Israel, UK, and the USA.

### **III. Other relevant human rights for nuclear weapons use**

The right to life is probably the most relevant human right in the context of use of nuclear weapons, but by far not the only one. The purpose of the following section is to examine the relevance of other human rights norms, beginning with the prohibition of inhuman and degrading treatment.

#### **A. The prohibition of inhuman and degrading treatment**

The special nature of the prohibition of inhuman and degrading treatment, including torture, has already been mentioned. In Europe, those values are protected by Article 3 ECHR. In the case of *El-Masri v. The Former Yugoslav Republic of Macedonia*,<sup>45</sup> dealing with extraordinary rendition, the ECtHR held what follows:

195. The Court reiterates that Article 3 of the Convention enshrines one of the most fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (...). The Court has confirmed that even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned (...).

In order to fall within the ambit of Article 3 ECHR, ill-treatment must attain a certain minimum level of severity (so-called “threshold-theory”).<sup>46</sup> Once this level is reached, the Court usually determines which of the three categories of treatments is involved (torture, inhuman, or degrading treatment).

In a prior publication, the author argued that the use of nuclear weapons could amount at least to “degrading treatment,” since it deprives the victims of their basic dignity. The standard formula developed and applied by the Court for this level of treatment is treatment “such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them.”<sup>47</sup> He also suggested that the use of nuclear weapons could amount to “inhuman” treatment, given the fact that numerous victims could suffer injuries that would inflict enormous suffering and pain and, within a few weeks, lead to their demise. The release of ionizing radiation and radioactive fallout can result in radiation sickness, with most people not being aware that they have been exposed to a potentially lethal radiation dose until days or weeks after the explosion. This period could certainly be qualified as “acute mental and physical suffering” that would “expose [the victims] to a real risk of dying under most distressing circumstances,”<sup>48</sup> within the meaning of the relevant jurisprudence of the ECtHR.

It is also noteworthy that, in the case of *Selçuk and Asker v. Turkey*,<sup>49</sup> The ECtHR held that there was “inhuman” treatment when, as a part of a security operation, the security forces destroyed the elderly applicants’ home and property in a contemptuous manner and in their presence, without regard to their safety or welfare, depriving them of their livelihood and shelter and causing them great distress.<sup>50</sup> It is obvious that the destruction of one’s home by a nuclear blast is very likely to have a similar effect and could amount, on its own, to a breach of Article 3 ECHR.

### **B. The right to respect for private and family life and home, and the right to property**

Essentially for the same reason, namely destruction of homes and property, a nuclear attack would affect the victims’ right to respect for private life and home (for example, Article 8 ECHR) as well as the right to property (Article 1 of Protocol 1 to the ECHR). These rights are less protected than the values under Article 2 or Article 3, since they can be restricted (relative rights) and derogated from under Article 15 ECHR. One of the conditions for a lawful interference in those rights is that such interference is necessary in a democratic society and proportionate to the aim pursued. As far as nuclear weapons are concerned, it is doubtful whether the destruction of the homes and property of tens and hundreds of thousands of people through a nuclear attack could be justified by whatever aim.<sup>51</sup> In this regard, it has to be underlined that, even in case a house or building would resist the nuclear blast, it might not be habitable for a long time or forever due to radioactive fallout.<sup>52</sup>

### **C. Intermediate conclusion: the use of nuclear weapons as a total denial of human rights**

To sum up, it has to be reiterated that, for practical reasons, a selection had to be made within this analysis. The rights addressed here are only certain rights that are likely to be denied in the situation of a nuclear attack. The list is not meant to be exhaustive insofar as only few, if any, rights would remain unaffected by a nuclear weapons explosion. Indeed, a detonation in a town would destroy churches, mosques, temples, and cemeteries, completely depriving the different religious groups of their places of worship and prayer, protected by the most relevant human rights treaties.<sup>53</sup> Moreover, an explosion of nuclear weapons is likely to destroy the buildings and infrastructure of media organs such as journal editors as well as television and radio stations. As a result, even the most basic enjoyment of the freedom of expression would be at stake too.<sup>54</sup> Similarly, a nuclear explosion would destroy the premises of private associations and trade unions and, therefore, deprive them of the possibility to gather peacefully in flagrant violation of the right of freedom of assembly and association.<sup>55</sup> A nuclear blast would also cause the destruction of court buildings and law firms and lead to the death of judges, lawyers, and other judicial staff. The paralysation of the judiciary authorities would lead to the deprivation, at least temporarily, of

the right to a fair trial.<sup>56</sup> Finally, a nuclear explosion would cause the destruction of schools, universities, and libraries and the deaths of their staff, depriving the people of their right to education.<sup>57</sup>

For practical reasons, the impact of a nuclear weapons on these freedoms and rights are not detailed here and, again, these examples are not exhaustive. It is sufficient, for the purpose of the present study, to conclude that the use of such a weapon would constitute a total denial of all basic human rights.

### **Final observations**

In light of what precedes, it can be concluded that the most fundamental human rights, namely the right to life, would be massively breached in the event of use of nuclear weapons. In this regard, General Comment no. 36 deserves our attention: The mere fact that the HRC, a human rights body, deals with issues of prevention of war and nuclear weapons constitutes evidence for the growing interconnection between these fields of international law, and, at the same time, a confirmation of growing “humanization of arms control.” The adoption of the TPNW, in 2017, and of General Comment no. 36 are signs of a new, more human-centered trend towards nuclear disarmament.

The right to life is without doubt very fundamental but far from being the only human right relevant for nuclear weapons. Other relevant norms to be invoked would be the right to respect for private and family life and home, as well as the right to property. Another significant norm that is likely to turn out relevant in the event of use of nuclear weapons is the prohibition of inhuman and degrading treatment, with the significant advantage that it constitutes an absolute guarantee from which no derogation, neither in peace time nor in war, is admissible. In addition, it has also been concluded that the use of such a weapon would constitute a total denial of all basic human rights. Apart from those “civil” rights examined in the present analysis, economic, social, and cultural rights might be infringed upon too by the use of nuclear weapons. For practical reasons, this aspect has not been dealt with here.

The usual nuclear disarmament channels having remained inefficient; new avenues have to be tried out. The bridge between arms control and human rights should now be used by civil society and governments in their efforts against nuclear weapons. As a result, and considering that the HRC is only one UN body dealing with human rights within a large machinery covering very different rights and areas, NGOs and governments fighting for a world without nuclear weapons should now invoke other norms, treaties, and fora in the field of human rights in order to make their voices heard. It has been demonstrated that human rights law, in particular through its institutional framework, offers some undeniable advantages compared to other branches of international law.

The present author is not naive and, as a matter of fact, he does not expect the nuclear weapons states to get rid of their stockpiles as an immediate result of the adoption of General Comment no. 36, but he does think that the adoption of statements of this kind, made by independent international legal and human rights experts and considered in light of the recent TPNW, increases the pressure on states possessing nuclear weapons and helps to delegitimize their weapons. All in all, in the desert of all the negative news in the field of nuclear disarmament recently, the General Comment no. 36 constitutes a true oasis of hope. Let's be positive and think that it contains the seed for effective nuclear disarmament.

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<sup>1</sup> Preambular paragraph 8.

<sup>2</sup> Daniel Rietiker, *Humanization of Arms Control: Paving the Way for a World Free of Nuclear Weapons*, Routledge, London and New York, 2017.

<sup>3</sup> *Ibidem.*, in particular pp. 207-222.

<sup>4</sup> According to the ICJ, the threat or use of nuclear weapons would “generally” be contrary to the rules of international law applicable in armed conflict, in particular to those of humanitarian law. However, the Court added that “in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.” (*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, Dispositif, paragraph E.).

<sup>5</sup> A recent example is the letter of 21 July 2016 by which the Government of Turkey communicated to the Secretary-General of the Council of Europe the notice of derogation under Article 15 of the ECHR. This derogation was prolonged for three months several times.

<sup>6</sup> See D.J. Harris, M. O’Boyle, E.P. Bates and C.M. Buckley, *Law of the European Convention on Human Rights*, 3<sup>rd</sup> edition, Oxford University Press, 2014, pp. 21-24.

<sup>7</sup> *Opuz v. Turkey*, no. 33401/02, ECHR 2009.

<sup>8</sup> *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, ECHR 2002-II.

<sup>9</sup> See, among many others, the cases decided by the ECtHR, *Taşkın and Others v. Turkey*, no. 46117/99, ECHR 2004-X, or *Tătar v. Romania*, no. 67021/01, 27 January 2009, both explained in more detail below, Part 2.III.C.4e).

<sup>10</sup> L. Doswald-Beck, “Human rights law and nuclear weapons,” in G. Nystuen, S. Casey-Maslen and A. Golden Bersagel (eds.), *Nuclear Weapons Under International Law*, Cambridge, 2014, pp. 435-460, 441 and seq.

<sup>11</sup> In terms of general international law, the VCLT defines a peremptory norm as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” (Article 53 VCLT; see also Article 64 VCLT). International tribunals have generally been hesitant to accept the *jus cogens* nature of norms, but there is widespread agreement that the prohibition of torture (ECtHR, *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 60, ECHR 2001-XI, ICTY, *Prosecutor v. Furundzija*, case no. IT-95-17/I-T, 10 December 1998, §§ 144 and seq., and ICJ, *Questions relating to the Obligation to Extradite or Prosecute case*, Judgment, 20 July 2012, ICJ Reports 2012, § 99), and the crime of genocide (*Armed Activities on the Territory of the Congo (Congo v Rwanda)*, Judgment, 3 February 2006, ICJ Reports 2006, § 125) fall under the definition.

<sup>12</sup> Article 26 of the ILC Articles.

<sup>13</sup> ILC Commentary of Article 26, p. 85;

[http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)

<sup>14</sup> ICJ Reports 1970, § 33.

<sup>15</sup> In the advisory opinion concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ recognized the *erga omnes* nature of the right of the Palestinian People to self-determination a right (ICJ Reports 2004, § 156), referring to the *Eastern Timor* case (ICJ Reports 1995, § 29).

<sup>16</sup> Doswald-Beck, *op.cit.*, p 442.

<sup>17</sup> Article 48 § 1 (b) of the ILC Articles on responsibility of States for internationally wrongful acts.

<sup>18</sup> See, for instance, Common Article 1 of the 1977 Geneva Conventions: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”

<sup>19</sup> A. Breitegger, *Cluster Munitions and International Law: Disarmament with a Human Face*, Routledge, London and New York, 2012, p. 92, and Doswald-Beck, *op.cit.*, p. 459. See also St. Casey-Maslen, ‘The right to a remedy and

reparation for the use of nuclear weapons’, in G. Nystuen, St. Casey-Maslen and A. Golden Bersagel (eds.), *Nuclear Weapons Under International Law*, Cambridge, 2014, pp. 461-480.

<sup>20</sup> Article 34 ECHR reads as follows: “The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set for in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any of the effective exercise of this right.”

<sup>21</sup> Article 46 ECHR.

<sup>22</sup> ICJ Reports 1996, § 25.

<sup>23</sup> See, for instance, L. Maresca, “The Catastrophic Humanitarian Consequences of Nuclear Weapons: The Key Issues and Perspective of the International Committee of the Red Cross,” in: J. Borrie and T. Caughley (eds.), *Viewing Nuclear Weapons through a Humanitarian Lens*, New York and Geneva, 2013, pp. 132 et seq.

<sup>24</sup> *Khamzayev and Others v. Russia*, no. 1503/02.

<sup>25</sup> *Ibidem.*, § 189.

<sup>26</sup> Doswald-Beck, *op.cit.*, p. 451.

<sup>27</sup> *Ibidem.*

<sup>28</sup> *Ibidem.*, p. 450.

<sup>29</sup> *Varnava and Others v. Turkey*, ECtHR, Judgment, no. 16064/90 et al., 18 September 2009, § 185.

<sup>30</sup> *Ibidem.*, § 185.

<sup>31</sup> *Ibidem.*, § 186.

<sup>32</sup> See, for instance, V. Gowlland-Debbas, ‘The Right to Life and Genocide: The Court and an International Public Policy’, in L. Boisson de Chazournes and P. Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge 1999, pp. 315-337, 328.

<sup>33</sup> See a submission of Swiss Lawyers for Nuclear Disarmament: <https://safna.org/2016/09/08/the-incompatibility-of-wmd-to-the-right-to-life-article-6-iccpr-a-submission-to-the-un-human-rights-committee/>.

<sup>34</sup> References and footnotes omitted.

<sup>35</sup> ICJ Reports 1996, § 35.

<sup>36</sup> Paragraph 4 of the Preamble.

<sup>37</sup> Rietiker, *op.cit.*, pp. 269-276.

<sup>38</sup> *Ibidem.*, pp. 276-277.

<sup>39</sup> See, for instance, G. Venturini, who argues that there exists a customary prohibition for atmospheric, underwater, outer space and celestial bodies testing. This author is more hesitant concerning underground testing (G. Venturini, *Test-Bans and the Comprehensive Test Ban Treaty Organization*, in: J.L. Black-Branch and D. Fleck (eds.), *Nuclear Non-Proliferation in International Law*, Vol. 1, Asser Press and Springer, 2014, pp. 133-158, 151-152).

<sup>40</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, conclusion F (unanimous): “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.”

<sup>41</sup> Res. A/56/10, of 12 December 2001.

<sup>42</sup> See also Paragraph 4 of General Comment no. 36.

<sup>43</sup> Article VII (b).

<sup>44</sup> By virtue of Article 18 of the 1969 Vienna Convention on the Law of Treaties, signatory states are under certain obligations, namely the obligation not to defeat the object and purpose of a treaty prior to its entry into force: “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty (...)”

<sup>45</sup> *El-Masri v. FYR of Macedonia* [GC], no. 39630/09, 13 December 2012.

<sup>46</sup> *Ibidem.*, § 196.

<sup>47</sup> *Kudla v. Poland* [GC], no. 30210/96, 26 October 2000, § 92.

<sup>48</sup> *D. v. the United Kingdom*, no. 30240/96, 2 May 1997., § 53.

<sup>49</sup> 24 April 1998, *Reports of Judgments and Decisions* 1998 II.

<sup>50</sup> In particular, § 77.

<sup>51</sup> Rietiker, *op.cit.*, p. 197.

<sup>52</sup> *Ibidem.*

<sup>53</sup> Regarding Europe see Article 9 ECHR; for instance, *Cyprus v. Turkey* [GC], no. 25781/94, 10 May 2001, §§ 241 and seq. This right is also protected by Article 18 ICCPR, Article 12 of the American Convention on Human Rights (ACHR) and Article 8 of the African Convention on Human and Peoples' Rights (ACHPR).

<sup>54</sup> See, for Europe, Article 10 ECHR; for instance, *Banković and Others v. Belgium and Others* [GC], no. 52207/99, 12 December 2001 (inadmissible), in which the applicants complained, *inter alia*, about the bombing of the building of *Radio Televizije Srbije* (“RTS”). In one of its most criticized decisions, the Court declared the case inadmissible for lack of jurisdiction. See also Article 19 ICCPR, Article 13 ACHR and Article 9 ACHPR.

<sup>55</sup> See for instance *Cyprus v. Turkey* [GC], no. 25781/94, 10 May 2001, §§ 255 and seq. (Article 11 ECHR). See also Article 21 ICCPR, Article 15 ACHR and Article 11 ACHPR.

<sup>56</sup> Article 14 ICCPR, Article 6 ECHR, Article 8 ACHR and Article 7 ACHPR.

<sup>57</sup> See, for instance, Article 2 of Protocol no. 1 to the ECHR, Article 5 e) v) ICESCR, Article 26 ACHR (at least implicit) and Article 17 § 1 ACHPR.

# The Treaty on the Prohibition of Nuclear Weapons and International Human Rights Law\*

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The 2017 Treaty on the Prohibition of Nuclear Weapons (TPNW) brings a humanitarian approach to nuclear disarmament.<sup>1</sup> It emerged from the Humanitarian Initiative, a series of international conferences that examined the human and environmental impacts of nuclear weapons.<sup>2</sup> The treaty's preamble expresses deep concern about "the catastrophic humanitarian consequences that would result from any use of nuclear weapons" and recognizes that only complete elimination of these arms can prevent future devastation. Its text includes both prohibitions and remedial measures, a combination that is characteristic of other humanitarian disarmament instruments, notably the 1997 Mine Ban Treaty and 2008 Convention on Cluster Munitions.<sup>3</sup>

Given that the TPNW aims to reduce human suffering, it is fitting that it invokes international human rights law. In addition to citing sources more commonly mentioned in discussions of nuclear weapons, such as the UN Charter, international humanitarian law, and other nuclear weapon treaties,<sup>4</sup> the TPNW explicitly refers to international human rights law twice, in its preamble and in its provision on victim assistance.<sup>5</sup> Its environmental remediation obligation can also be read in light of human rights principles. International human rights law provides both an added reason for states to join the TPNW and guidance for how to implement the TPNW's obligations once they do.

## **Preamble**

The TPNW's first explicit reference to human rights appears in the preamble. It reaffirms "the need for all States at all times to comply with applicable international law, including international humanitarian law and international human rights law."<sup>6</sup> Although the preamble is non-binding, this paragraph foregrounds human rights law early in the treaty, giving it equal status to international humanitarian law. The paragraph reflects the value states parties place on compliance with international human rights law in the context of nuclear weapons. It also anticipates the TPNW's preventive and remedial measures, which provide a means to ensure that states meet their human rights obligations.

## *Right to Life*

The phrase "applicable . . . international human rights law" encompasses several rights, which come from customary international law as well as treaties, such as the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR). The right to life is fundamental to this body of law, and protecting it is a prerequisite to the enjoyment of other human rights.<sup>7</sup>

In its 2018 general comment interpreting the right to life, the treaty body for the ICCPR, known as the

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\* Based on remarks made May 1, 2019 at an NPT side-event, "Human Rights, Democracy, and Nuclear Weapons," held at United Nations, New York City.

Human Rights Committee, raised specific concerns about nuclear weapons. The Committee declared that the “threat or use of . . . nuclear weapons . . . is incompatible with respect for the right to life and may amount to a crime under international law.”<sup>8</sup> According to the committee, the right to life also calls for states parties to the ICCPR to refrain from the development, production, stockpiling, and transfer of nuclear weapons.<sup>9</sup> The TPNW bans all of these activities. Thus, abiding by its prohibitions would help states uphold the right to life.

In the same general comment, the Human Rights Committee linked the right to life with the obligation “to pursue in good faith negotiations in order to achieve the aim of nuclear disarmament under strict and effective international control.”<sup>10</sup> This obligation originated in Article VI of the 1968 Nuclear Non-Proliferation Treaty (NPT).<sup>11</sup> The International Court of Justice reiterated the obligation in its 1996 Advisory Opinion on Nuclear Weapons, emphasizing that the negotiations must lead to a result.<sup>12</sup> The TPNW is the product of good faith negotiations and a concrete step toward achieving nuclear disarmament. By joining the TPNW, therefore, states can better comply with their obligations under both the NPT and human rights law.

The Human Rights Committee further called for “adequate reparation to victims whose right to life has been or is being adversely affected by the testing or use of [nuclear weapons].”<sup>13</sup> The TPNW does not address reparations, but it does not preclude them either. The TPNW does require states parties to provide victim assistance, which is related to, albeit somewhat different from, reparations. While victim assistance measures do not depend on determining legal responsibility for unlawful acts, they address the human suffering caused by nuclear weapons and help victims realize their human rights, including the right to life.

#### *Other Human Rights*

The need to comply with international human rights law applies to more than the right to life. For example, with regard to economic, social, and cultural rights, the right to health entitles people to health care that is available, accessible, acceptable, and of good quality.<sup>14</sup> This right extends to individuals who have experienced health problems attributable to the use or testing of nuclear weapons, and it can be promoted through the TPNW’s victim assistance provision. The right to a healthy environment, based on the understanding that environmental protection contributes to the realization of other human rights, is relevant given the significant environmental damage caused by the use and testing of nuclear weapons.<sup>15</sup> Ensuring the right to a healthy environment calls for a ban on new use and testing as well as remediation of existing contamination. The TPNW incorporates both of these measures.

Civil and political rights, such as the right to information and the right of people to participate in decisions that affect their lives, are also applicable to nuclear weapons.<sup>16</sup> Indeed, the TPNW’s preamble notes that “equal, full and effective participation of both women and men is an essential factor for the promotion and attainment of sustainable peace and security,” and that women’s participation in nuclear disarmament should be strengthened.<sup>17</sup> States parties to the TPNW can promote such civil and political rights by implementing the treaty in a transparent and inclusive way.

#### **Victim Assistance**

The second explicit reference to human rights in the TPNW appears in Article 6(1) on victim assistance. The paragraph obliges states parties to provide assistance to individuals affected by the use and testing of nuclear weapons “in accordance with applicable international humanitarian and human rights law.”<sup>18</sup> The phrase “in accordance with . . . human rights law” influences this provision’s interpretation and implementation.

The phrase places the obligation to assist victims within a human rights frame. Article 6(1) enumerates several types of assistance, notably “medical care, rehabilitation and psychological support” as well as measures to provide for social and economic inclusion.<sup>19</sup> Providing these forms of assistance “in accordance with . . . human rights law” goes beyond addressing the needs of affected individuals to ensuring that they can realize their human rights. This understanding of Article 6(1) conforms with how victim assistance is interpreted in earlier humanitarian disarmament treaties.<sup>20</sup> For example, Article 5(1) of the Convention on Cluster Munitions includes the same reference to international human rights law in its virtually identical, corresponding paragraph on victim assistance.<sup>21</sup> In articulating the goals of victim assistance in its preamble, that convention highlights the need to “ensure the full realisation of the rights of all cluster munition victims” and to respect victims’ “inherent dignity.”<sup>22</sup>

The TPNW’s reference to international human rights law can guide the implementation of the treaty’s victim assistance provision in multiple ways. International human rights law offers several principles that can help make victim assistance a more sensitive, effective, and feasible endeavor.

Non-discrimination is a fundamental human rights principle, and, as Article 6(1) states, victim assistance should be provided “without discrimination.”<sup>23</sup> This principle prohibits discrimination on the basis of such characteristics as race, sex, religion, or disability.<sup>24</sup> The Convention on Cluster Munitions explains that in the disarmament context, non-discrimination also means states may not “discriminate against or among . . . victims, or between . . . victims [of a banned weapon] and those who have suffered injuries or disabilities from other causes.”<sup>25</sup> The only legitimate reasons for differences of treatment under the TPNW and its humanitarian disarmament predecessors are medical, rehabilitative, or psychological, or related to socioeconomic needs.<sup>26</sup>

Another applicable human rights principle is inclusivity. The 2006 Convention on the Rights of Persons with Disabilities stresses the importance of “full and effective participation and inclusion in society.”<sup>27</sup> Applying that principle to victim assistance, the Convention on Cluster Munitions requires states parties to “closely consult and actively involve . . . victims and their representative organisations.”<sup>28</sup> The TPNW does not explicitly refer to inclusion, but the concern for survivors expressed in its preamble and the parallels between its victim assistance provision and that of the more detailed Convention on Cluster Munitions suggests this principle should be a key factor in the implementation of TPNW Article 6(1).<sup>29</sup> States parties should actively involve affected individuals at every stage of the victim assistance process: design, implementation, monitoring, and assessment.

Human rights law also informs how the TPNW spreads responsibility for victim assistance across states parties. The treaty, like other humanitarian disarmament instruments, requires affected states parties to take the lead. This approach is consistent with human rights law, under which states have to respect, protect, and fulfill their people’s human rights. The approach further recognizes that affected states are best suited to assess needs and ensure the delivery of assistance due to their proximity to victims, and it respects states’ sovereignty over matters within their borders.<sup>30</sup>

At the same time, international human rights law recognizes that states often need help implementing their obligations. The ICESCR specifies that states should realize rights “individually and through international co-operation and assistance.”<sup>31</sup> In accordance with this principle, as well as humanitarian disarmament precedent, TPNW Article 7 spreads responsibility for its victim assistance obligations across states parties. It obliges all states parties “in a position to do so” to provide “technical, material and financial assistance” to support affected states’ victim assistance and environmental remediation efforts.<sup>32</sup> Given that assistance can come in a variety of forms, all states should be in position to provide some kind of support. In addition, the TPNW explicitly requires states parties that used or tested nuclear weapons to assist affected states parties with their Article 6 obligations.<sup>33</sup>

Finally, international human rights law's principle of progressive realization can make victim assistance more manageable. Given that nuclear weapons cause large-scale, far-reaching, and long-term harm, addressing victims' needs can be a significant undertaking. The fact that affected states often have fewer resources increases the challenge. The principle of progressive realization recognizes the difficulties of implementing certain economic, social, and cultural rights. The ICESCR requires states parties to act "to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant."<sup>34</sup> The TPNW should therefore be understood to oblige states parties to strive to realize the economic, social, and cultural rights of survivors, while recognizing that full attainment may take time due to resource constraints.

## **Environmental Remediation**

Although the victim assistance provision is the only TPNW obligation that explicitly refers to international human rights law, human rights principles can be applied to the treaty's other positive obligation in Article 6: environmental remediation. Article 6(2) requires affected states parties to "take necessary and appropriate measures towards the environmental remediation of [contaminated] areas."<sup>35</sup> The paragraph relates to human rights law in part because environmental remediation can help states promote the right to a healthy environment.

As it does for victim assistance, international human rights law offers principles that can facilitate states parties' compliance with the TPNW's environmental remediation provision. Articles 6 and 7 set up the same framework of shared responsibility. The TPNW assigns affected states parties primary responsibility for environmental remediation while entitling them to international cooperation and assistance to help them meet their obligations.

The principle of progressive realization can also be applied to environmental remediation. Containing or removing nuclear contamination can be as daunting a task as assisting people affected by the use and testing of nuclear weapons. By obliging states to work "towards . . . environmental remediation," however, the TPNW recognizes that environmental remediation can proceed gradually and that returning a site to its pre-detonation state may be difficult if not impossible. In other words, states parties may realize remediation progressively.<sup>36</sup>

## **Conclusion**

The TPNW's references to international human rights law do more than signal the humanitarian nature of the treaty. The need to comply with human rights law, which is articulated in the preamble, should increase states' incentives to join the TPNW. In addition, human rights law provides guidance that should help states parties meet their TPNW obligations, especially regarding victim assistance and environmental remediation. Proponents of the TPNW can thus use international human rights law as a tool to promote universalization and strong interpretation of the new treaty, while states parties should implement their obligations in accordance with human rights principles and duties.

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<sup>1</sup> Treaty on the Prohibition of Nuclear Weapons (TPNW), adopted July 7, 2017, opened for signature September 20, 2017.

<sup>2</sup> Bonnie Docherty, "A 'Light for All Humanity': The Treaty on the Prohibition of Nuclear Weapons and the Progress of Humanitarian Disarmament," *Global Change, Peace and Security* (2018), p 10.

<sup>3</sup> Humanitarian disarmament, which is a people-centered approach to governing weapons, seeks to prevent and remediate the human and environmental harm inflicted by arms. *Ibid.*, pp. 1-2.

<sup>4</sup> TPNW, pmbli., paras. 1, 8-12, 18-20.

<sup>5</sup> Ibid., pmb., para. 8, and art. 6(1).

<sup>6</sup> Ibid., pmb., para. 8.

<sup>7</sup> Human Rights Committee, “General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life,” CCPR/C/GC/36, October 30, 2018, para. 2. See also International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, entered into force March 23, 1976, art. 6 (codifying the right to life).

<sup>8</sup> Human Rights Committee, “General Comment No. 36,” para. 66.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Treaty on the Non-Proliferation of Nuclear Weapons (NPT), adopted June 12, 1968, entered into force March 5, 1970, art. VI.

<sup>12</sup> International Court of Justice, Legality of the Threat or Use of Nuclear Weapons: Advisory Opinion of 8 July 1996, *ICJ Reports 1996*, p. 226, paras. 99, 105(2)(F).

<sup>13</sup> Human Rights Committee, “General Comment No. 36,” para. 66.

<sup>14</sup> Committee on Economic, Social and Cultural Rights, “General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12),” August 11, 2000, para. 12. See also International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted December 16, 1966, entered into force January 3, 1976, art. 12 (codifying the right to health).

<sup>15</sup> “Framework Principles on Human Rights and the Environment,” para. 4, in Report of the Special Rapporteur on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, A/HRC/37/59, January 24, 2018, annex, p. 7. Although not codified in an international treaty, the right to a healthy environment builds on other human rights and has been increasingly recognized at the regional and national level. Report of the Special Rapporteur on the Issue of Human Rights Obligations relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, paras. 11-13.

<sup>16</sup> ICCPR, arts. 19(2) (codifying the right to information) and art. 25(a) (codifying right to participate in public affairs).

<sup>17</sup> TPNW, pmb., para. 22.

<sup>18</sup> Ibid., art. 6(1).

<sup>19</sup> Ibid.

<sup>20</sup> Markus Reiterer and Tirza Leibowitz, “Article 5: Victim Assistance,” in *The Convention on Cluster Munitions: A Commentary*, eds. Gro Nystuen and Stuart Casey-Maslen (Oxford: Oxford University Press, 2010), paras. 5.66-5.67.

<sup>21</sup> Convention on Cluster Munitions, adopted May 30, 2008, entered into force August 1, 2010, art. 5(1).

<sup>22</sup> Ibid., pmb., para. 6.

<sup>23</sup> TPNW, ar. 6(1).

<sup>24</sup> ICCPR, art. 2(1); ICESCR, art. 2(2); Convention on the Rights of Persons with Disabilities, adopted December 13, 2006, entered into force May 3, 2008, art. 3(1).

<sup>25</sup> Convention on Cluster Munitions, art. 5(2)(e).

<sup>26</sup> Ibid.

<sup>27</sup> Convention on the Rights of Persons with Disabilities, art. 3(c).

<sup>28</sup> Convention on Cluster Munitions, art. 5(2)(f).

<sup>29</sup> TPNW, pmbl., paras. 6-7, and art. 6(1); Convention on Cluster Munitions, art. 5(1).

<sup>30</sup> Harvard Law School International Human Rights Clinic, “Victim Assistance and Environmental Remediation in the Treaty on the Prohibition of Nuclear Weapons: Myths and Realities,” April 2019, [http://hrp.law.harvard.edu/wp-content/uploads/2019/04/TPNW\\_Myths\\_Realities\\_April2019.pdf](http://hrp.law.harvard.edu/wp-content/uploads/2019/04/TPNW_Myths_Realities_April2019.pdf) (accessed December 29, 2020), pp. 2-3.

<sup>31</sup> ICESCR, art. 2(1).

<sup>32</sup> TPNW, art. 7(3).

<sup>33</sup> Ibid., art. 7(6).

<sup>34</sup> ICESCR, art. 2(1).

<sup>35</sup> TPNW, art. 6(2).

<sup>36</sup> Ibid. (emphasis added).

## **Humanitarian Law, Human Rights, and Nuclear Weapons: Social Movements and the Path of Legal Development\***

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I am a generalist peace activist and lawyer, not an international law expert. So I am the token member of the user community for international law expertise on this panel. I will be offering some speculative thoughts about what kinds of international law I think will be useful to peace movements going forward and about where that law might come from. My views rest on some assumptions about the current moment. If there was a window for nuclear disarmament created by the end of the Cold War, it now is definitively over. That period, with its relative absence of confrontation among the leading nuclear-armed countries, perhaps offered some hope that advocacy focused solely on nuclear disarmament might succeed. Now, with global conditions increasingly resembling those that have brought great power wars in the past, I believe that meaningful progress towards disarmament will require social movements broad and deep enough to address the causes of high-tech militarism and war.

I also believe that movements of this kind will be necessary to stave off wars that could be catastrophic in a nuclear-armed world. These movements will need to bring together work for peace and disarmament with the disparate strands of work against environmental breakdown, polarization of wealth and economic injustice, erosion of democracy, and the targeting of migrants, national minorities, and other vulnerable people. The connections between these issues will have to be made at the level of their common causes in a global economy whose central dynamic for centuries has been endless material growth, driven by ruthless competition among authoritarian organizations of ever-increasing size and power.

I am old enough now to have lived through the latter part of one long cycle of high political mobilization and large, sustained social movements, followed by three decades of low political mobilization in which significant movements were few, at least in the country I live in, the United States.

Doing social change work is quite different in those two kinds of moments. Periods of low political mobilization are characterized by single-issue, professionalized, interest-group advocacy-style politics. Conventional professionals focus on effects rather than causes and offer technical, legal, and short-term political fixes for the problems that the dominant order of things systematically generates. In contrast, sustained, broad-based social movements can change not only the boundaries of the politically possible but the terrain of legal argument and interpretation.

I believe that we are at the beginning of another wave of movements now. And given the gravity of the overlapping crises we face, it likely is best that we act as if we are. In regard to international law, we must try to think of the kind of role it might play in a time of unresponsive, authoritarian governments that spark widespread resistance. It is worth noting that perhaps the most acute proliferation danger we face today is the proliferation of authoritarian nationalist governments in nuclear-armed states.

In trying to describe our current moment, a number of commentators have turned to Antonio Gramsci's concept of an interregnum. He used the term to characterize a period in which the old order is dying, but a new one cannot yet be born. In such moments, Gramsci observed, "a great variety of morbid symptoms will appear." We are, I think, in another such moment today.

One of the reasons that such transitions are so difficult is that so much power has concentrated at the top of societies that ruling elites have been able to eliminate many of the mechanisms that might rein in their

power—and that might also provide the means for an orderly and non-violent transition to something else.

A characteristic of such moments is a general sense of rapidly eroding norms and of lawlessness emanating from the highest levels of society. I believe that today both can be felt within many countries—and certainly is here in the United States. But it is also apparent in the strains on the fabric of the post-World War II international legal order, its institutions increasingly deadlocked and its central norms, particularly regarding the use of force, ignored by the most powerful states.

So where does this leave us, in terms of where our focus might be in peace and disarmament work in regard to international law? The states, the actually existing governments, are not going to save us. We must save ourselves. We can only do so by building movements strong enough to take power back from the small fractions of global society that now wield it and that threatens to annihilate us with their endless quest for material wealth and their factional disputes.

Generally, I think that until large movements emerge strong enough to challenge the dynamics driving high-tech militarism and conflicts among the most powerful states, we can expect few positive developments in state forums.

In the realm of the laws by which states choose to limit their ways and means of war-making—arms control treaties and humanitarian law—the role of law will mainly be defensive, aimed at containing an accelerating arms race. There will be little opportunity for significant norm development. In the realm of human rights, however, there is perhaps more hope. Such development could take place first within movements, as part of broader processes of elaborating a vision for a more humane future.

Unless and until there are movements powerful enough to address the forces driving high-tech militarism in general, I think that in most of the nuclear-armed countries, campaigning for disarmament treaties, or for that matter any kind of single-issue campaigning for elimination of nuclear weapons will be of limited use.

The Treaty on the Prohibition of Nuclear Weapons might play a useful role in providing a focus for debate about nuclear weapons issues in some of the nuclear umbrella states where there already is controversy about nuclear weapons in the mainstream. It also provides a way for other nuclear weapons-free states to put some pressure on the nuclear-armed countries.

But it is far more difficult to make significant disarmament progress in countries where nuclear weapons play a systemic role in military policies, national security ideologies, and the increasingly insular top tier of national economies. We have not assembled nearly enough social power to get nuclear disarmament on the agenda of governments in those countries in any serious way.

To the extent that it is worth spending time in single-issue work on nuclear weapons here in the United States, I think the near-term focus should be on supporting what is left of the existing arms control framework and pushing for arms control negotiations. These are areas where there is some support within the national security elites and some hope for success in the absence of significant movements pushing for more. Arms control can slow some of the most dangerous forms of arms racing. And even where prospects for tangible outcomes are dim, sustained negotiations provide channels of communication and a measure of mutual understanding that may prove invaluable in a crisis.

The most fruitful context for further normative development pointing towards the outlawing of nuclear weapons is not, I think, in inter-state forums. Rather, it will be *within* movements broad and deep enough to address the causes of international conflict and war. Until further on, when ordinary people in many

places have gathered enough social power to build some measure of democracy, enough to hold the powerful and unaccountable few to account, there is little value on core issues of state power in trying to convince governments that one or another international law rule is authoritative.

Within the movements, the discussion should not center on what the law is. Rather, it should be about what the law should be, what is consistent with the world we must bring into being if we are to have a fair, humane, democratic, and sustainable future, and with a democratic and nonviolent path for getting there.

A legal discourse intended to play a positive role in movements should aim to play a role in their self-formative process, to be part of their story, their vision, their sense of justice. All of this requires lawyers and legal workers who are willing to find ways to situate themselves within the emerging movements, and to make themselves accountable to them.

In regard to the body of law most useful for this kind of normative development within our movements, it seems to me that human rights law has more promise going forward than humanitarian law.

The Treaty on the Prohibition on Nuclear Weapons represents something of a transitional and forward-looking effort in this regard, still rooted in humanitarian law but containing elements of a broader human rights perspective. Humanitarian law still ultimately is state-centered law. It concerns what states can expect and demand from each other. Humanitarian law provides the rules by which states regulate their war making. It is compatible with war, and to some degree legitimizes it. As the International Committee of the Red Cross has observed, “These rules strike a careful balance between humanitarian concerns and the military requirements of States.”<sup>1</sup>

We are faced today with potentially civilization-ending ecological crises. We can no longer afford diversion of resources for war, and war itself could end civilization in a day. The laws of war have little capacity to inform the broad normative vision we need in this moment. Human rights law is, or can be, a people-centered law. It concerns what all human beings can expect and demand from states.

## **A Right to Democracy?<sup>2</sup>**

The United Nations Human Rights Committee in 2018 adopted a general comment on the right to life set out in the International Covenant on Civil and Political Rights. Paragraph 66 of the general comment stated that “[t]he threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and are of a nature to cause destruction of human life on a catastrophic scale, is incompatible with respect for the right to life and may amount to a crime under international law.”<sup>3</sup>

This development has sparked further reflection and discussion about the application of international human rights principles to nuclear weapons and disarmament. It strikes me, however, that like the TPNW, the characterization of the threat or use of nuclear weapons as a violation of the right to life is a kind of transitional effort, both in applying human rights law to the goal of nuclear disarmament and in developing legal thought that might play a role in accomplishing it.

Using either humanitarian law or a human rights-based right to life as a lens through which to view the problem of nuclear weapons tends to keep the focus mainly on the *effects* of nuclear weapons—the horrific things they do, and the way those effects violate every civilized value. I would like to suggest that the next step in moving the project of disarmament forward is to focus more on *causes*—why nuclear weapons still exist, and in sufficient quantities to end our civilization in short order, and who nuclear

weapons serve, what elements in society benefit from continuing to wield them. I believe a focus on the causes of our current predicament to be essential not only for legal efforts but across the range of social action for nuclear disarmament, and for action to address other threats to humanity's future that share common roots with the persistence of nuclear arsenals.

An approach that might allow a stronger focus on root causes, while also providing some common ground with movements confronting other manifestations of civilizational crisis such as climate change, would be to explore a more expansive right to democracy. This would entail much more than a right to vote, which in many countries today affords most people only limited choices among narrowly defined elites. Rather, it would mean creating space for the emergence of movements embodying significant alternatives to the existing order of things, with the requisite tolerance of and protection for political expression and nonviolent action. Such a right already has some grounding in human rights law, and there are arguments that we would be well served by measures that set free the creativity of all humanity in seeking solutions to the existential challenges we now face, solutions that encourage and protect political participation.

A right to democracy is an essential corollary to the right to life where what is at stake are the decisions of governments that threaten our collective survival. It is a right that inheres in the people as a whole. A right that is framed in reference to the individual, as opposed to one of the people in relation to the state, is too easily made compatible with a jurisprudence that places existential issues, especially those concerning war and peace, firmly and unreachably within the purview of a presumptively legitimate state.<sup>4</sup> It denies the people the power they need when rulers make existential decisions not easily reversed because existing political channels are blocked, and also without means short of insurrection to declare a social emergency that requires immediate redress.

Most modern views of the state acknowledge that sovereignty ultimately resides in the citizenry. For the most part, however, mere acquiescence of the populace is taken as sufficient evidence of consent to support a state's legitimacy. From the perspective of the international legal system, this view is reinforced by principles of non-intervention in the internal affairs of states. The foundational texts of human rights and of the post-World War II international legal order contain support for a right to democracy, but also manifest this tension with the principle of state sovereignty.<sup>5</sup>

Yet no government's sovereignty should be viewed as legitimate if it places the survival of its people permanently at risk. Nuclear deterrence assumes the legitimacy of risking annihilation of the people to preserve the state. This has become a corrosive contradiction at the heart of the legitimacy of every nuclear-armed state, particularly those claiming to be democracies, and also at the core of nuclear age international law. It is this latter contradiction that was signaled by the International Court of Justice in its 1996 *Advisory Opinion on the Legality of the Threat and Use of Nuclear Weapons*: "In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons."<sup>6</sup>

This is true not only for nuclear weapons, but also for the refusal of the most powerful governments to take action of a magnitude commensurate with the threat of global warming, and with the broader human-caused deterioration of the ecosystems essential to our survival. Here too we must ask what are the root causes, and who is benefiting so much that they are willing to place humanity's future at risk. It is clear that a global economic and political order whose main goal is accumulation of material wealth, and whose driving dynamic is endless competition among immense, internally authoritarian organizations is on a course bound for ecological and social collapse. It is this order that generated and has been sustained by the state model, centered on rapid resource extraction and accumulation of the means to make war,<sup>7</sup> that has come to dominate the entire planet. The dangers of this moment are compounded by the presence of weapons that could end civilization in short order, with the likelihood of their use likely to increase as

ecological decline precipitates social disorder within states, and intensifies competition among them.

Humanity now faces the challenge of developing new ways of organizing our life here together on earth. This will require a transformation of the economy, our technology, and much of our built world, and also of how we conceive “the state” and its purposes. As Elizabeth Wilson observes in her monograph *People Power Movements and International Human Rights*,

The nation-state system is a historical phase, perhaps one that has attained a certain stability and power to endure, but at this point it is arguably failing the most important test confronting the international community at the present time—the threat of climate change. . . . If the state-centric system fails to respond adequately to this catastrophic threat to human existence, we may see the end of the state-based system we have now and a transition to a new, probably more primitive pattern of organized human relations characterized by chaos, violence, and suffering.<sup>8</sup>

Wilson argues for a strong concept of democracy, one in which social movements that prefigure a more democratic and nonviolent future play a central role. It is grounded in a view of the sovereignty of the people that is more than an abstract notion of original social contract. “Since in every practical sense people power creates and maintains states,” Wilson writes, “it is a fiction to assign sovereign power only to states as international law traditionally does.”<sup>9</sup> Wilson posits that “when nonviolent civil resistance movements respecting human rights general principles reach a certain scale and intensity, they are activating a ‘dormant social contract’ and reclaiming sovereignty and thus taking law-making power back from the state.”<sup>10</sup>

Large scale social movements demanding fundamental change represent a claim by large numbers of people to exercise directly the sovereignty the state claims to exercise on their behalf. But they also are one of the main ways that societies can learn, by experimenting with alternative forms of social organization and visions of the future. They are where concepts like “human rights” have been incarnated and further developed, often through risky confrontations with state power.

In 1985, writing about the great wave of disarmament movements of that time, Jürgen Habermas observed that they opposed not just nuclear weapons but the entire way of life that produced them.<sup>11</sup> And he argued that there are circumstances in which resistance to the state’s law may be the only way that the law can continue to develop:

That which is *prima facie* disobedience may soon prove to be the pace-setter for long overdue corrections and innovations because law and policy depending on principles are in a constant process of adaptation and revision. In these cases, civil violations or rules are morally justified experiments without which a vital republic can retain neither its capacity for innovation nor its citizens’ belief in its legitimacy. If the representative system collapses in the face of challenges that touch the interests of all, the nation as a collectivity of citizens as well as individual citizens, must be permitted to assume the original rights of the sovereign. In the last instance, the democratic constitutional state must rely on this guardian of legitimacy.<sup>12</sup>

And even in “normal” times, vigorous social movements keep societies that aspire to be democratic on track, providing an essential check on governments anchored outside mainstream institutions.<sup>13</sup>

How a right to democracy might be put into practice can only be sketched in a preliminary way. The first steps can be taken within movements for a more fair, democratic, and peaceful society, by incarnating

those values in their actions and organizational forms. In this moment, there also is particular value for movements in elaborating an explicit normative vision of the more fair and democratic future we hope to bring about. An essential part of this is a commitment to non-violence. Political violence only reinforces the existing violent order of things, feeding the immense organizations both public and private that are all too ready to offer more elaborate mechanisms and technologies of surveillance and repression. A commitment to non-violence also is consistent with broader human rights principles and helps to build the legitimacy of social movements as providing an alternative both lawful and democratic.<sup>14</sup>

The project of social transformation without violence in complex, culturally and structurally diverse and stratified modern societies suffused with bureaucratic institutions and pervasive webs of legal regulation presents tasks of normative self-understanding, elaboration, and transformation that are vast, and particular to this age. Part of this process is assessing the relationship of that vision to existing legal orders, evaluating what must be transformed and what can be retained. Efforts to craft and practice an alternative vision of democracy and law also may help prepare movements to act effectively—and consistently with their principles—should they attain significant political power.<sup>15</sup> Human rights law, with core principles that have emerged in large part out of past emancipatory movements, provides one logical starting point and frame of reference. At the same time, it also provides movements with some resources in public discourse to defend and expand space for political expression and self-organization.<sup>16</sup>

For peace and disarmament efforts human rights law, with its capacity to elaborate the protection of human life, dignity, freedom, and equality in a wide range of social settings, provides more fertile ground than does humanitarian law for integrating disarmament work into the kind of multi-issue movements that likely will be needed to create the conditions for significant disarmament progress. A right to democracy may be more likely than the right to life to play a useful role in defining a legal discourse that bears on key issues blocking everything else, such as prevalent extremes in wealth concentration and concomitant inequities in meaningful access both to political power and to meaningful legal redress for rights violations of all kinds.

It is within broader, system-critical movements, perhaps, that the concept of human rights can be reclaimed and redeemed from being too often the stalking horse for geopolitical interventions of the Western countries. And it is also within emerging movements that a new synthesis might be reached of civil and political rights and economic, cultural, and social rights, a split in thought and practice with roots deep in the Cold War that persists to this day.<sup>17</sup> The “western” character of “democracy” and the civil and political rights commonly associated with it becomes less clear when one considers democracy initiatives having no necessary link to capitalism, especially neoliberal capitalism, which in the words of Boaventura de Sousa Santos, “recognizes no other freedom than economic freedom, and so finds it easy to sacrifice all other freedoms.”<sup>18</sup> And democracy movements have sprung up many places outside “the West,” with a variety of visions of self-determination and democratic rule emerging—or re-emerging. This includes campaigns for Indigenous self-governance, now being recognized even by intergovernmental expert panels as critical to preserving alternative ways of sustaining ourselves together with our ecosystems.<sup>19</sup>

In the movement to address climate change, there already has been an effort to think systematically about how human rights principles might advance their work. Scholars participating in the Global Network for the Study of Human Rights and the Environment published a Draft Declaration on Human Rights and Climate Change, with the hope that human rights could “offer a powerful meta-ethical language of critique and the seeds of alternative future histories....”<sup>20</sup> Noting the emergence in several countries of climate change initiatives grounded in human rights principles, the authors noted that “...it is vital that respect for human rights should now be understood as an indispensable element of any adequate approach to climate change.”<sup>21</sup>

The Draft Declaration recognizes the importance not only of substantive rights, such as the right to life, but of procedural rights to participate in decisions that affect all of our futures, particularly for those who long have been excluded from meaningful participation. One section reads in part:

All human beings have the right to active, free, and meaningful participation in planning and decision-making activities and processes that may have an impact on the climate. This particularly includes the rights of indigenous peoples, women and other under-represented groups to equality of meaningful participation. This includes the right to a prior assessment of the climate and human rights consequences of proposed actions. This includes the right to equality of hearing and the right for processes to be free of domination by powerful economic actors....<sup>22</sup>

It is easy to see how such principles are relevant to disarmament work. Decisions about nuclear weapons affect everyone on the planet. Yet most people, including most who live in nuclear-armed states, have little or no voice in those decisions. And it is easy to see these principles as a starting point for finding common ground on which movements might come together that are broad and deep enough to make a different kind of world possible, a world where nuclear disarmament might become a reality rather than an ever-distant dream.

Regarding the role of states, it is hard to imagine governments recognizing a right to democracy under international law in a moment when authoritarian elements are ascendant globally and hold power in most of the nuclear-armed countries. Yet we must imagine it, for it is unlikely that humanity will have much of a future unless it is more democratic, a future that can unleash the willing participation of all to overcome the current economic, political, and ecological impasse of our civilization.

The tension between a right to democracy and the principle of non-intervention poses conundrums for movements for a more fair, democratic, peaceful, and sustainable global society that are different than those perceived by governments, but that are significant nonetheless. In a time in which state power is deployed internationally by the most powerful countries with little accountability to their own publics, democratic movements must consider with care any principle that might provide a rationale for intervention by the most powerful governments in the internal affairs of other states. Until the distribution of wealth and power both among and within states has become far more equitable, claims by governments that such interventions are intended to further human rights or “democracy” must be viewed with suspicion. For the moment, international efforts to further either democracy or human rights may best be advanced by solidifying connections and mutual support globally among organizations and movements embodying those values.<sup>23</sup>

Nonetheless, there remains a great deal that states can do to devolve a greater measure of sovereignty back to the people for whom they only hold it in trust. A starting point is to recognize the positive roles that recurring non-violent movements can play in providing flexibility, learning capacity, and legitimacy for the state. An essential first step would be to reverse the nearly-universal dynamic of exploiting every possible technological development to expand the reach and power of state surveillance and repression. Next would come expanding space for self-organized political expression and action outside existing channels and institutions. This begins with informal tolerance of more vigorous dissent, including nonviolent civil disobedience, manifesting a recognition that democracy is worth some suspension of order that interferes with business as usual.

This expanded political space could allow development of a positive cycle of normative innovation. It could create the conditions for a de-centering of the state-centered legal order by according legal significance to the norms and practices of social movements that organize themselves and act in ways consistent with existing human rights principles and that embody principles of democracy and

nonviolence. Norms generated within these movement contexts could be recognized, as Elizabeth Wilson suggests, as “a second, even alternative, source of legal meaning is created that is independent of, though to some extent parallel to, the state practice that traditionally shaped the emergence and applicability of human rights norms,” cognizable as “general principles” that can be a source of law.<sup>24</sup>

Without democratization of our society and economy that allows more meaningful participation in decisions that affect us all and a fair sharing of the risks of the necessary transitions we must undertake, the likely outcome will be widespread resistance, social chaos, and rising danger of great power war in a nuclear-armed world. The path to a humane, peaceful, and sustainable future will require openness and forbearance from above, and disciplined nonviolence and democracy from below.

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<sup>1</sup> International Committee of the Red Cross, Advisory Service on International Humanitarian Law, “What is International Humanitarian Law?” 2004.

<sup>2</sup> This section draws on Elizabeth A. Wilson, *People Power Movements and International Human Rights: Creating a Legal Framework* (Philadelphia: International Center on Nonviolent Conflict, 2017). My thanks to Professor Wilson for the thoughts her work engendered, and my apologies if I took them in a direction never intended.

<sup>3</sup> “The threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and are of a nature to cause destruction of human life on a catastrophic scale is incompatible with respect for the right to life and may amount to a crime under international law. States parties must take all necessary measures to stop the proliferation of weapons of mass destruction, including measures to prevent their acquisition by non-state actors, to refrain from developing, producing, testing, acquiring, stockpiling, selling, transferring and using them, to destroy existing stockpiles, and to take adequate measures of protection against accidental use, all in accordance with their international obligations. They must also respect their international obligations to pursue in good faith negotiations in order to achieve the aim of nuclear disarmament under strict and effective international control[,] and to afford adequate reparation to victims whose right to life has been or is being adversely affected by the testing or use of weapons of mass destruction, in accordance with principles of international responsibility.” United Nations Human Rights Committee, General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, 3 September 2019, Para. 66. Adopted by the Committee at its 124th session (8 October–2 November 2018). Access at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f36&%20Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f36&%20Lang=en).

<sup>4</sup> The General Comment on the right to life frames it as an individual right:

The right to life is a right that should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity. Article 6 of the Covenant guarantees this right for all human beings, without distinction of any kind, including for persons suspected or convicted of even the most serious crimes.” United Nations Human Rights Committee, General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, 3 September 2019, CCPR/C/GC/36, Para. 3.

<sup>5</sup> “International human rights law is somewhat schizophrenic with respect to a right to democracy. The UN Charter does not mention democracy but links human rights and self-determination in Articles 1 and 55, without, however, clearly explicating either term. At the same time, Article 1 of both the ICCPR and ICESCR declares the right of self-determination, defined broadly as a right enabling ‘peoples’ to ‘freely determine their political status and freely pursue their economic, social and cultural development.’ By their terms, Article 1 in both Covenants seems to guarantee the right of a people to democratically choose their form of self-government. Article 25 of the ICCPR protects, among other things, the rights “to take part in the conduct of public affairs, directly or through freely chosen representatives” and “to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.” But, as [Thomas] Franck recognized, the ‘notion that the [international] community can impose such standards, on which

the democratic entitlement is based' is in tension with the principle of state sovereignty, embodied in Article 2(7) of the UN Charter, which provides that the UN shall not interfere in matters 'essentially within the domestic jurisdiction of states.'" Wilson, *People Power Movements and International Human Rights*, pp.122-123.

<sup>6</sup> International Court of Justice, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, para.98.

<sup>7</sup> "Power holders' pursuit of war involved them willy-nilly in the extraction of resources for war making from the populations over which they had control and in the promotion of capital accumulation by those who could help them borrow and buy. War making, extraction, and capital accumulation interacted to shape European state making." Charles Tilly, "War Making and State Making as Organized Crime," in *Bringing the State Back In*, edited by Peter Evans, Dietrich Rueschmeyer, and Theda Skocpol (Cambridge: Cambridge University Press, 1985), p.172.

<sup>8</sup> Wilson, *People Power Movements and International Human Rights*, p.132.

<sup>9</sup> *Ibid* at 109.

<sup>10</sup> *Ibid* at p.111; see also Elizabeth A. Wilson, *People Power and the Problem of Sovereignty in International Law*, 26 *Duke J. Comp. & Int'l L.* 551 (2016).

<sup>11</sup> "The heterogeneous groups which have coalesced in this movement say not only a plebiscitary "no" to nuclear missiles. instead, many "no's" are aggregated in this movement: the "no" to nuclear weapons with the "no" to nuclear power, to large-scale technology general, to chemical pollution of the environment, to bureaucratic health care, "slum clearance," the death of the forests, discrimination against women, hatred of foreigners, restrictive immigration policies, etc. The dissensus which gains expression in this complex "no" aims not at this or that measure or policy; it is rooted in the rejection of a life-form- namely, that life-form which has been stylized as the normal prototype- which is tailored to the needs of a capitalist modernization process, programmed for possessive individualism, for values of material security, and for the strivings of competition and production, and which rests on the repression of both fear and the experience of death." Jürgen Habermas, "Civil Disobedience: Litmus Test for the Democratic Constitutional State," *Berkeley Journal of Sociology* Vol. 30 (1985), pp. 95-116, 110.

<sup>12</sup> *Ibid* at pp.95-116, 104-105.

<sup>13</sup> "In the historical evolution of democratic regimes, a circuit of surveillance, anchored outside mainstream institutions, has developed side by side with the institutions of democratic accountability. Necessary to democratic legitimacy, confidence requires defiance, in the sense of instruments of external control and actors ready to perform this control; in fact, democracy requires permanent contestation of power. Actors such as independent authorities and judges, but also mass media, experts, and social movements, have traditionally exercised this function of surveillance. The latter, in particular, are most relevant for the development of an 'expressive democracy' that corresponds to the *prise de parole* of the society, the manifestation of a collective sentiment, the formulation of a judgement about the governors and their action, or again the production of claims.'" Donnatella della Porta, *Can Democracy be Saved? Participation, Deliberation, and Social Movements* (Cambridge, UK: Polity Press, 2013), p.5; citing and quoting Rosanvallon, P., *La Contre-democratie: la politique a l'age del la defiance*. Paris, Seuil.

<sup>14</sup> "Nonviolence is also a core principle because the use of force in the name of human rights does not respect the right to life. Not all nonviolent resistance practice is a human rights practice but there is compelling argument that all human rights practice must be nonviolent. It is important that the means used to realize rights be consistent with the overall spirit and end goals of the human rights project.... However, from a human rights perspective, resistance characterized by a high degree of nonviolent discipline is the appropriate modality for realizing human rights because it is less likely to set off a costly cycle of violence in the short and long term and less likely than its violent counterpart to increase the level of repression, discrimination and exploitation." Elizabeth A. Wilson, *People Power Movements and International Human Rights: Creating a Legal Framework* (Philadelphia: International Center on Nonviolent Conflict, 2017), p.57.

<sup>15</sup> See *Ibid* at pp.132-133.

<sup>16</sup> “..... [I]t is important not to overlook the central relevance of international law and human rights to civil society movements for peace, justice, and ecological sustainability. These normative sources of authority give peoples a legitimated discourse by which to oppose oppressive tendencies of the state or international institutions, and to project images of alternative futures that are more benevolent from the perspective of promoting a more satisfying shared destiny for the peoples of the world, with a special emphasis on protecting those who are most vulnerable.” C. J. Polychroniou, “Human Rights, State Sovereignty, and International Law: An Interview With Richard Falk,” *Global Policy* blog, September 11, 2018.

<sup>17</sup> “The Marxist political program has been left behind but the values advanced by the tradition—social and economic welfare, the communal good—have been integrated into the human rights movement with the adoption of the ICESCR, especially after an Optional Protocol came into force in 2013. Without the principle of nonexploitation, the human rights project maps too neatly onto political liberalism and corporate capitalism, exposing the project to the criticism of neoimperialism or neocolonialism. However, the most radical vision of the human rights project, the UDHR, conceived of human rights as an indivisible and interdependent unity of civil and political rights and social and economic rights. The general principle of nonexploitation encompasses most of the social and economic rights outlined in the ICESCR, including the right to work (Art. 6); the right to “just and favorable conditions of work” (Art. 7), including fair wages, safe and healthy working conditions, rest and leisure; the right to form and join trade unions (Art. 8); the right to social security and social insurance (Art. 9); special protections for childbirth article 10; “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions” (Art. 11); the right to the “enjoyment of the highest attainable standard of physical and mental health” (Art. 12); the right to education (Art. 13); the right to share in cultural life and scientific progress, including to benefit from any intellectual property (Art. 15). Nonexploitation includes structural exploitation (e.g., an unfair tax code) and exploitation by businesses or other private actors. Social and economic rights are here expressed through the idea of not exploiting in order to highlight human responsibility for human suffering.” Wilson, *People Power Movements and International Human Rights*, pp. 55-56.

<sup>18</sup> “As everyone knows these days, neoliberalism’s deep interconnectedness with the interests of finance capital makes it the most antisocial version of global capitalism. It recognizes no other freedom than economic freedom, and so finds it easy to sacrifice all other freedoms. The specificity of economic freedom lies in the fact that it is exercised strictly on the basis of one’s economic power to exercise it. This, in turn, always entails a measure of asymmetrical imposition upon those social groups that are lacking in power and a measure of brutal violence upon those who have no power at all, which happens to be the vast majority of the world’s impoverished population. The imposition and the violence lead invariably to the transfer of wealth from the poor to the rich (via the state’s meager policies of social protection) and the plundering of natural resources as well as economic assets whenever available.” Boaventura de Sousa Santos, “Ecuador: del centro al fin del mundo,” *LaJornada* October 15, 2019, <https://www.jornada.com.mx/ultimas/mundo/2019/10/15/ecuador-del-centro-al-fin-del-mundo-boaventura-de-sousa-santos-1939.html>. English translation by the author.

<sup>19</sup> “Recognizing the knowledge, innovations, practices, institutions and values of indigenous peoples and local communities, and ensuring their inclusion and participation in environmental governance, often enhances their quality of life and the conservation, restoration and sustainable use of nature, which is relevant to broader society. Governance, including customary institutions and management systems and co-management regimes that involve indigenous peoples and local communities, can be an effective way to safeguard nature and its contributions to people by incorporating locally attuned management systems and indigenous and local knowledge.” Sandra Díaz et al., *Report of the Plenary of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services on the work of its seventh session, Addendum: Summary for policymakers of the global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services*, (2019), p.9.

See also Kenneth P. Jameson, “The Indigenous Movement in Ecuador: The Struggle for a Plurinational State,” *Latin American Perspectives*, Vol. 38, No. 1, A Second Look at Latin American Social Movements (January 2011), pp.63-73

<sup>20</sup> For the full text of the Declaration and a commentary on its origins, intentions, and legal basis, see Kirsten Davies, Sam Adelman, Anna Grear, Catherine Iorns Magallanes, Tom Kerns and S. Ravi Rajan, “The

Declaration on Human Rights and Climate Change: a new legal tool for global policy change,” *Journal of Human Rights and the Environment*, Vol. 8 No. 2, September 2017, pp. 217–253.  
<https://www.elgaronline.com/view/journals/jhre/8-2/jhre.2017.02.03.xml>; passage cited here at p.248.

<sup>21</sup> *Ibid.*

<sup>22</sup> Draft Declaration on Human Rights and Climate Change, II.13; *ibid* at p.252.

<sup>23</sup> “This right to democracy may not create a duty as a matter of positive law on the part of other states to assist nonviolent activists in their struggles for democratic self-determination because of the norm of nonintervention and the fact that interventions can do more harm than good. But it would accord with the general (natural law) principles of human rights to say that non-state actors committed to the human rights project have both a right and a duty to do everything in their power to help those engaged in such struggles achieve their objectives.” Wilson, *People Power Movements and International Human Rights*, pp.125-127.

<sup>24</sup> “This monograph goes, however, further and argues that general principles can be created and embodied by the activities of organized nonviolent individuals, not only by states. The key originality of the monograph lies in how it rehabilitates natural law by ‘operationalizing’ it as collective practice, treating the organized activities of mobilized individuals as practice that becomes legally relevant to the determination of human rights law as a kind of analogy to state practice to the extent that such activities are designed and executed consistent with the overall general principles that characterize the human rights *ethos*. In that way, this monograph argues, a second, even alternative, source of legal meaning is created that is independent of, though to some extent parallel to, the state practice that traditionally shaped the emergence and applicability of human rights norms. This monograph thus opens a theoretical and conceptual door for a *demos*-centric perspective to play a significant and concrete role in shaping and even determining new human rights norms.” *Ibid* at p.130.

See also on this point at p.16 *et seq.* Wilson’s discussion regarding the application in this context of Article 38 of the Statute of the International Court of Justice, which recognizes as a source of law “the general principles of law recognized by civilized nations...”.