

## **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 HRC's 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

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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>

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 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>

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<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 on 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.” Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, *ICJ Reports*, 1996, 226, (“Nuclear Weapons Advisory Opinion”), para. 25 of its Opinion. 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

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

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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.” Paras. 105(2)E, F.

<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/>.

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 that law.” “Threat” does

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<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> Nuclear Weapons Advisory Opinion, para. 78. 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.”)

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 seated 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 which all parties to the Covenant "*must take*". The footnote

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<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).

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 of 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 obligations 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 footnote 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.

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<sup>24</sup> Treaty on the Prohibition of Nuclear Weapons, Art. 1(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, and Pace University International Disarmament Institute, 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).

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 dialog 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”.

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<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 measures to stop the proliferation...” See Daniel Rietiker, [Threat and Use of Nuclear Weapons Contrary to Right to Life, says UN Human Rights Committee](https://safna.org/2018/11/07/threat-and-use-of-nuclear-weapons-contrary-to-right-to-life-says-un-human-rights-committee/), November 7, 2018, <https://safna.org/2018/11/07/threat-and-use-of-nuclear-weapons-contrary-to-right-to-life-says-un-human-rights-committee/>. See also, Daniel Rietiker, *Humanization of Arms Control: Paving the War for a World Free of Nuclear Weapons* (2017).

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>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: <http://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.