

# Nuclear Weapons and the Law on Human Rights and Future Generations

A Report on a May 1, 2018 Panel Discussion

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In a compelling side event held May 1, 2018 at the NPT PrepCom at the United Nations in Geneva, speakers analyzed nuclear weapons under the rubric of human rights law and law protecting future generations. The event was sponsored by the Basel Peace Office, the International Association of Lawyers Against Nuclear Arms (“**IALANA**”) and the Abolition 2000 Working Group on Nuclear Weapons and International Law. A video recording of the side event is accessible at the following hyperlink: <https://youtu.be/a4IcHF9BE5M>.

The event was chaired by **Dr. Andreas Nidecker (President, Basel Peace Office; Board Member, International Physicians for the Prevention of Nuclear War – Switzerland)**. He began the discussion by highlighting the increased role of nuclear weapons in current world events and asserting that the use of nuclear weapons, as well as the generation of nuclear energy, violate the rights of future generations. He contended that harms both from military uses of nuclear energy (*e.g.*, the ongoing suffering of victims from decades of nuclear weapons testing), as well as from peaceful nuclear energy (*e.g.*, the ongoing damage from nuclear reactor accidents, such as the 1986 explosion at the Chernobyl nuclear power plant), constitute crimes against future generations, analogous to harms unrelated to nuclear weapons (*e.g.*, failure to combat climate change).

“In general,” Dr. Nidecker argued, “current law fails to safeguard the rights of future generations. But that doesn’t make failure defensible, sustainable, or in accord with legal principles. Evolution of this area of law is necessary and inevitable.” In advance of such progress, Dr. Nidecker cited examples in which the interests of future generations have been acknowledged in the context of nuclear weapons, spanning from (a) the 1996 Advisory Opinion on the Legality of Threat or Use of Nuclear Weapons, in which the International Court of Justice took note of harms to future generations caused by nuclear explosions, to (b) the Treaty on the Prohibition of Nuclear Weapons, adopted at the United Nations on the July 7th, 2017 (the “**TPNW**”), the preamble of which refers to the risks and consequences of nuclear weapons for future generations.

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Dr. Nidecker also highlighted a conference held in Basel, Switzerland from September 14th-17th, 2017. That conference, entitled “Human Rights, Future Generations and Crimes in the Nuclear Age,” produced a [declaration](#) that the impacts of both nuclear weapons and nuclear energy are transnational and trans-generational; violate human rights, international humanitarian law (“**IHL**”), and international environmental law; and constitute crimes against future generations.

**Dr. Emilie Gaillard (Lecturer in Law, Université de Caen Normandie, Board Member, IALANA)** next surveyed the evolution of legal protections for future generations. Outlining the philosophical and ethical underpinnings of an obligation to protect future generations, she argued that a new legal paradigm is emerging, one in which the law ceases to discriminate between present and future generations and recognizes, instead, that human dignity and, ergo, human rights, apply to future generations as well as present generations. The result, she posited, is an increasing recognition of transgenerational human rights in international law, giving rise in turn both to (a) a legal obligation of states and other entities to protect future generations, and (b) a “right” of future generations entitling them to such protection. Certain legal obligations already constitute international customary law, she argued, thus applying even to states reluctant to recognize such rights at the national level. She maintained further that such rights should extend under international criminal law, giving rise to crimes against future generations analogous to crimes against humanity or ecocide.

The fundamental legal imperative to protect the survival of humankind through time and space, Dr. Gaillard argued, must further include

protecting the environment and all elements that sustain life. In this connection, Dr. Gaillard added that we must recognize that all nuclear technologies, both peaceful and military, violate this imperative. Dr. Gaillard advanced the notion that, when considering human rights in the nuclear context, there is no distinction between the harms of peaceful use and military use of nuclear energy. Citing the work of the philosopher Günther Anders, she observed that both military and peaceful uses threaten the health and the environment of both present and future generations. Accordingly, she concluded that any claimed “right” to pursue peaceful nuclear energy contravenes the human rights of future generations such as the rights to live and to breathe clean air.

Following Dr. Gaillard’s presentation, **Dr. Daniel Rietiker (International Law Lecturer, Lausanne University; President, Swiss Lawyers for Nuclear Disarmament)** focused on the relevance of human rights law and human rights fora in raising legal claims relating to nuclear weapons and nuclear disarmament. Dr. Rietiker asserted that human rights law may offer claimants certain legal advantages because, unlike IHL, which applies only in the context of armed conflict and relies largely on good faith implementation by states, human rights



*Panelists (left to right) Alyn Ware, Daniel Rietiker, Andreas Nidecker, Emilie Gaillard, and Marzhan Nurzhan*

law: (1) is applicable under all circumstances (and that emergency derogation, though possible if specific conditions are met, is not possible with respect to particularly important rights); (2) requires states, under certain circumstances, to take positive measures to protect human rights; (3) involves treaty bodies' institutional mechanisms for legal remedies, as well as reporting requirements, providing mechanisms for redress; (4) with respect to certain fundamental rules, such as in the case of the Universal Declaration of Human Rights, has attained the status of customary international law (and accordingly, in those cases, applies even to states that have not ratified the relevant treaties) and, in certain cases, has even reached the status of "peremptory" norms or norms of "jus cogens" (and accordingly, in those cases, no derogation from such rules is authorized under any circumstances).

In analyzing other laws applicable to victims of nuclear activities, Dr. Rietiker distinguished between the rights of direct victims of nuclear attacks as compared with victims of the indirect effects of nuclear weapons and ionizing radiation resulting from other uses of nuclear energy. With respect to direct victims of attacks, Dr. Rietiker opined that the human right most clearly violated would be the right to life (as provided, for example, under the International Covenant on Civil and Political Rights ("ICCPR")), but Dr. Rietiker outlined how other "civil" rights also may apply to direct victims (at least pursuant to the European Convention on Human Rights ("ECHR")), in particular the right not to be subject to inhuman or degrading treatment, protected, *inter alia*, under Article 3 ECHR.

With respect to indirect victims of nuclear weapons and nuclear energy, Dr. Rietiker outlined the applicability of various economic, social, and cultural rights, as well as international judicial precedent related to environmental harm

and the rights to private and family life and home. In particular, he noted that the most applicable rights may include the right to health (as codified, for example, in the International Covenant on Economic, Social and Cultural Rights (the "ICESCR")) and the right to a healthy environment (as also established in the ICESCR, but as referred to elsewhere, particularly in the context of water, such as in the Convention on the Elimination of all Forms of Discrimination Against Women ("CEDAW")). He noted, also, that the TPNW offers another route for redress, as Article 6 thereof provides for assistance to those affected by use or testing of nuclear weapons. Finally, Dr. Rietiker observed that certain classes of persons who are disproportionately affected by nuclear activities (in particular, indigenous peoples, women, and children) are especially vulnerable to violations of their human rights by such activities, and that specialized fora (*e.g.*, the CEDAW Committee, the Committee on the Rights of the Child, and the United Nations Permanent Forum on Indigenous Issues) may offer avenues to address human rights violations in such circumstances.

**Dr. John Burroughs (Executive Director, Lawyers Committee on Nuclear Policy ("LCNP"))** was unable to deliver his remarks in person and was represented on the panel by **Alyn Ware (Director, Basel Peace Office; Consultant, IALANA; former Executive Director, LCNP)**. A printed statement from Dr. Burroughs, made available to event attendees, begins with the premise that, arguable marginal cases aside, use of nuclear weapons would violate IHL. He critiques the 2018 U.S. Nuclear Posture Review for asserting that "the conduct of nuclear operations would adhere" to the requirements under IHL of necessity, proportionality, and discrimination, because, he argues, it is impossible to use nuclear weapons in a manner that distinguishes between military targets and

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civilian populations and infrastructure. Dr. Burroughs also states that in many circumstances, as in attacks on cities, it is likely that use of nuclear weapons also would constitute crimes against humanity. Those crimes were defined most recently in the 1998 Rome Statute of the International Criminal Court to include knowingly committing murder or extermination as part of a widespread or systematic attack directed against any civilian population.

As to human rights law, Dr. Burroughs refers to a [comment](#), co-written by him and Dr. Rietiker and submitted in response to a draft of a general comment on right to life to be released by the UN Human Rights Committee. In this comment, Drs. Burroughs and Rietiker contend that the threat or use of nuclear weapons massively violates the right to life, because the catastrophic consequences of use of nuclear weapons vastly exceed the ordinary boundaries of armed conflict and adversely impact populations in third-party states, the natural environment necessary to sustain human life, and future generations. They note, approvingly, that the preamble to the TPNW invokes both IHL and international human rights law.

**Marzhan Nurzhan (Convener, Abolition 2000 Youth Network)** then spoke about her organization's mission to connect youth from around the world advocating for nuclear abolition. She reported that the Abolition 2000 Youth Network held a conference in Prague in November 2017, and issued an appeal, "Reach

High for a Nuclear-Weapon-Free World." She underlined, in particular, the need for intergenerational partnership.

Ms. Nurzhan spoke also about her personal background in Kazakhstan, where, between 1949 and 1989, the USSR conducted approximately 500

nuclear tests above-ground and underground, particularly in Semipalatinsk. She noted that approximately two million residents of this region already have suffered health, environmental, humanitarian, social, and economic consequences from the effects of such testing, and observed that the effects, including from the resulting radiation of such testing, are continuing and will continue for generations to come. As a representative of a present generation, Ms. Nurzhan asserted that she must lead in seeking solutions, both to prevent future use and testing, and to assist those from present and future generations who are and will continue to be affected by the testing done to date.

Finally, **Kazue Mori (Board Member, Japan Association of Lawyers Against Nuclear Arms ("JALANA"))** provided a brief statement from JALANA. Ms. Mori stated that, as jurists from the country that suffered wartime atomic bombings, JALANA seeks to demonstrate the illegality and inhumanity of nuclear weapons in order to establish a world free of nuclear weapons. Dr. Gaillard commented in response that the Japanese constitution serves as a model for addressing the human rights of future generations; its Articles 11 and 97 guarantee fundamental human rights for present and future generations.

An engaging question-and-answer session followed the panel presentations. One provocative query identified an underlying tension between the interests of future

generations in preserving and expanding access to natural resources versus the interests of capitalist economies in seeking to consume and restrict resources.

The issue that provoked the most discussion was whether future generations are capable of possessing either legal rights or, given that they are not-yet-existent entities, legal standing. **Phon van den Biesen (Vice President, IALANA; Attorney, Van den Biesen Kloostra Advocaten)**, for example, in questioning whether future generations can or should possess legal rights, queried too which existing entities may have the power to represent such rights in legal proceedings. In this regard, he cautioned that the

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“right to life movement” claims to speak on behalf of the rights of the unborn, often taking extreme measures in pursuing rights for a class that cannot yet speak for themselves. He suggested, accordingly, that it may be more prudent to focus on the duties and responsibilities of states and existing entities to protect future generations, rather than a right of future generations to receive such protections.

In response, Dr. Gaillard cited a 1993 case in the Supreme Court of the Philippines, *Minors Oposa v. Secretary of the Department of Environmental and Natural Resources*, 224 SCRA 792, G.R. No. 101083 (1993) (ruling that minors, represented and joined by their parents, could proceed with lawsuit seeking to cancel logging permits claimed to contribute to deforestation). The ruling recognized a responsibility of the present generation to future generations and held that the minors could bring claims on behalf of future generations; it also appeared to recognize a constitutional right of future generations to a healthy environment.

Mr. Ware added that a court decision in The Netherlands, now on appeal, requires the Dutch government to take action to combat climate change for the benefit of future as well as present generations. That case is *Urgenda Foundation v. The State of the Netherlands (Ministry of Infrastructure and the Environment)*, C/09/456689/HA ZA 13-1396 (2015) (ordering Dutch government to lower its greenhouse gas emissions limitations). He noted that there is a similar case in the U.S., *Juliana, et al. v. United States of America, et al.*, No. 6:15-cv-01517-TC (D. Or.). In *Juliana*, claims are made, *inter alia*, on behalf of future generations, represented through a guardian. The case has withstood an initial challenge by the U.S. government for dismissal and is scheduled to proceed to trial in October 2018.

Mr. Ware noted further the precedent for procedural mechanisms to oversee the protection of future generations, observing that states such as Hungary and New Zealand have created parliamentary commissioners explicitly tasked with protecting future generations, and noted further proposals within intergovernmental bodies such as the European Parliament and the United Nations to establish “guardians” for future generations.

Those whose work relates to the law of nuclear weapons and nuclear energy are well versed in the applicability of IHL. The panelists at this event provided key perspectives on how other legal doctrine, both established (such as human rights law) and emerging (such as law protecting future generations), may play a greater role in the legal landscape, and in advocating for the abolition of nuclear weapons.