

THE RIGHT TO LIFE AND NUCLEAR WEAPONS

Dr. Daniel Rietiker

Lecturer on Public International Law, University of Lausanne and Suffolk University Law School;
President, Swiss Lawyers for Nuclear Disarmament

Side-Event on Human Rights, Democracy, and Nuclear Weapons
Sponsored by Lawyers Committee on Nuclear Policy
NPT PrepCom
United Nations, New York City, May 1, 2019

A. General remarks on the right to life

The right to life is the most fundamental human right. The International Court of Justice (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 1966 International Covenant on Civil and Political Rights (ICCPR), has to be determined in light of international law governing armed conflict, in particular humanitarian law.¹

Under the ICCPR, the right to life is non-derogable, even in the event of a “public emergency which threatens the life of the nation” by virtue of its Article 4.² The right to life seem relevant in many respects in the context of use of nuclear weapons. To name just four situations:

First, and the most obvious, is that nuclear weapons have the potential to violate the right to life of tens and hundreds of thousands of people within a couple of seconds, not even taking into account the high number of people who would die after years and decades as a consequence of exposure to radiation, and without being capable of distinguishing between enemy combatant and civilians. If this does not constitute “arbitrary deprivation” of life within the meaning of Article 6 of the ICCPR, what else would?

¹ ICJ Reports 1996, § 25.

² Article 15 of the European Convention on Human Rights (ECHR), for example, allows derogations from the right to life for deaths resulting from lawful acts of war.

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 infrastructure, 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. This could, according to Doswald-Beck, amount to a violation of the right to life by the attacking State.³

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*. But the duties inherent in the right to life do not stop there since a State might be under the obligation to provide adequate medical care in response to a harmful event.⁴ 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 European Court of Human Rights. 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.⁵

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 International Committee of the Red Cross to do its work in this field.⁶ 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 (...).”⁷

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 this in various stages in the detonation of such a weapon.

B. General Comment no. 36 on the right to life

³ 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, p. 451.

⁴ *Ibidem.*, p. 450.

⁵ *Varnava and Others v. Turkey*, ECtHR, Judgment, no. 16064/90 et al., 18 September 2009, § 185.

⁶ *Ibidem.*, § 185.

⁷ *Ibidem.*, § 186.

On 30 October 2018, the UN Human Rights Committee (HRC), which is in charge of the implementation of the 1966 International Covenant on Civil and Political Rights, has adopted its General Comment (GC) 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. In para. 66, the HRC considers the threat and use of weapons of mass destruction (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 GC no. 36 is a detailed and lengthy document, of 32 pages. Even though other paragraphs are certainly relevant too, I am commenting here only on the clause relating to WMD, in particular nuclear disarmament.

a) Earlier general comments on the right to life and preparatory work to the General Comment no. 36

Prior to the General Comment no. 36, the HRC issued already two so-called General Comments on the right to life. In fact, the HRC adopted its GC no. 6 in 1982 and, more relevant, its GC 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 having allegedly overstepped its mandate by commenting on issues of nuclear weapons.⁸

A couple of years ago, the HRC began its consideration of a new GC on the right to life, which became ultimately GC no. 36. A first proposal was considered incomplete and unsatisfactory for many reasons. Therefore, in co-authorship with John Burroughs of Lawyers Committee on Nuclear Policy and having received valuable inputs from Roger S. Clark and Emilie Gaillard, I submitted [observations](#) on behalf of Swiss Lawyers for Nuclear Disarmament (SLND).⁹ We criticized, in particular, the failure of the draft to refer at all to the obligation to pursue in good faith and conclude negotiations on the elimination of nuclear weapons in accordance with Article VI of the Nuclear Non-Proliferation Treaty (NPT) and customary international law. In addition, recalling that the current text stated that threat or use of WMD is “prima facie” incompatible with the right to life, we observed that, from our point of view, any use of nuclear weapons as well as other weapons of mass destruction would constitute “arbitrary deprivation” of life prohibited under Article 6 ICCPR.¹⁰

A second draft, much more elaborated and appropriate on WMD, was presented in 2017. By [follow-up submissions](#) of 5 October 2017, we expressed our general satisfaction with this proposal and urged the HRC to keep the notion of “threat” in the text.¹¹ We also noted that, from our point of view, the last sentence regarding the right of victims of nuclear testing or use of nuclear weapons, was useful and, as a result, should be kept.

b) The text of General Comment no. 36 as adopted on 30 October 2018

On 30 October 2018, the final draft of GC 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 (references and footnotes omitted):

⁸ 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.

⁹ Daniel Rietiker and John Burroughs, The incompatibility of WMDs with the right to life (Article 6 ICCPR) – a submission to the UN Human Rights Committee, 7 September 2016.

¹⁰ Ibidem.

¹¹ See, Daniel Rietiker and John Burroughs, Threat or Use of Weapons of Mass Destruction and the Right to Life: Follow-Up Submissions to the UN Human Rights Committee on draft General Comment no. 36, 5 October 2017.

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. (...)*

c) Preliminary observations on GC no. 36

I find the adopted draft very noteworthy and valuable. At this stage, I limit myself to a couple of brief remarks.

First of all, the HRC finds 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 I (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.”¹²

¹² ICJ Reports 1996, § 35.

In the same vein, the preamble of the TPNW reads as follows:

*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...*¹³

Third, the GC considers that use and threat of nuclear weapons may amount to crimes under international law. I explained elsewhere why I think that different provisions of war crimes and crimes against humanity under the Rome Statute of the International Criminal Court may come into play regarding the use of nuclear weapons.¹⁴ I also suggest that such use could also 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.¹⁵

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 NPT and the Comprehensive Nuclear Test Ban Treaty, as well as the TPNW. The two latter treaties have not yet entered into force, but some of their provisions reflect customary international law regarding certain acts including nuclear explosive testing and the threat and use of nuclear weapons.

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.¹⁶

¹³ Paragraph 4 of the Preamble.

¹⁴ Rietiker, *Humanization of Arms Control – Paving the Way Free of Nuclear Weapons*, Routledge, 2017, pp. 269-276.

¹⁵ *Ibidem.*, pp. 276-277.

¹⁶ This duty derives from Article VI NPT.

Sixth, the GC 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 International Law Commission draft Articles,¹⁷ 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 victims with an effective remedy.¹⁸ In addition, paragraph VII of UN General Assembly Resolution 60/147, adopted on December 16, 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”.¹⁹

As a matter of delimitation, it is 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 set out in the comment. In other words, the scope of application of these two mechanisms is different.

C. Final observations

¹⁷ Res. A/56/10, of 12 December 2001.

¹⁸ See also Paragraph 4 of GC no. 36.

¹⁹ Article VII b).

The comment deserves our attention at least for the following reasons: First, 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.

Second, 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 in its efforts against nuclear weapons. Considering that the right to life is without doubt a very fundamental but far from the only human right relevant for nuclear weapons, and that the HRC is only one UN body dealing with human rights within a large machinery covering very different rights and areas, NGOs fighting for a world without nuclear weapons should now use other norms, treaties and fora in the field of human rights in order to make their voices heard.

Third, perhaps the main value of the GC, from a strictly legal point of view, lies in the fact that general comments of UN human rights bodies are generally considered as their 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.

Fourth, it is 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, United Kingdom, and United States.

I am not naive and, as a matter of fact, I do not expect the nuclear weapons States to get rid of their stockpiles as an immediate result of the adoption of GC no. 36, but I do 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.