

# **The Intersection of Nuclear Weapons and International Human Rights Law: Implications for the Good-Faith Obligation to Negotiate Nuclear Disarmament**

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## **I. Introduction**

It is a great honor to be here today and I would like to thank the organizers for inviting me. I am a supporter of the anti-nuclear movement, I serve on the Board of the Lawyers Committee on Nuclear Policy, and I was active as a student on nuclear issues in the now pre-historic 1980s. However, I have done most of my international law work in recent years in the human rights movement, rather than in the disarmament community. As Peter Weiss and John Burroughs wrote in their important piece in the Disarmament Forum entitled “Weapons of Mass Destruction and Human Rights,” “[w]ith few exceptions those who think, write and speak about Weapons of Mass Destruction live in a different world from those who think, write and speak about human rights.”<sup>1</sup> And yet we share many common goals. So I am very glad to be participating in this conference, and I hope that we can create as many opportunities as possible for disarmament activists and human rights advocates to brainstorm together and work together toward those shared goals.

Moreover, as a U.S. based international lawyer of Algerian descent, I wanted to say what a particular honor it is to participate in an event with so distinguished an Algerian jurist as Judge Bedjaoui. His paper was so insightful and comprehensive that there is little left to say about good faith in international law, and in the field of nuclear disarmament. Thus, I thought I would make a few remarks today on the treatment of nuclear weapons in the field of international human rights law, and about what human rights can bring to the table on the discussion of good faith, in particular. As Judge Bedjaoui has persuasively argued, an obligation on the part of states to negotiate a total nuclear disarmament in good faith exists in international law.<sup>2</sup> I want to suggest that international human rights law can be used to bolster the case calling for states to negotiate such disarmament in good faith. In addition, I want to look at what the field of women’s human rights can offer to this discussion. Due to limitations of time and space, I am only able to provide an overview of these topics, all of which deserve further consideration in the future.

## **II. Human Rights Law and Nuclear Disarmament**

### **A. The Human Rights Committee and the Right to Life**

Many human rights bodies and organizations have opined on the subject of nuclear weapons and their impact on human rights over the years. Some of these pronouncements are more well-known than others. One important body that has weighed in is the UN Human Rights Committee, which is charged with monitoring implementation of the International Covenant on

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Civil and Political Rights (ICCPR), a treaty in the international bill of human rights that has now been ratified by 164 states in all regions of the world, including all of the permanent members of the Security Council except for China.<sup>3</sup> The Human Rights Committee issued an important General Comment on nuclear weapons and the right to life, General Comment Number 14, back in 1984. Such General Comments are explicitly authorized by Article 40(4) of the Covenant, and are today recognized by experts as “authoritative interpretation[s]” of its provisions.<sup>4</sup> The language of General Comment Number 14 is striking and bears quotation at length. According to the Committee,

[i]t 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...

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...

The production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity...”<sup>5</sup>

In making this last assertion, the Human Rights Committee was clearly drawing from a number of sources, including resolutions of the UN General Assembly like the 1981 resolution 36/92I which indeed deemed use of nuclear weapons to constitute a crime against humanity.<sup>6</sup> Returning to the language of the Comment, in its last paragraph, the Committee made the following sweeping appeal:

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>

Manfred Nowak, in his foundational commentary on the ICCPR published in 1993, has described this courageous and forthright General Comment as, up to the time of his writing, its “most controversial.”<sup>8</sup> While the Human Rights Committee adopted the comment by consensus following its most normal practice, the Comment was sharply criticized in the Third Committee of the General Assembly by some Western States. Indeed, Nowak relates that in discussions internal to the Human Rights Committee a few members of the Committee itself were critical of some of the aspects of the draft Comment, such as the appeal to all states (rather than just to the State Parties to the ICCPR), the call for *criminalization* of possession and production of nuclear weapons when the Human Rights Committee is not a judicial body, the omission of the right to self-defense and the failure to distinguish between possession and use of nuclear weapons.<sup>9</sup> Nevertheless, all members of the Committee joined the consensus on the final text of the Comment, and its language had especially strong support from international lawyers of the

caliber of Christian Tomuschat and the late Torkel Opsahl, who were also members of the Human Rights Committee at that time. According to Nowak, these jurists argued that in “applying the right to life, the Committee must not close its eyes to the immense danger threatening all of humanity by nuclear weapons.”<sup>10</sup> Nowak, himself, concludes that General Comment Number 14 is laudatory, as it

shows not only a willingness to innovate, which is sorely missed in other international bodies, but also a resolute application of the premises derived from Art. 6, whereby the right to life is not to be interpreted narrowly and the State Parties are obligated to take positive measures to ensure it.<sup>11</sup>

## **B. The Right to Life in Armed Conflict**

The right to life, which the Committee discusses in this General Comment, is indeed the central human right without which all others are rendered meaningless. It is a non-derogable human right rising to the level of a *jus cogens* norm, meaning that it will override inconsistent treaty or customary norms. However, given that the language of the Covenant only prohibits arbitrary deprivations of life, the precise meaning of this right in times of armed conflict is a matter of some controversy. As the International Court of Justice ruled in its 1996 Advisory Opinion on *Legality of Threat or Use of Nuclear Weapons* (“Nuclear Weapons Case”), Article 6 does indeed apply even during an armed conflict. However, in the view of the ICJ,

[t]he test of what is an arbitrary deprivation of life... then falls to be determined by the applicable *lex specialis*, namely the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.<sup>12</sup>

This “renvoi” to humanitarian law is a view which has been criticized by as distinguished a jurist as Vera Gowland- Debbas.<sup>13</sup> Moreover, Manfred Mohr has written in the International Review of the Red Cross that in the Nuclear Weapons Case, the “link between the nuclear weapons issue... and the right to life should have been more clearly perceived by the Court.”<sup>14</sup> In fact, as Mohr points out, the ICJ did not make reference to the Human Rights Committee’s “famous” General Comment Number 14 quoted above.<sup>15</sup>

One assumes that this was due to legitimacy concerns on the part of the Judges of the Court in general, and specifically to the fact that certain powerful states, including France,<sup>16</sup> Russia<sup>17</sup> and the United States,<sup>18</sup> urged it not to consider human rights law dispositive of the questions at hand and therefore were unlikely to be swayed by such arguments. For the most part, these positions on the part of states seemed to focus on the limitations that exist within the right to life itself, as codified in the ICCPR and other instruments. For example, the Russian Federation argued that, “[t]he existence of the right to life does not mean that it is not possible to deprive a person of his life through legitimate use of force.”<sup>19</sup> However, this line of argument also went further to a more blanket denial of the relevance of human rights law to the subject matter. Perhaps the most absolute statement was made by France: “*Il est en effet évident que ces*

*argument n'ont et ne peuvent avoir en l'espèce aucune pertinence.*"<sup>20</sup> Similarly, the United States argued that

the citation of human rights instruments adds nothing to the analysis of the question whether the use of nuclear weapons is consistent with existing international law. The answer to that question is determined, as it must be, not by reference to human rights instruments but by application of the principles of international law governing the use of force and the conduct of armed conflict.<sup>21</sup>

On a side note, this is an issue which has consequences both in the fields of human rights and disarmament. The Bush Administration has more recently taken an even stronger position against the use of human rights law to assess the conduct of armed conflict – in particular of the “war on terror.”<sup>22</sup>

Returning to the written pleadings in the Nuclear Weapons Case, it is notable just how few human rights arguments seem to have been advanced even by the states advocating for the illegality of using nuclear weapons. States like New Zealand made lengthy references to international humanitarian law (IHL), and virtually none to human rights law.<sup>23</sup> Nauru is a notable exception, having devoted several pages to human rights arguments, cited General Comment Number 14 and submitted that manufacture and possession of nuclear weapons violates the right to life.<sup>24</sup> Judge Weeramantry’s dissent offers the lengthiest and most ambitious attempt to highlight the relevance of human rights law.<sup>25</sup> He dismissed the theory advanced by some states that limitations within the right to life could comfortably encompass nuclear weapons, stressing the singularity of weapons that in his estimate “ha[ve] the potential to kill between one million and one billion people.”<sup>26</sup>

In terms of the general applicability of human rights and the right to life to these questions, the Human Rights Committee for its part, takes the view that “the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant.”<sup>27</sup> Unfortunately, it has not sufficiently followed up on the themes raised in its General Comment Number 14.<sup>28</sup> It is to be hoped that the Human Rights Committee will indeed take up these themes again in the near future. However, it will need encouragement from both human rights and disarmament NGOs (perhaps working together) to do so. And the Human Rights Committee has faced new threats to the legitimacy of human rights and its work in the post September 11 era. But, if the Committee was able to show the moral courage it did on this issue during the difficult times of the Cold War when General Comment Number 14 was issued, there is no reason to think that it is impossible for it to do so now.

### **C. The Contributions of the UN Sub-Commission**

In addition to the Human Rights Committee, some other human rights bodies have also weighed in on the issue of nuclear weapons and human rights. In the wake of the ICJ Nuclear Weapons Case, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities<sup>29</sup> (later to be known as the UN Sub-Commission on Promotion and Protection of Human Rights) adopted a resolution on nuclear weapons in 1996. The 1996 resolution, in its preamble, “reiterate[ed] the ultimate goals of the complete elimination of nuclear weapons and a treaty on general and complete disarmament under strict and effective control.”<sup>30</sup> The Sub-Commission hence

[r]ecommend[ed] that the relevant international forums, in particular the Conference on Disarmament, should immediately start negotiations on nuclear disarmament to reduce nuclear weapons globally within a phased programme, with the ultimate goal of eliminating those weapons, thus contributing to the enhancement of international peace and security and the protection of human rights and fundamental freedoms and above all the right to life.<sup>31</sup>

On a less technical, more policy-oriented note, the Sub-Commission affirmed that “nuclear weapons should have no role to play in international relations and thus should be eliminated.”<sup>32</sup>

In 1997 the Sub-Commission “urge[d] all States to be guided in their national policies by the need to curb the testing, the production and the spread of weapons of mass destruction.”<sup>33</sup> In the preamble to that resolution, it concluded that

the use of or threat of use of weapons of mass destruction, and in certain circumstances, the production and sale of such weapons are incompatible with international human rights and/or humanitarian law.<sup>34</sup>

Building on these earlier resolutions, in 2001 the Sub-Commission requested a study on the human rights impact of weapons of mass destruction and some other types of weapons. This study was conducted by the Mauritian Supreme Court Judge Y.K.J. Yeung Sik Yuen and presented to the Sub-Commission in 2002.

In Justice Yuen’s view, nuclear weapons and the other weapons he studied were likely to infringe a range of human rights, including not only the right to life, but also the right to freedom from torture, the right to health, the prohibition of genocide, and related rights in other human rights instruments.<sup>35</sup> He emphasized the particular relevance to these questions not only of IHL, but also the provisions of human rights law, including the Universal Declaration of Human Rights and the Covenants on human rights, the Genocide Convention and the UN Convention against Torture. As he noted, while to some degree IHL and human rights converge, “the notable difference” in his view is that “the main United Nations Covenants and regional human rights instruments have no ‘threshold’ and apply to all situations irrespective of whether there is armed conflict or not.”<sup>36</sup> This means that not only does the *use* of nuclear weapons raise legal questions, but so too does their possession, manufacture, and stockpiling in “peacetime,” under human rights law.

The human rights community, and UN human rights mechanisms, should follow up on many of the questions that were raised in the Yuen report and in the debate about it within the Sub-Commission. The work of the late Sub-Commission on nuclear weapons and human rights should be seen as a beginning of human rights engagement with the issue of nuclear weapons, not as an end of that process.

## **D. Non-Governmental Organizations and Nuclear Weapons**

Some prominent non-governmental organizations in the field of human rights have also taken positions on nuclear weapons issues. For example, in 2003 the International Council Meeting of Amnesty International (which is the organization’s highest democratic governing body) passed a resolution declaring that AI opposes the use, possession, production and transfer of nuclear weapons, given their indiscriminate nature. This decision was adopted on the

understanding that Amnesty International would have no major plans for campaigning actively against nuclear weapons in the near future. However, it is now AI's public position that the organization opposes these weapons.

It is interesting to note that as one of the world's leading human rights NGOs, Amnesty International still poses its opposition to nuclear weapons in terms of their indiscriminate nature – a concept drawn from international humanitarian law rather than from human rights law. This is probably due to the view expressed by the ICJ in the nuclear weapons case quoted above – a view critiqued by some human rights experts - that the meaning of arbitrary deprivation of life in armed conflict is to be determined using IHL. It also underscores the need to re-insert human rights law itself into the debate – and to remind both human rights experts and disarmament advocates of the specific relevance of human rights law to the issues of armed conflict in general, and to nuclear weapons in particular. Applying such a methodology, of course, requires confronting a number of technical issues such as questions of jurisdiction and application, and the doctrine of *lex specialis*. These questions are vital, but are beyond the scope of this paper. I have addressed them in depth in the past in my article, “Toward a Human Rights Approach to Armed Conflict: Iraq 2003.”<sup>37</sup> Simply stated, IHL is a useful and important body of law; but it cannot alone answer all of the human rights questions posed by armed conflict or by nuclear or other weapons. As Ruti Teitel has noted,

the attempted merger [of IHL and human rights discourse] poses a threat to the continued existence of an independent international human rights discourse. Indeed... the displacement of the established human rights vocabulary by that of the law of war goes to the very heart of the meaning of ‘human rights.’<sup>38</sup>

An IHL-bound framework focuses on admittedly important operational issues, but leaves advocates no vocabulary to comment on the broader topic of misguided military spending priorities or the broader impact on human rights of both militarism and conflict.

Returning to the review of human rights NGO positions, we find that unlike its sister organization Amnesty International, Human Rights Watch has not taken a general position on the issue of nuclear weapons. This is because the group has not seen a particular role that it could play in the work on these issues wherein it could bring added value. However, the organization did make an appeal to all of the likely parties in the lead up to the 2003 Iraq War not to use nuclear weapons as, in light of the ICJ Nuclear Weapons Case, it could not foresee any use of nuclear weapons in that conflict that would not have been internationally unlawful.<sup>39</sup> Additionally, Human Rights Watch General Counsel Dinah PoKempner wrote in the *World Today* in 2003 that it was “disturbing that scenarios for nuclear deployment found their way into the Pentagon’s 2002 Nuclear Posture Review...”<sup>40</sup>

Concluding this quick overview of civil society positions, it is interesting to note that even so cautious an organization as the ICRC has publicly called on States to “pursue negotiations with a view to achieving a complete prohibition on nuclear weapons as well as the elimination of such weapons, as they have undertaken to do.”<sup>41</sup> Thus, some of the most prominent human rights and humanitarian groups have opined in some way on nuclear weapons. These pronouncements can be useful in building the case for the need for good faith implementation of the obligation to negotiate nuclear disarmament. Moreover, they can be the basis for a new dialogue between human rights and disarmament NGOs.

## E. Nuclear Weapons and Economic, Social and Cultural Rights

Broadening the consideration of how substantive human rights law intersects with the question of nuclear weapons, we must move beyond the right to life. While that right is perhaps the most implicated in the discussion of nuclear weapons, it is certainly not the only one affected. Potentially all human rights may be catastrophically impacted, both by the use and testing of nuclear weapons.

Clearly, nuclear weapons undermine the right to the highest attainable standard of health. Just to give one example, Physicians for Social Responsibility suggests that U.S. government figures show “the U.S. nuclear weapons program has sickened 36,500 Americans and killed more than 4,000.”<sup>42</sup> In the context of interpreting the right to health, the UN Committee on Economic, Social and Cultural Rights has, somewhat more cautiously than the Human Rights Committee, expressed the view that

States should... refrain from unlawfully polluting air, water and soil, *e.g.*... from using or testing nuclear, biological or chemical weapons if such testing results in the release of substances harmful to human health...<sup>43</sup>

However, even in the absence of the use or testing of nuclear weapons, their very existence gravely affects a range of human rights. The broader human rights consequences of nations spending their peoples’ resources to produce such weapons are especially pronounced in the area of economic, social and cultural rights. The interconnection between these rights and the stockpiling of expensive weaponry, like nuclear weapons, seems to have been clearly understood by former General and U.S. President Dwight Eisenhower. In 1953 he said,

[e]very gun that is made, every warship launched, every rocket fired signifies, in the final sense, a theft from those who are hungry and not fed, those who are cold and not clothed. This world in arms is not spending money alone. It is spending the sweat of its laborers, the genius of its scientists and the hopes of its children. The cost of one modern heavy bomber is this: a modern brick school in more than 30 cities... It is two fine, fully equipped hospitals... We pay for a single destroyer with new homes that could have housed more than 8,000 people...<sup>44</sup>

This is a linkage we in the human rights and disarmament communities need to underscore. As Eisenhower himself seemed to recognize, war and the war system are human rights issues deserving human rights analysis. Our analysis of these issues must be more fully developed. In 2003, Global Action to Prevent War described the world’s combined military budgets as amounting to all of the world’s governments collectively spending over 1 million dollars a minute on the military, or a total of 2 billion dollars per day.<sup>45</sup> Just looking at the cost of the U.S. nuclear program, according to Stephen Schwartz and Joseph Cirincione, between 1940 and 2005 the U.S. spent about 7.5 trillion dollars on this program.<sup>46</sup> This shockingly large amount of money, if redirected appropriately, could make huge strides in human rights implementation possible. It is perhaps out of recognition of these interlinkages that the UN General Assembly in its Millennium Declaration resolved to strive for the elimination of weapons of mass destruction, particularly nuclear weapons, and to keep all options open for achieving this aim, including the possibility of convening an international conference to identify ways of eliminating nuclear dangers.<sup>47</sup>

## F. The Right to Peace

Another implicated human right, to which I will not devote too much space, is the collective right to peace. In part, I will not say much about this because the right to peace is less widely accepted or evolved than civil and political rights, or economic, social and cultural rights. Before it can be used as a useful tool in this struggle, its own legal foundations need strengthening. As human rights expert Philip Alston joked in 2001 in his edited collection on Peoples' Rights, "a search of 'right to peace' sites on the World Wide Web yields almost nothing which sheds any light on the issue but instead reveals a great number devoted to the right to peace and quiet!"<sup>48</sup> Indeed, Weiss and Burroughs note that "the right to peace has fallen on hard times..."<sup>49</sup>

Of course, as Alston himself recognized there have been some legal developments in the area, mostly in the realm of soft law. The General Assembly proclaimed the right to peace in a 1984 Declaration on the Right of Peoples to Peace. This Declaration "solemnly proclaims that the peoples of our planet have a sacred right to peace" and moreover that "the promotion of its implementation constitute[s] a fundamental obligation of each state."<sup>50</sup> More needs to be done to make these rights and obligations binding, and a reality.

However, instead of emphasizing this right to begin with in developing a human rights approach to nuclear weapons, a preferable route would be to build comprehensive arguments based on hard law sources grounded in article 38(1) of the Statute of the ICJ such as those treaties and principles of customary international law found in the areas of civil, political, economic, social and cultural rights. Ultimately, it is possible that such a discussion can lead back in the direction of renewed interest in the right to peace.

## III. Women's Human Rights and Nuclear Weapons

To complete my sketch of human rights law and nuclear weapons, I want to consider how women's human rights should impact our consideration of the intersection of these matters. As the feminist international lawyers Hilary Charlesworth and Christine Chinkin have reminded us in their important book, *The Boundaries of International Law: A Feminist Analysis*, women are rarely involved in decisions about the resort to force or the use or development of weapons.<sup>51</sup> Women are rarely represented in defense establishments and are inadequately represented on the Security Council and other relevant bodies. Women are, however, often involved in NGO work for disarmament.

Addressing these disparities, Security Council resolution 1325 on women, peace and security called for greater representation of women in official processes related to conflict resolution, and in international institutions, an objective which has recently been reaffirmed in Security Council resolution 1820.<sup>52</sup> The greater inclusion of women by itself might not be enough to make states respect their good faith obligation to negotiate nuclear disarmament. However, increasing gender balance could be an important step in that direction. As Chinkin and Charlesworth conclude,

[w]hether greater participation of women in international decision-making would result in different types of decisions being made is difficult to establish, but it would at least allow for a greater diversity of considerations to be taken into account.<sup>53</sup>

In another article they co-wrote, “The Gender of Jus Cogens,” Chinkin and Charlesworth have argued that a feminist rethinking of *jus cogens* could give increased prominence to a range of other human rights that might have a direct bearing on the question of the obligations of states to negotiate nuclear disarmament, like the rights to be free from violence and even to the right to peace.<sup>54</sup>

In terms of existing obligations for disarmament in the women’s human rights field, it is often overlooked that in the Beijing Declaration and Platform for Action, adopted by governments at the UN Fourth World Conference on Women in 1995, governments also committed to reduce excessive military expenditures and control the availability of armaments. To that end, they agreed to do the following:

- i. Work actively towards general and complete disarmament under strict and effective international control;
- ii. Support negotiations on the conclusion, without delay, of a universal and multilaterally and effectively verifiable comprehensive nuclear-test-ban treaty that contributes to nuclear disarmament and the prevention of the proliferation of nuclear weapons in all its aspects;
- iii. Pending the entry into force of a comprehensive nuclear-test- ban treaty, exercise the utmost restraint in respect of nuclear testing.<sup>55</sup>

The drafters of the Beijing Platform for Action explained their call for these specific actions to be taken by governments in their “diagnosis” of how disarmament could affect women’s human rights.

An environment that maintains world peace and promotes and protects human rights ... is an important factor for the advancement of women. Peace is inextricably linked with equality between women and men....<sup>56</sup>

Specifically, in this regard, the current UN Special Rapporteur on violence against women has argued that militarization promotes violence against women.<sup>57</sup> Her predecessor, Radhika Coomaraswamy, noted that

[i]t has been posited that the military establishment is inherently masculine and misogynist, inimical to the notion of women’s rights. The masculinity cults that pervade military institutions are intrinsically antifemale and therefore create a hostile environment for women.<sup>58</sup>

Women’s International League for Peace and Freedom experts Dr. Carol Cohn and Felicity Hill have talked about the ways in which gender stereotypes have affected our thinking about nuclear weapons. They argue that these weapons are “culturally associated with strength, power and masculinity.”<sup>59</sup> This coding has a direct impact on the policy debate over nuclear weapons in their view. Hill, writing with Jennifer Nordstrom, reports that the WMD Commission has recognized that, “misguided ideas about masculinity and strength are an obstacle to disarmament.”<sup>60</sup> By way of explanation of these “misguided ideas” referenced by the WMD Commission, Nordstrom and Hill argue further that

[p]ossessing and brandishing an extraordinarily destructive capacity is a form of dominance associated with masculine

warriors... and is more highly valued than the feminine-associated disarmament, cooperation, and diplomacy.<sup>61</sup>

These are the very gender stereotypes that the Convention on the Elimination of All Forms of Discrimination against Women mandates states to eliminate in its Article 5.<sup>62</sup> Hence, a women's human rights perspective needs to be fully integrated into any human rights approach to nuclear weapons.

#### **IV. Human Rights and Good Faith in International Law**

This brief overview of human rights and nuclear weapons now brings me back to the question of good faith. How does the concept of good faith - which we are focusing on here today in relation to the obligation to negotiate nuclear disarmament - relate to human rights? And conversely, what can human rights law tell us about the meaning and centrality of good faith in international law generally? As I noted above, Judge Bedjaoui's remarks on good faith were so learned and comprehensive that I will only make a few brief remarks on this topic.

In *Good Faith and International Law*, J. F. O'Connor presents the following simplified definition of good faith:

The principle of good faith in international law is a fundamental principle from which the rule *pacta sunt servanda* and other legal rules distinctively and directly related to honesty, fairness and reasonableness are derived, and the application of these rules is determined at any particular time by the compelling standards of honesty, fairness and reasonableness prevailing in the international community at the time.<sup>63</sup>

Good faith implementation is essential in the world of human rights.<sup>64</sup> Without this principle, no serious enactment of human rights treaties is possible. Given the lack of effective international enforcement mechanisms in the human rights world, the *pacta sunt servanda* obligation that states implement human rights treaties in substantive reality is vital. As in the area of nuclear disarmament, in the world of human rights, all too often we see clear and repeated violations of Article 26 of the Vienna Convention on the Law of Treaties rule which stipulates that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."<sup>65</sup> States are rarely held accountable for these abuses. The same holds true for the Article 31 obligation to interpret treaties in good faith.<sup>66</sup>

Yet, good faith is meant to facilitate the implementation of international law in the diverse, horizontal world order. As Robert Kolb has written in *La bonne foi en droit international public*,

Sur le plan positif, le principe de bonne foi fournit d'abord une mesure pour déterminer l'étendue de droits et d'obligations. Il fournit le complément substantiel nécessaire à la mise en œuvre d'une série de règles de caractère formel (par exemple *pacta sunt servanda*). La bonne foi renforce ensuite les obligations imparfaites, fréquentes dans une société internationale marquée par le sceau du relativisme juridique et des divergences politique.<sup>67</sup>

These aspects of good faith are crucial in the world of human rights.

John Burroughs, Executive Director of the Lawyers Committee on Nuclear Policy, has suggested to me that a world in which human rights are respected is a world in which threat or use of nuclear weapons is utterly unacceptable, and in which the disarmament obligation, so conclusively documented by Judge Bedjaoui, is implemented fully – and in good faith. In other words, to fully implement the central human right to life by protecting it from what the Human Rights Committee has dubbed “one of the greatest threats”<sup>68</sup> to that right, good faith efforts to reach nuclear disarmament are absolutely necessary. To enable full implementation of economic, social and cultural rights through redirection of the massive resources consumed by nuclear weapons, thus ending this massive theft - as President Eisenhower named it - from “those who are hungry and not fed,”<sup>69</sup> good faith efforts to conclude nuclear disarmament are absolutely necessary. To give real meaning to the right to peace, such efforts are a *sine qua non*.

Unfortunately, a number of recent developments suggest that these may be trying times for the concept of good faith implementation of international obligations.<sup>70</sup> For its part, the Human Rights Committee has recently felt the need to reiterate this basic legal notion, when making its 2006 Concluding Observations on the State Party report of the United States. It urged the U.S. to “review its approach and interpret the Covenant [ICCPR] in *good faith*... and consider in *good faith* the interpretation of the Covenant provided by the Committee pursuant to its mandate.”<sup>71</sup> The Committee made this appeal in light of the general approach of the U.S. to interpreting and implementing the Covenant, including in regards to the issue of extraterritoriality. As a reminder of the one of the compelling reasons for complying with this Human Rights Committee statement, U.S. leaders should remember that, according to David Koplow, Thomas Jefferson was “convinced that it is [in a nation’s] interest, in the long run, to be ... faithful to [its] engagements, even in the worst of circumstances, and honorable and generous always.”<sup>72</sup>

However, shortcomings in good faith implementation of international law obligations also represent a truly transnational set of problems. Perhaps we need to remind our leaders globally that, in Professor O’Connor’s view,

[n]othing contributes more to the glory of nations and their rulers than complete and perfect good faith, since it is of the greatest importance that a promise should not be violated, if treaties have been made.<sup>73</sup>

Ultimately, human rights and nuclear disarmament advocates should see a common interest in a vigorous defense of the principle of good faith in international legal process – as it is central to both our sets of projects.

## V. Conclusion

Human rights must be re-inserted in discussions of nuclear weapons and the obligations of states to pursue nuclear disarmament in good faith. Nuclear weapons also need to be re-inserted into the human rights debate. Little has been produced in the human rights world on this issue in the last few years. Effective cooperation between NGOs and advocates in the anti-nuclear and human rights movements is crucial to making this integration happen. We need to encourage further scholarship and advocacy in our areas of overlap.

Both advocacy communities can benefit from such an approach. For example, on the human rights side, as Weiss and Burroughs point out, recent debates over the use of torture in so-called ticking time bomb situations often invoke the specter of a nuclear weapon<sup>74</sup> placed

(invariably) in New York City. While human rights advocates often focus on the issue of excluding torture as a permissible response in the hypothetical,<sup>75</sup> nuclear disarmament is the best way to deconstruct the hypothetical itself in the long run. On the disarmament side, the law that I have summarized here today offers further strength, and a campaigning tool, to the case for a good faith obligation to negotiate nuclear disarmament as required by the Treaty on the Non-Proliferation of Nuclear Weapons<sup>76</sup> and affirmed in the ICJ Nuclear Weapons Case.<sup>77</sup>

In any contemplated return to the World Court on the issue of nuclear weapons, the Court must be encouraged to reference the applicability and centrality of human rights law to the questions of nuclear weapons, and of nuclear disarmament and the good faith obligation of states to pursue – and achieve it. Those of us in the human rights and disarmament worlds, however, will need to do a great deal of preparatory work to make that happen. We will need to begin to live in the same world, to return to the paradigm of Burroughs and Weiss, at least sometimes.

Finally, I would like to close with the words of Jayantha Dhanapala, then Under-Secretary-General for Disarmament Affairs, in a speech made while accepting the Alan Cranston peace award in 2002. He concluded that

[d]isarmament is pre-eminently a humanitarian endeavour for the protection of the human rights of people and their survival. We have to see the campaign for nuclear disarmament as analogous to the campaigns such as those against slavery, for gender equality and for the abolition of child labour. It will be a hard, uphill struggle but, eventually, we shall overcome!<sup>78</sup>

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<sup>1</sup> Peter Weiss and John Burroughs, *Weapons of mass destruction and human rights*, DISARMAMENT FORUM 3, 2004, at 25.

<sup>2</sup> Judge Mohammed Bedjaoui, Keynote Address at Conference: Good Faith, International Law and the Elimination of Nuclear Weapons: The Once and Future Contributions of the International Court of Justice, 15-20 (1 May 2008).

<sup>3</sup> See [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last visited April 29, 2009). China has signed the Covenant in 1998 giving it the obligation under the Vienna Convention on the Law of Treaties “to refrain from acts which would defeat the object and purpose of [the] treaty” pending ratification. Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331. This is yet another obligation grounded in good faith.

<sup>4</sup> MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS, CCPR COMMENTARY xxiv (1993).

<sup>5</sup> UN Human Rights Committee, General Comment Number 14 (Article 6), *Nuclear Weapons and the Right to Life*, 23<sup>rd</sup> Session, 1984, paras. 4-6.

<sup>6</sup> G.A. Res. 36/92I, ¶ 1(a), *Non-Use of Nuclear Weapons and Prevention of Nuclear War*, U.N. Doc. A/RES/36/92 (9 December 1981).

<sup>7</sup> UN Human Rights Committee, General Comment Number 14, *supra* note 5 at para. 7.

<sup>8</sup> Nowak, *supra* note 4 at 109.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 110.

<sup>12</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, para. 25 (July 8).

<sup>13</sup> Vera Gowlland-Debbas, *The Right to Life and Genocide: The Court and an International Public Policy in International Law*, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 315, 325 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999).

<sup>14</sup> Manfred Mohr, *Advisory Opinion of the International Court of Justice on the legality of the use of nuclear weapons under international law – a few thoughts on its strengths and weakness*, INT’L REV. RED CROSS, No. 316, at 93 (1997).

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<sup>15</sup> *Id.*

<sup>16</sup> *Exposé Ecrit du Gouvernement de la République Française, Requette Pour Avis Consultatif, Licéité de la Menace ou de l'Emploi d'Armes Nucléaires* 37-38 (June 1995).

<sup>17</sup> Written Statement and Comment of the Russian Federation, Legality of the Threat or Use of Nuclear Weapons (June 16, 1995).

<sup>18</sup> Written Statement of the Government of New Zealand before the International Court of Justice, Request by the United Nations General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons 14-23 (June 20, 1995).

<sup>19</sup> Written Statement and Comment of the Russian Federation, *supra* note 17 at 9.

<sup>20</sup> *Exposé Ecrit du Gouvernement de la République Française, supra* note 16 at 38.

<sup>21</sup> *Id.* at 46.

<sup>22</sup> See, for example, the response of the Permanent Representative of the United States of America to the United Nations to the 2006 report by UN human rights experts on the treatment of detainees in Guantanamo. UN Doc. E/CN.4/2006/120, 15 Feb. 2006 at Annex II.

<sup>23</sup> Written Statement of the Government of the United States of America before the International Court of Justice, Request by the United Nations General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons 42-46 (June 20, 1995).

<sup>24</sup> Memorial of the Government of the Republic of Nauru, International Court of Justice, Legality of the Use or Threat of Use of Nuclear Weapons (Request for an Advisory Opinion) 20-22 (June 15, 1995).

<sup>25</sup> Dissenting Opinion of Judge Weeramantry, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *supra* note 12 at 506-508.

<sup>26</sup> *Id.* at 507.

<sup>27</sup> Concluding Observations of the Human Rights Committee: Israel, U.N. Doc. CCPR/CO/78/ISR, para. 11 (2003).

<sup>28</sup> INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 879 (Philip Alston et al. eds., 2008).

<sup>29</sup> The Sub-Commission was a body of twenty-six independent experts reporting to the Commission on Human Rights. It carried out a range of expert tasks in the field of human rights, including the adoption of resolutions and the commissioning of studies on vital topics. With the advent of the Human Rights Council, the Sub-Commission ceased to exist in 2006.

<sup>30</sup> UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *International peace and security as an essential condition for the enjoyment of human rights, above all the right to life*, Res. 1996/14, pmbl. (August 23, 1996).

<sup>31</sup> *Id.* at para. 2.

<sup>32</sup> *Id.* at para. 1.

<sup>33</sup> UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *International Peace and Security as an essential condition for the enjoyment of human rights, above all the right to life*, Res. 1997/36, para. 1 (August 28, 1997).

<sup>34</sup> *Id.* at preamble.

<sup>35</sup> *Human rights and weapons of mass destruction, or with indiscriminate effect, or of a nature to cause superfluous injury or unnecessary suffering*, UN Doc. No. E/CN.4/Sub.2/2002/38 at page 2.

<sup>36</sup> *Id.* para. 4.

<sup>37</sup> Karima Bennoune, *Toward a Human Rights Approach to Armed Conflict: Iraq 2003*, 11 U.C. DAVIS J. INT'L L. & POL'Y 171, 171-228 (2004).

<sup>38</sup> Ruti Teitel, *Humanity's Law: Rule of Law for the New Global Politics*, 35 CORNELL INT'L L.J. 355, 375 (2001-2002).

<sup>39</sup> See Human Rights Watch, *Letter to U.S. and Allies Regarding Adherence to Laws of War*, March 19, 2003, available at <http://hrw.org/press/2003/03/us031903ltr.htm>.

<sup>40</sup> Dinah Pokempner, *Bending the rules: Laws of War*, World Today, Vol. 59 (2003), available at <http://hrw.org/english/docs/2003/05/01/usint12469.htm>.

<sup>41</sup> International Committee of the Red Cross, *Use of nuclear, biological or chemical weapons: current international law and policy statement 2* (March 4, 2003).

<sup>42</sup> Physicians for Social Responsibility, *Oppose new nuclear weapons production*, April 3, 2008, available at [http://www.psr.org/site/PageServer?pagename=ComplexTransformations\\_LearnMore&JServSessionIdr009=430vzcmks2.app1b](http://www.psr.org/site/PageServer?pagename=ComplexTransformations_LearnMore&JServSessionIdr009=430vzcmks2.app1b) (last visited April 29, 2009), citing the Rocky Mountain News.

<sup>43</sup> UN Committee on Economic, Social and Cultural Rights, General Comment Number 14, *The right to the highest attainable standard of health*, 2000, para. 34.

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- <sup>44</sup> Dwight D. Eisenhower, *The Chance for Peace*, Address Before the American Society of Newspaper Editors 75, 77-78 (Apr. 16, 1953).
- <sup>45</sup> Global Action to Prevent War, *Program Statement 10* (2003), available at [www.globalactionpw.org/GAtPW\\_v3.03.pdf](http://www.globalactionpw.org/GAtPW_v3.03.pdf).
- <sup>46</sup> Joseph Cirincione, *Lessons Lost*, 61 BULL. ATOM. SCIENTISTS 42, 47 (Nov./Dec. 2005), also referencing the earlier study in STEPHEN I. SCWARTZ, *ATOMIC AUDIT* (1996).
- <sup>47</sup> G.A. Res. 55/2, ¶ 9, *United Nations Millennium Declaration*, U.N. Doc. A/RES/55/2 (8 September 2000). This connection has long been recognized in some form by the General Assembly. In 1981 it was already, “[c]onvinced that the halting of the arms race and adoption of effective disarmament measures, particularly in the field of nuclear disarmament, would release considerable financial and material resources to be used for the economic and social development of all States...” G.A. Res. 36/92D, pmb., *International Co-operation for Disarmament*, U.N. Doc. A/RES/36/92 (9 December 1981). Thus, not only are individual economic, social and cultural rights impacted, but also the collective right to development.
- <sup>48</sup> PEOPLES’ RIGHTS 281 (Philip Alston ed. 2001).
- <sup>49</sup> Weiss and Burroughs, *supra* note 1 at 26.
- <sup>50</sup> G.A. Res. 39/11, Annex, ¶¶ 1 and 2, *Declaration on the Right of Peoples to Peace*, U.N. Doc. A/RES/39/11 (12 November 1984).
- <sup>51</sup> HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 258 (2000).
- <sup>52</sup> See S.C. Res. 1325, pmb., *Women, peace and security*, U.N. Doc. S/RES/1325 (31 October 2000) and S.C. Res. 1820, pmb., *Women and peace and security*, (19 June 2008).
- <sup>53</sup> *The Boundaries of International Law*, *supra* note 51 at 258.
- <sup>54</sup> Hilary Charlesworth and Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63 (1993).
- <sup>55</sup> Fourth World Conference on Women, September 1995, *Beijing Declaration and Platform for Action*, ¶. 143, available at <http://www.un.org/womenwatch/daw/beijing/platform/armed.htm#object2>.
- <sup>56</sup> *Id.* at para. 131.
- <sup>57</sup> Report of the UN Special Rapporteur on violence against women, UN Doc. E/CN.4/2001/73, para. 57.
- <sup>58</sup> Report of the UN Special Rapporteur on violence against women, UN Doc. E/CN.4/1998/54, para. 9.
- <sup>59</sup> Jennifer Nordstrom and Felicity Hill, *A Gender Perspective, in NUCLEAR DISORDER OR COOPERATIVE SECURITY?: U.S. WEAPONS OF TERROR, THE GLOBAL PROLIFERATION CRISIS AND PATHS TO PEACE* 165 (Michael Spies & John Burroughs eds., 2007).
- <sup>60</sup> *Id.*
- <sup>61</sup> *Id.* at 166.
- <sup>62</sup> Convention on the Elimination of All Forms of Discrimination against Women art. 5, Dec. 18, 1979, 1249 U.N.T.S. 13. In relevant part, this article requires States Parties “to eliminate[e]... prejudices ... based on... stereotyped roles for men and women...” *Id.*
- <sup>63</sup> J.F. O’CONNOR, *GOOD FAITH IN INTERNATIONAL LAW* 124 (1991).
- <sup>64</sup> See generally, Louis Henkin, *Human Rights and “Domestic Jurisdiction:”* in *HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD* 21, 29-31 (Thomas Buergenthal ed. 1977). While discussing enforcement in the human rights area, Henkin notes that, “[t]he duty to carry out international obligations is the heart of the international legal system.” *Id.*
- <sup>65</sup> Vienna Convention on the Law of Treaties, *supra* note 3 at Article 26.
- <sup>66</sup> *Id.* at Article 31.
- <sup>67</sup> ROBERT KOLB, *LA BONNE FOI EN DROIT INTERNATIONAL PUBLIC: CONTRIBUTION À L’ÉTUDE DES PRINCIPES GÉNÉRAUX DE DROIT* 685 (2000).
- <sup>68</sup> See text *supra* at note 5.
- <sup>69</sup> See text *supra* at note 44.
- <sup>70</sup> See, e.g., Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885 (2005) and *Medellín v. Texas*, 128 S. Ct. 1346 (2008).
- <sup>71</sup> Concluding Observations of the Human Rights Committee: United States of America, U.N. Doc. No. CCPR/C/USA/CO/3/Rev.1, para. 10 (2006).
- <sup>72</sup> David Koplow, *Parsing Good Faith: Has the United States Violated Article VI of the Nuclear Non-Proliferation Treaty?*, 1993 WIS. L. REV. 301, 393 (1993).
- <sup>73</sup> O’Connor, *supra* note 63 at 69.
- <sup>74</sup> Weiss and Burroughs, *supra* note 1 at 31-32.

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<sup>75</sup> For a broader discussion of human rights responses to and refutations of the “ticking time bomb” hypothetical, see Karima Bennouna, *Terror/Torture*, 26 BERKELEY J. INT’L L. 1, 30-39 (2008).

<sup>76</sup> Treaty on the Non-Proliferation of Nuclear Weapons art. VI, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S 161.

<sup>77</sup> *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 12 at para. 103

<sup>78</sup> Jayantha Dhanapala, Remarks Upon Accepting the Alan Cranston Peace Award 4 (16 April 2002).