

# Threat and use of nuclear weapons contrary to right to life, says UN Human Rights Committee

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## Introduction

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 (ICCPR), 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 and human rights. In para. 66, the HRC considers the threat and use of WMD, in particular nuclear weapons, incompatible with the right to life and reiterates the duties of the States Parties in the field of nuclear disarmament and non-proliferation.

The most obvious human right when talking about use of nuclear weapons is the right to life. The ICJ, in its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, confirmed the applicability of the right to life in time of armed conflict and, moreover, observed that the test of what is an “arbitrary deprivation of life” has to be determined in light of international law governing armed conflict, in particular humanitarian law.<sup>[1]</sup>

The GC no. 36 is a detailed 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.

## Earlier General Comments on the right to life and *travaux préparatoires* to GC no. 36

The HRC issued already two so-called General Comments on the right to life. Those GCs are considered an authentic interpretation by the HRC of the provisions of the ICCPR and the obligations imposed on States Parties concerning a certain right.

Regarding the right to life, 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 heavily criticized by certain States, in particular by France, for having allegedly overstepped its mandate by commenting on issues of nuclear weapons. A couple of years ago, the HRC started its consideration of a new GC on the right to life, which became ultimately GC no. 36. The following paragraph of a first draft was devoted to weapons of mass destruction:

*The threat or use of weapons of mass destruction, including nuclear weapons, is prima facie incompatible with respect for the right to life. States parties must take all feasible measures to stop the proliferation of weapons of mass destruction and to prevent their development and use.*

This proposal was incomplete and unsatisfactory for many reasons. Therefore, in co-authorship with John Burroughs from Lawyers' Committee on Nuclear Policy (LCNP) and having received valuable inputs from Roger S. Clark and Emilie Gaillard, I submitted [observations](#) on behalf of Swiss Lawyers for Nuclear Disarmament (SLND).<sup>[2]</sup> 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. For those and other reasons, we proposed a concrete new wording of the paragraph:

*The threat or use of weapons of mass destruction, including nuclear weapons, amounts to actual or potential “arbitrary deprivation” of life within the meaning of Article 6 ICCPR and, as a result, is incompatible with respect for the right to life. States parties must take all feasible and lawful measures to ensure compliance, without any exception whatsoever, with existing obligations not to possess and use weapons of mass destruction; to prevent their proliferation, development, and use; and to bring about their global elimination, including through early fulfilment within a given timeline of the universal legal obligation to pursue in good faith and conclude negotiations on nuclear disarmament in all its aspects.*

A second draft, much more elaborated and appropriate on WMD, was presented in 2017 and read as follows:

*The [threat] or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and can destroy 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, stockpiling and using them, and to destroy existing stockpiles, 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 adversely affected by the testing or use of weapons of mass destruction].*

By [follow-up submissions](#) of 5 October 2017, we expressed our general satisfaction with this proposal and urged the HRC to keep the notion “threat” in the text.<sup>[3]</sup> 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.

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):

*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. (...)*

### **Preliminary observations on GC no. 36**

I find the adopted draft quite noteworthy and valuable and will comment on it more in detail later. At this stage, I limit myself to a couple of brief remarks.

First of all, the HRC expresses that not only actual use, but also *threat* of weapons of mass destruction, in particular nuclear weapons, is incompatible with the right to life. This reflects, *inter alia*, the core prohibitions of the Treaty on the Prohibition of Nuclear Weapons (TPNW), set out in Article I d), which bar states parties from using and *threatening to use* such weapons. Both clauses are powerful statements against the threat of nuclear weapons. In view of the centrality of threat to now decades-old reliance on nuclear weapons in military and security postures, they will be significant tools in delegitimizing ‘nuclear deterrence’ as contrary to international law as well as common sense in view of the immense risks involved.<sup>[4]</sup> Delegitimization of nuclear deterrence is essential to success in achieving the global abolition of nuclear arms.<sup>[5]</sup>

Second, the HRC considers nuclear weapons as indiscriminate in effect and of a nature to cause destruction of human life on a catastrophic scale and, therefore, incompatible with right to life. The ICJ, in its 1996 Advisory Opinion, stated that “[t]he destructive power of nuclear weapons cannot be contained in either space or time.”<sup>[6]</sup>

In the same line, the preamble of the TPNW reads as follows (par. 4):

*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...*

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 may come into play regarding the use of nuclear weapons.<sup>[7]</sup> 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.<sup>[8]</sup>

Fourth, the HRC reiterated that States parties must take all necessary measures to stop the proliferation of weapons of mass destruction, including measures to prevent their acquisition by non-state actors, to refrain from developing, producing, testing, acquiring, stockpiling, selling, transferring and using them, to destroy existing stockpiles, and to take adequate measures of protection against accidental use, all in accordance with their international obligations. This is a valuable reminder of the duties deriving, regarding nuclear weapons, from the NPT, Comprehensive Test Ban Treaty (CTBT) as well as the TPNW, once entered into force. Moreover, it contains an important statement conveying that the intentional use of nuclear weapons by States is only one among several possible scenarios threatening humanity and future generations and that, as a result, the only way to guarantee that they are never used again lies in their total elimination. Such language is also contained in the preamble of the TPNW:

*Deeply concerned about the catastrophic humanitarian consequences that would result from any use of nuclear weapons, and recognizing the consequent need to completely eliminate such weapons, which remains the only way to guarantee that nuclear weapons are never used again under any circumstances,*

*Mindful of the risks posed by the continued existence of nuclear weapons, including from any nuclear-weapon detonation by accident, miscalculation or design, and emphasizing that these risks concern the security of all humanity, and that all States share the responsibility to prevent any use of nuclear weapons,<sup>[9]</sup>*

Fifth, the HRC also recalls that states parties must also respect their international obligations to pursue in good faith negotiations in order to achieve the aim of nuclear disarmament under strict and effective international control. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ unanimously held that “[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”<sup>[10]</sup> This duty is imposed on all States, whether possessing nuclear weapons or not, and whether having ratified the NPT or not. Moreover, the fundamental legal principle of good faith requires implementation of the obligation without unreasonable delay and within a timeline set by participating States. After long years and decades of stagnation in the field of nuclear disarmament, a new attempt to implement Article VI was undertaken by progressive states in cooperation with civil society, beginning in 2013 with a series of conferences on the humanitarian impacts of nuclear weapons, that eventually led to the adoption, in July 2017, of the TPNW, whose Article 4 TPNW provides for a disarmament clause with the title “towards total elimination of nuclear weapons”.

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 act, nowadays codified in the 2001 ILC draft articles,<sup>[11]</sup> which may apply to situations of States having tested or used nuclear weapons in or against other States. Moreover, it is noteworthy to recall that Article 2 § 3 of the ICCPR imposes on States Parties the duty to provide the victims for an effective remedy.<sup>[12]</sup> In addition, Article VII of the UNGA 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.”[\[13\]](#)

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. In other words, the scope of application of these two mechanisms is different; in addition, Articles 6 § 3 and 7 § 6 TPNW (international cooperation and assistance) explicitly reserve the applicability of principles of general international law:

*6 § 3. The obligations under paragraphs 1 and 2 above shall be without prejudice to the duties and obligations of any other States under international law or bilateral agreements.*

*7 § 6. Without prejudice to any other duty or obligation that it may have under international law, a State Party that has used or tested nuclear weapons or any other nuclear explosive devices shall have a responsibility to provide adequate assistance to affected States Parties, for the purpose of victim assistance and environmental remediation.*

Accordingly, there should be no or only little room for potential norm conflicts between victim assistance under Article 6 § 1 TPNW and State responsibility, as referred to by HRC GC no. 36.

### **Final observations**

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, last year, and of GC no. 36 a couple of days ago 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. The right to life, without doubt a very fundamental but by far not the only human right relevant for nuclear weapons, and 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, in the midst of all the negative and worrying news in the nuclear field recently, such as the 2018 US Nuclear Posture Review, its Russian equivalent, the repudiation by the US Administration of the Joint Comprehensive Plan of Action (JCPA) concerning Iran or the intention to withdraw from the INF Treaty, driven by pure Realpolitik and the law of the stronger, the adoption of a document such as GC no. 36, inspired by reason, the principles of international law and considerations of humanity, are more than welcome and have to be reproduced elsewhere.

Finally, maybe 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.

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.

[1] ICJ Reports 1996, § 25.

[2] 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.

[3] 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.

[4] See Rietiker and Burroughs, *op.cit.*, Follow-Up Submissions.

[5] *Ibidem.*

[6] ICJ, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, *ICJ Reports* 1996, § 35.

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

[8] *Ibidem.*, 276-277.

[9] Paras 2 and 3.

[10] Conclusion F) of the Advisory Opinion.

[11] Res. A/56/10, of 12 December 2001.

[12] See also Paragraph 4 of GC no. 36.

[13] Article VII b).

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