

**The Right to Life Versus Nuclear Weapons:
A Bold Intervention by the UN Human Rights Committee**

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I'd like to begin by expressing my gratitude for being here today and for my inclusion on this panel. As a law student intensely committed to wielding the law to make a safer, better world for all throughout my career, I'm honored to be here today with my co-panelists discussing the UN Human Rights Committee's recent comment on the right to life.

While opinions may differ as to just how the Committee's general comments may affect the development of international legal norms, it's quite clear that the recent comment 36 complements the pre-existing customary norm prohibiting not only the use of nuclear weapons, but their threat of use as well. The comment reflects similarities to the interpretation of the legality of nuclear weapons offered by the International Court of Justice in its 1996 *Nuclear Weapons Advisory Opinion*. In this opinion, the Court said that the use or threat of use of nuclear weapons would be illegal in scenarios where such use or envisioned use violated international law, particularly humanitarian law.

The Human Rights Committee, in paragraph 66 of its new comment, uses language that supports the development of customary law prohibiting the threat or use of force by asserting outright that such threat or use of nuclear weapons is incompatible with respect for the right to life. The right to life affirmed by general comment 36 also relies heavily on the humanitarian law-based rationale referred to by the ICJ decades earlier. As international humanitarian law encompasses principles like necessity and proportionality, as well as distinctions between civilians and combatants, it is very difficult to envision a scenario in which either the threat or use of nuclear weapons could be condoned under international law. The comment takes seriously states' obligations under our current regime to both protect people from the effects of nuclear weaponry and also to pay reparations to survivors of prior nuclear attacks or testing. Coming on the heels of additional developments in our legal framework—like the Treaty on the Prohibition of Nuclear Weapons—this new comment has the potential to offer strong reinforcement of the customary norm against the use or threat of use of nuclear weapons.

The consequences of nuclear force—even through targeted, tactical weapons—are too massive, permanent, and indiscriminate to warrant any lawful use or threat; the Human Rights Committee maintains this gravity in their comment. Neither the impact of a nuclear weapon nor its lasting radiological effects distinguishes between combatants and civilians—an essential requirement in humanitarian law. While the ICJ abstained from holding that nuclear weapons are by default so indiscriminate as to *always* violate humanitarian or other international laws, the court unanimously agreed that *if* such use violated humanitarian law, it would be de facto unlawful. The Human Rights Committee maintains what the ICJ originally said in its *Advisory* opinion:

that nuclear weapons cause “untold human suffering” and indescribably harm “generations to come.” Their comment goes further in affirming that nuclear weapons intrinsically violate the right to life, and the Committee thus a bit more readily than the ICJ suggests the obvious: the threat or use of nuclear weapons cannot be lawful if we are to claim a fundamental respect for life within our global system.

The general prohibition of force codified in the UN Charter concurrently prohibits threats of force, too. The text of general comment 36 likewise blends the two prohibitions stating, “The threat or use of weapons of mass destruction, in particular nuclear weapons...is incompatible with respect for the right to life and may amount to a crime under international law.” As such, when considering how the comment reinforces customary norms against threats of nuclear force, it’s important to define what constitutes a threat.

While notoriously difficult to pin down, generally, a threat of force comprises an express or implied credible assertion, from one state to a target state, of readiness to engage in force, should the targeted state trigger a particular condition, usually within the context of a dispute. While an ongoing dispute makes the identification of a threat easier—as analyzing credibility and rationality in this context tends to be more straightforward—a threat can be made independent of any prior dispute as well.

Credibility can present a challenge in identifying unlawful threats of force, but the analysis is arguably simplified for threats of nuclear force. The credibility of a threat generally involves two elements: capability and rationality. An actor threatening force must have the ability to exert such force, and following through on the threat likely needs to make some rational sense for the threat to be deemed credible (and thus possibly unlawful). When it comes to nuclear threats, however, the two elements can largely be distilled into capability alone, as, I would argue, there can be no legitimate rationality in threatening such cataclysmic violence. Whether it seems reasonable to threaten force can be subjective and hard to pin down in some circumstances, but with nuclear force, it is a moot point; it is never reasonable nor rational to threaten with a nuclear weapon, particularly in a world where the right to life is non-derogable and should be construed broadly, per Human Rights Committee’s comment. To that end, if a state has nuclear weapon capabilities—or the active backing of a nuclear weapon state—nearly any threat of nuclear force should be credible and legitimate-enough to be classified as illegal.

Some assert that an inflammatory speech alone may not constitute a legitimate and credible threat. But when an incendiary speech by a leader of a nuclear weapon state intimates nuclear force, the threat is credible-enough to constitute unlawful action. For example, many people, rightly so, took President Trump very seriously when he threatened the total destruction of North Korea in his speech at the General Assembly in 2017. As a reminder, Trump said that if the United States is “forced to defend itself or its allies, we will have no choice but to *totally destroy* North Korea.” North Korean foreign minister Ri Yong Ho responded that targeting the United States mainland with North Korea’s rockets was “inevitable” after Trump’s remarks. Both leaders’ words constitute dangerous and unlawful threats of nuclear force. While issued in the context of provocative speeches that some wrote off as continued political posturing by two of the world’s most volatile leaders, as threats of nuclear force by two nuclear-capable countries, their credibility is established (regardless of the rationality of the words). Again, the

indiscriminate gravity of nuclear force makes threats of that kind inherently more dangerous regardless of variations in perceived credibility.

Some find that threats in self-defense offer a slightly different opportunity to consider whether a threat of nuclear force is ever legal or strategically appropriate. Many scholars assert that if a threat contributes to averting actual force, then it is (or should be) lawful. The force envisaged in threats of self-defense, though, must still meet the principles of necessity and proportionality and comply with international law generally. The ICJ takes the position that proportionality must manifest as an expression of force only to the extent necessary to stop or repel an attack. A threat of nuclear force will always then threaten to far exceed any provoking conventional use of force and likely cannot be lawful. A threat of nuclear force in response to another's first use of nuclear weapons or other weapons of mass destruction, while one could argue may be a proportionate response, remains indiscriminate to the extent that such a threat would *still* breach international law and violate the right to life.

While there is more room for legitimate debate as to what constitutes a lawful threat of conventional force, I would argue that a threat of nuclear force is never lawful when held accountable under international humanitarian law regardless of whether the threat is issued from an offensive or defensive posture. The Human Rights Committee's revised general comment and its emphasis on the broad and essential right to life for all people reinforces this notion and will hopefully be wielded as a tool moving forward to promote effective disarmament and the eventual legal prohibition of nuclear weapons.