

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

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Those of us who were around a quarter of a century ago when we campaigned to get nuclear weapons before the International Court of Justice – it was when I first met Roger Clark because he was there for the same reason – those of us that were there at the time will recall that it was not easy, in fact it was rather difficult, to get the word threat into the question that we wanted and succeeded in putting to the ICJ. As you have just heard from both Roger and Ariana, threat is not an easily defined term. So, and I am repeating in part what you just said about President Trump and North Korea, but when he talked about raining “fire and fury” on North Korea, was that a threat? Or, was that one of the hyperboles that our president is so fond of?

And to complement what the president did, we can also look at what Kim Jong-un was saying and doing about his missile capability. It reminded me of a story once told to me by Selig Harrison, that great North Korea academic expert. He said that he decided to take a fairly high North Korean official to lunch. In the course of that lunch his lunch partner said, “Do you know we now have the capability to hit New York City?” Selig Harrison said, “If you’ll forgive me, I don’t think that’s a correct statement,” to which his lunch partner replied, “alright, then we’ll hit Chicago instead”. So, what was that, was that a threat, or was that a joke?

So threat is not easy to define, and I would like to make a small contribution to that definition. It takes the form of referring you to Article 120.14 of the Penal Law of New York State, which reads in part as follows: “A person is guilty of menacing (Please remember that word as I go on) in the second degree when he/she intentionally places or attempts to place another person in reasonable fear of physical injury, or serious physical injury or death by displaying a deadly weapon.” Now is that not the perfect definition of the head of a nuclear-armed state?

So perhaps it would be a good idea to expand the discussion of the term “threat” to include “menacing”, which I have just read the definition of for you in the law, which is something that you will find in the penal code of a great many countries. And menacing in that sense does not even have to be limited to situations threatening the right to life. It applies to any situation in which a nuclear-armed entity finds itself in conflict with another entity regardless of whether such use is justified by self-defense or “deterrence”. You should know that laws similar to the New York law which I have quoted to you is found in the penal codes in a great many other states of the United States.

* Transcript of remarks as delivered, slightly edited.

So let me know turn to the very welcome, but somewhat mysterious paragraph 66 of General Comment 36 on the right to life clause, which is Article 6.1 in the International Covenant. The reason I call it mysterious is that actually not a great deal has changed on the ground. There are fewer nuclear weapons right now in existence than there were in 1984 when the second comment, which Roger spoke about, was issued by the Human Rights Committee. So, what are the members of the Human Rights Committee doing here, what are they telling us? Are they saying that “we members of the HRC, or our predecessors, goofed by not referring to the complete incompatibility of nuclear weapons with the right to life in the 1984 version of the comment”? Or, are they saying that the illegality of threat or use of nuclear weapons under customary international law is clearer today than it was in 1984? Or, are they intimating that threat, use, development, acquisition, etc. of nuclear weapons is so horrendously violative of elementary human rights standards that they must also be declared to be clearly illegal?

Knowing that the mansion of international law has many chambers, I would say it's a bit of all of the above, but I would also add a reference to Article 38 to the Statute of the International Court of Justice, which although it mentions only sources of law applicable to rulings by the ICJ, is in fact regarded generally in international law circles as applicable to every instance in which the term “international law” appears. In other words you're going to find references to the elements of Article 38 whenever a lawyer somewhere or a judge wants to defend his or her reference to Article 38 as a source of international law. These elements are not complementary, they are not a bunch of things which taken together give you international law, but any single element in Article 38 can be a source of international law and frequently is.

I will just quote some of the more relevant ones for you. Nuclear weapons could be said to be illegal under “international custom” or under the “general principles of law accepted by civilized nations”. Please don't ask me to define “civilized nations”, although if you take seriously what I have been talking about here it would appear that countries that rely on the use of nuclear weapons are not civilized nations, and the others, the many others who consider them incompatible with international law are the civilized ones.

The last element I want to mention to you under Article 38 reads “the teachings of the most highly qualified publicists of the various nations”. That I have always liked a lot, that part, because it says in effect that the most qualified publicists of international law, like Roger Clark now and Ariana at some point in the future, will not only be interpreters of international law, but they can be creators of international law. It gives great opportunities for creating international law and some of us have been trying to do that in relation to nuclear weapons for more than half a century.

So the main thing to be taken away from this discussion is that paragraph 66 in General Comment 36 adds an absolutely unqualified unequivocal legal condemnation of nuclear weapons and that this new condemnation is joining the long list of other condemnations of nuclear weapons as incompatible with international law. And I think you have heard from the previous two speakers that it must be taken as a necessary interpretation of the General Comment that nuclear weapons are incompatible with international law and that they are also more specifically incompatible with the right to life.

One comment I would also make about why this is happening now, this General Comment, when it hasn't happened before. I am indebted to my wife Cora for reminding me that Christie

Weeramantry, the great Sri Lankan international law expert, has said on occasion (and by the way Judge Weeramantry was a very active member of the organizations that we represent here and we miss him - he died about a year ago) that “the law does not necessarily change, but the interpretation of the law changes”. I think we can think of the new General Comment in those terms.

Before I yield the floor for the general discussion, I just want to remind you on this 70th anniversary of the Universal Declaration of Human Rights what Eleanor Roosevelt, who was one of the creators, perhaps even the principal one, of the Universal Declaration, said about human rights. She said “human rights begin in the home”.