

UN Human Rights Committee - General Comment no. 36 on the Right to Life

**Threat or Use of Weapons of Mass Destruction and the Right to Life:
Follow-up Submissions**

**International Association of Lawyers Against Nuclear Arms (IALANA)
and Swiss Lawyers for Nuclear Disarmament (SLND)**

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The present submissions are limited to para. 13 of draft General Comment no. 36 on the Right to life (Article 6 ICCPR) currently under consideration,¹ which reads 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].”

IALANA/SLND welcome the inclusion of para. 13 and consider this clause a useful and appropriate statement against the use and threat of WMD, in particular nuclear weapons, and a powerful statement of the imperative for nuclear disarmament. **Therefore, the present submissions mainly concerns the two parts that are currently [between brackets]. IALANA/SLND urge the members of the Committee to maintain those parts in the final version of General Comment no. 36. IALANA/SLND also suggest that the word “lawful” be inserted between “necessary” and “measures”, so the first part of the second sentence would read “States parties must take all necessary lawful measures to stop the proliferation of weapons of mass destruction” .**

¹ http://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf.

1. As far as the notion of [threat] of nuclear weapons is concerned, allusions to possible use of nuclear weapons have been made in recent years, in connection with the Ukraine crisis and in the Korean context, and have generally been a staple of the nuclear age. In recent remarks at the United Nations, Foreign Minister Ri Yong Ho of the Democratic People's Republic of Korea referred to "our rockets' visit to the entire U.S. mainland,"² and US President Donald Trump has made recent statements that suggest the use of nuclear weapons, referring to "fire and fury"³ and, in a speech at the United Nations, saying that "if it is forced to defend itself or its allies, we will have no choice but to totally destroy North Korea".⁴ Whether or not each of these and other such statements is considered to constitute a "threat" in the legal sense, they are powerful evidence that the possible use of nuclear weapons continues to be invoked in international relations in a menacing way. Moreover, most nuclear-armed states have public doctrines providing that use of nuclear weapons will be considered in certain circumstances, and even providing that nuclear weapons *will* be used in response to a prior nuclear attack.

Given the history and current context, it is entirely appropriate and right that the General Comment address the threat as well as the use of weapons of mass destruction. This is particularly so because it is human rights at issue here. IALANA/SLND are of the opinion that the threat or use of nuclear weapons massively violates the right to life in ways not reducible to law intended to govern the conduct of warfare.⁵ The catastrophic consequences of use of nuclear weapons vastly exceed the ordinary boundaries of armed conflict and adversely impact populations in third-party states, the natural environment necessary to sustain human life, and future generations. The use and threatened use of nuclear weapons accordingly also violates international human rights law, most centrally the right to life. It is therefore appropriate that the preamble to the Treaty on the Prohibition of Nuclear Weapons adopted 7 July 2017 at the United Nations invokes international human rights law as well as international humanitarian law.

From our point of view, the right to life is violated even if, implausibly, nuclear weapons are possessed and deployed indefinitely into the future but not used. Deployment coupled with declared policies that the weapons may be used when vital interests are at stake casts a shadow over exercise of the right of life.⁶ Referring to the threat to the right to life posed by nuclear

² 23 September 2017, https://gadebate.un.org/sites/default/files/gastatements/72/kp_en.pdf.

³ "Trump Threatens 'Fire and Fury' Against North Korea if It Endangers U.S.," New York Times, 8 August 2017, https://www.nytimes.com/2017/08/08/world/asia/north-korea-un-sanctions-nuclear-missile-united-nations.html?_r=0.

⁴ 19 September 2017, https://gadebate.un.org/sites/default/files/gastatements/72/us_en.pdf.

⁵ <https://safna.org/2016/09/08/the-incompatibility-of-wmd-to-the-right-to-life-article-6-iccpr-a-submission-to-the-un-human-rights-committee/>

⁶ In his argument to the International Court of Justice in the Advisory Opinion proceedings, Australian Foreign Minister Gareth Evans observed: "The threat of global annihilation engendered by the existence of such weapons, and the fear that this has engendered amongst the entire post-war generation, is itself an evil, as much as nuclear war itself. If not always at the forefront of our everyday thinking, the shadow of the mushroom cloud remains in all our minds. It has pervaded our thoughts about the future, about our children, about human nature. And it has pervaded the thoughts of our children themselves, who are deeply anxious about their future in a world where nuclear

weapons, the Committee in its General Comment no. 14 on the Right to Life observes that “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...”⁷

Deployment of nuclear weapons coupled with policies contemplating their use also runs counter to the UN Charter’s clear injunction that the lawful threat of force is the exception, not the rule.⁸ According to the International Court of Justice (ICJ), if the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2 § 4 of the UN Charter.⁹ Additionally, a direct threat to use an already deployed nuclear weapon would also run counter to international humanitarian law. The ICJ stated that “[i]f an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law.”¹⁰ Under Article 51 § 2 of Additional Protocol I to the 1949 Geneva Conventions, “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”¹¹ Such acts or threats are today also prohibited in international and non-international armed conflicts by customary humanitarian law.¹²

Finally, the core prohibitions of the Treaty on the Prohibition of Nuclear Weapons, set out in Article I, bar states parties from developing, testing, producing, and possessing nuclear weapons, and from using and *threatening to use* such weapons. This provision is a powerful statement 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, IALANA has already emphasized the importance of the explicit inclusion of the prohibition of threatened use in the treaty.¹³ It will be a significant tool in the ongoing campaign to delegitimize ‘nuclear deterrence’ as contrary to international law as well as common sense in view of the immense risks involved. Delegitimization of nuclear deterrence is essential to success in achieving the global abolition of nuclear arms.¹⁴

The Treaty on the Prohibition of Nuclear Weapons has not entered into force yet, but was adopted by a vote of 122 to 1, with 1 abstention, and already more than 50 states have signed the

weapons remains.” Verbatim Record, Public Sitting, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict and Legality of the Threat or Use of Nuclear Weapons*, 30 October 1995, p. 42.

⁷ General Comment no. 14, Right to Life, *Nuclear Weapons and the Right to Life*, 9 November 1984.

⁸ Article 2 § 4 of the UN Charter: “All Members shall refrain in their international relations from the *threat* or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” (Emphasis added.)

⁹ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, at § 47.

¹⁰ *Ibidem*, § 78.

¹¹ Emphasis added.

¹² See J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1, Cambridge University Press, 2005, Rule 2, pp. 8-11.

¹³ See: <https://safna.org/2017/09/19/ialana-statement-regarding-the-treaty-on-the-prohibition-of-nuclear-weapons-on-the-occasion-of-its-opening-for-signature-on-20-september-2017/>

¹⁴ *Ibidem*.

treaty. Considering the broad support that it enjoys, the treaty is expected to enter into force within one or two years. In any event, at least the prohibitions of using and threatening to use nuclear weapons apply to all states whether or not they are party to the treaty, as a matter of universal law rooted in international humanitarian law, the UN Charter, and principles of humanity and dictates of public conscience.¹⁵

In light of what precedes, IALANA/SLND urge the Committee to keep the notion of [threat] in the final version of General Comment no. 36.

2. The second point of IALANA/SLND' submissions concern the sentence [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]. Our organizations are convinced that it too should be retained in the final version of General Comment no. 36, for the following four reasons.

First, we reiterate that Para. 4 of current draft General Comment no. 36 refers explicitly to the duty for States Parties to provide “effective remedies and reparation” to all victims of the right to life:

“Paragraph 1 of article 6 of the Covenant (...) lays the foundation for the obligation of States parties to respect and to ensure the right to life, to give effect to it through legislative and other measures, and to provide effective remedies and reparation to all victims of violations of the right to life.”

Second, IALANA/SLND recall that Article 2 § 3 of the ICCPR imposes on States Parties the duty to provide the victims for an effective remedy, which implies the right to adequate, effective and prompt reparation for the harm endured:

“Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity...”

IALANA/SLND observe, third, that Article VII of the UNGA Resolution 60/147, adopted on December 16, 2005,¹⁶ states the rights of victims of gross violations of international human rights law and serious violations of international humanitarian law in the following terms:

¹⁵ *Ibidem.*

¹⁶ “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.”

“Victims’ right to remedies:

Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to the following as provided for under international law : (...)

(b) Adequate, effective and prompt reparation for harm suffered (...)”

Fourth, the principle that States must guarantee reparation for the most serious abuses of human rights, constituting crimes under international law, has more recently been confirmed in an *amicus curiae* brief by the European Commission in the case of *Kiobel, Esther, et al., Royal Dutch Petroleum, et al.* (10-1491) decided by the U.S. Supreme Court on April 17, 2013:

“(...) This application of the ATS [Alien Tort Statute] is consistent with the growing recognition in the international community that an effective remedy for repugnant crimes in violation of fundamental human rights includes, as an essential component, civil reparations to the victims. (...)”¹⁷

Fifth, Article 6 § 1 of the above mentioned Treaty on the Prohibition of Nuclear Weapons contains a key clause imposing on States Parties the obligation to provide adequate assistance to victims of use and testing of nuclear weapons on their territory:

“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.”¹⁸

This clause is clearly inspired by humanitarian and human rights principles and similar language had already been included in the Ottawa¹⁹ and Oslo Conventions.²⁰ Bearing in mind that international treaties have to be interpreted in light of their surrounding legal landscape, and not in a legal vacuum,²¹ IALANA/SLND are convinced that an interpretation of Article 6 of the ICCPR, as far as nuclear weapons are concerned, has to take into account Article 6 of the Treaty on the Prohibition of Nuclear Weapons. Therefore, the phrase between brackets has its place in General Comment no. 36.

¹⁷ P. 18 of the *amicus curiae*.

¹⁸ See also Article 7 of the same treaty, on international cooperation and assistance.

¹⁹ Article 6 § 3 of the Ottawa Convention.

²⁰ Article 5 § 1 of the Oslo Convention.

²¹ Article 31 § 3 c) of the VCLT: “3. There shall be taken into account, together with the context (...) Any relevant rules of international law applicable in the relations between the parties.”

In light of the foregoing, IALANA/SLND ask the Committee to keep the sentence [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] in the final version of General Comment no. 36.

3. Finally, the phrase “necessary measures to stop the proliferation of weapons of mass destruction” in an international law document ordinarily would be read to mean necessary measures within the framework of international law. However, one war justified on grounds of counterproliferation of WMD has already been conducted outside the bounds of the UN Charter, namely the US/UK invasion of Iraq in 2003. The United States continues to maintain that it may take unilateral, preemptive military action in self-defence or in defence of allies. This doctrine encompasses preventive military action, that is, action taken not in response to an actual or imminent armed attack but rather to a potential attack or a threatening capability. It therefore is not consistent with the UN Charter and its Article 51. In connection with the current crisis involving the United States and the Democratic People’s Republic of Korea, the U.S. government is considering unilateral, preventive military action.²² Other such scenarios, involving other countries, are entirely possible in the future.

Consequently, IALANA/SLND urge that the word “lawful” be inserted so that the phrase reads “necessary lawful measures to stop the proliferation of weapons of mass destruction.” This would help make it clear that the comment does not in any way endorse measures taken outside the framework of the UN Charter and international law.

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²² Cf. Peter Baker and Choe Sang-Hun. “Trump Threatens ‘Fire and Fury’ Against North Korea if It Endangers U.S.,” *The New York Times*, August 8, 2017 (a “pre-emptive military strike, while a last resort, is among the options they have made available to the president”).

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