

Dealing with Human Rights in the Nuclear Age

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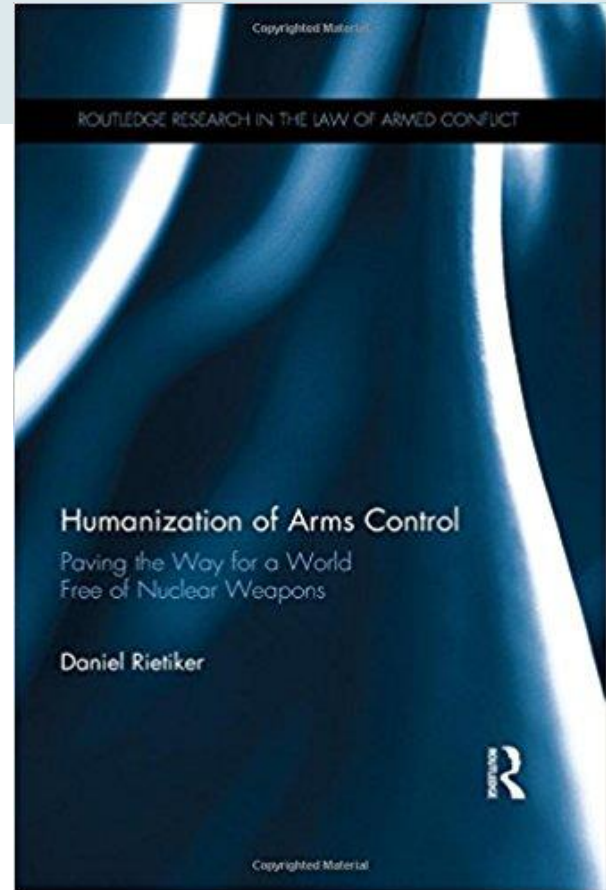
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Daniel Rietiker, *Humanization of Arms Control: Paving the Way for a World Free of Nuclear Weapons*, Routledge 2017, 322 pages.



Treaty on the prohibition of nuclear weapons

“*The States Parties to this Treaty (...) Reaffirming* the need for all States at all times to comply with applicable international law, including international humanitarian law and **international human rights law**” (Preamble, § 8)

“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.” (Article 6 § 1)

The advantages of human rights law in the nuclear age

- ▶ Applicability in all circumstances
- ▶ Dynamic interpretation of human rights and positive obligations:
 - ▶ For instance, duty to protect the local population against environmental disasters, to inform about potential risks and to take appropriate measures after such a disaster occurred (including procedural obligations)
 - ▶ Duty to protect against violence from other individuals, incl. terrorist attacks
 - ▶ Duty to promote economic, social and cultural rights
 - ▶ Duty to reduce child mortality
- ▶ Institutional support (in particular regional courts)
- ▶ Particular nature of certain rights (*jus cogens*)
- ▶ Focus on certain particularly vulnerable groups of people

“Direct” victims of nuclear attacks

The Right to Life

- ▶ Article 6 § 1 of the 1966 International Covenant on Civil and Political Right (ICCPR):
- ▶ “Every human being has the inherent right to life. This right shall be protected by law. No one shall be **arbitrarily deprived** of his life.”

The Right to Life

- ▶ **Article 2 European Convention on Human Rights (ECHR):**
- ▶ “1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
- ▶ 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the **use of force which is no more than absolutely necessary:**
 - ▶ a. in defence of any person from unlawful violence;
 - ▶ b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - ▶ c. in action lawfully taken for the purpose of quelling a riot or insurrection.”

Article 15 ECHR: Derogation in time of emergency

- ▶ “1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
- ▶ **2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.**
- ▶ (...).”

Khamzayev and Others v. Russia, no. 1503/02, May 3, 2011

“180. (...) the Court may be prepared to accept that the Russian authorities had no choice other than to carry out aerial strikes in order to be able to take over Urus-Martan, and that their actions were in pursuit of the aim set out in paragraph 2 (a) of Article 2 of the Convention, as alleged by the Government. **It is, however, not convinced, having regard to the materials at its disposal, that the necessary degree of care was exercised in preparing the operation of 19 October 1999 in such a way as to avoid or minimise, to the greatest extent possible, the risk of a loss of life, both for the persons at whom the measures were directed and for civilians (...).”**

Varnava and Others v. Turkey, no. 16064/90, Sept. 18, 2009

« 186. Article 2 ECHR therefore imposes a continuing obligation on the respondent Government to account for the whereabouts and fate of the missing men in the present case. »

Draft General Comment no. 36 on the Right to life [UN Human Rights Committee (under consideration)]

- ▶ **“13. 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]”.

Prohibition of inhuman and degrading treatment, including torture

- ▶ For instance Article 3 ECHR: **“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”**

“195. The Court reiterates that Article 3 of the Convention enshrines one of the most fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (...). **The Court has confirmed that even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned (...).**” (*El-Masri v. The Former Yugoslav Republic of Macedonia*, GC, December 13, 2012).

Prohibition of inhuman and degrading treatment, including torture

- ▶ Absolute right!
- ▶ Threshold-theory
- ▶ 3 different types of treatment, namely
 - ▶ **Degrading**: a treatment « such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them » (*Kudla v. Poland*, GC, no. 30210/96, October 26, 2000, § 92).
 - ▶ **Inhuman**: implies « acute mental and physical suffering » that would « expose the victims to a real risk of dying under most distressing circumstances. » (*D. v. UK*, no. 30240/96, May 2, 1997, § 53).
 - ▶ **Torture...**

Destruction of property by nuclear attack

- ▶ has been considered inhuman treatment (Article 3 ECHR) (*Selçuk and Asker v. Turkey*, no. 23184/94, April 24, 1998, § 77).
- ▶ is likely to amount to violations of the right to respect of private and family life and home (for instance Article 8 ECHR) and of the right to property (for instance Article I of Protocol no. 1 to the ECHR) [non absolute rights that can be restricted and derogated from under certain conditions].

« Indirect » victims of nuclear attacks [and victims of other nuclear activities and accidents] – the relevant rights

- ▶ **1. Right to the highest standard of health** (in particular Article 12 § 1 of the International Covenant on Economic, Social and Cultural Rights, ICESCR)
 - ▶ General Comment no. 14 of the Committee on ESCR: « States should...refrain from unlawfully polluting air, water and soil, e.g....**from using or testing nuclear...weapons**, if such testing results in the release of substances harmful to human health. »
- ▶ **2. Right to a healthy environment** (see for instance the ECtHR's « environmental » jurisprudence).

« Indirect » victims of a nuclear attack – the relevant rights

- ▶ **3. Right to an adequate standard of living, in particular the right to food and to water;** for instance Article 11 § 1 of the ICESCR:
 - ▶ « The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions (...). »

The right to water

- ▶ General comment no. 15 of the Committee on ESCR: Article 11 § 1 contains the right to water!
- ▶ **Article 14 § 2 of the Convention on the Elimination of Discrimination against Women (CEDAW):** States shall ensure to all women the right to « enjoy adequate living conditions, particularly in relation to...**water supply.** »
- ▶ **Article 24 § 2 of the UN Convention on the Rights of the Child (UNCRC)** requires States Parties to combat disease and malnutrition through, inter alia, « the provision of adequate nutritious foods and **clean drinking-water**, taking into consideration the dangers and risks of environmental pollution. » (sub-para. c).

The right to water

- ▶ Important contribution by regional human rights courts, in particular the African Commission of Human and Peoples' Rights:
 - ▶ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International v. Kenya*, 276/2003, February 4, 2010.
 - ▶ *Sudan Human Rights Organization and the Centre on Housing Rights and Evictions v. The Sudan*, 279/03, May 27, 2009.
- ▶ And the ECtHR:
 - ▶ *Tatar v. Romania*, 67021/01, January 27, 2009.
 - ▶ *Dubetska and Others v. Ukraine*, no. 30499/03, February 10, 2011.

Focusing on vulnerable groups

▶ **Treaty on the prohibition on nuclear weapons:**

- ▶ « *The States Parties to this Treaty, cognizant that the catastrophic consequences of nuclear weapons...have a disproportionate impact on **women and girls**, including as a result of ionizing radiation* » (Preamble, § 4).
- ▶ « *Recognizing the disproportionate impact of nuclear-weapon activities on **indigenous peoples*** » (Preamble, § 7).

Focusing on vulnerable groups: children's rights

- ▶ **Article 24 UNCRC (Health and health services)**
- ▶ “1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.
- ▶ 2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
 - ▶ (a) **To diminish infant and child mortality**
 - ▶ (...)”

Focusing on vulnerable groups: children's rights

- **Article 6 UNCRC (Right to life, survival and development):**
 - « 1. States Parties recognize that every child has the inherent right to life. States Parties shall ensure to the maximum extent possible the survival and development of the child. »
- See also Article 12 § 2 a) ICESCR and Article 14 § 2 a) of the African Charter on the Rights and Welfare of the Child

Conclusions

- ▶ Human rights law has relevant advantages, in particular if it can rely on a strong institutional support,
- ▶ « Direct » victims of nuclear attacks: total destruction of all basic human rights (civil and political rights),
- ▶ « Indirect » victims: relevance of « environmental » rights (for instance ECtHR); economic, social and cultural rights,
- ▶ Focusing on vulnerable groups (see Treaty on the prohibition of nuclear weapons), and
- ▶ Rights of women and rights of children: relevance for future generations!