

AUSTRALIA, NUCLEAR WEAPONS AND THE RIGHT TO LIFE

Australia's Compliance with Article 6 of the *International Covenant on Civil and Political Rights* in respect of Nuclear Weapons

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A Submission by the International Campaign to Abolish Nuclear Weapons to the United Nations Human Rights Committee

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1. INTRODUCTION

1.1 ABOUT THE SUBMISSION

1.1.1 This submission was prepared by Tim Wright, with the assistance of Associate Professor Tilman Ruff, on behalf of the Australian Management Committee of the International Campaign to Abolish Nuclear Weapons ('ICAN') in response to Australia's Common Core Document lodged with the Human Rights Committee ('Committee') on 25 July 2007. That document incorporates Australia's Fifth Report under the *International Covenant on Civil and Political Rights* ('ICCPR'), which ICAN considers to be deficient for its failure to address matters relating to nuclear weapons.

1.1.2 This submission examines Australia's compliance with Article 6 of the *ICCPR* in respect of nuclear weapons. It draws on the Committee's jurisprudence from individual complaints brought under the *First Optional Protocol* to the *ICCPR* as well as its two general comments on the right to life. It refers also to the 1996 advisory opinion of the International Court of Justice ('ICJ') on the legality of the threat or use of nuclear weapons.¹

1.2 ABOUT OUR CAMPAIGN

1.2.1 ICAN is a global grassroots campaign supported by 130 non-government organisations in 58 countries, including 46 in Australia. It was initiated in 2007 by the Nobel Peace Prize-winning International Physicians for the Prevention of Nuclear War. ICAN aims to mobilise a groundswell of public opposition to nuclear weapons and to generate support among States for the negotiation of a legally binding nuclear weapons convention. We believe that nuclear weapons are fundamentally incompatible with human rights, particularly the right to life.

1.2.2 Our partner organisations include the World Federation of United Nations Associations, the Campaign for Nuclear Disarmament (United Kingdom), Women's International League for Peace and Freedom, the Nobel Women's Initiative and Mayors for Peace. Our prominent supporters include His Holiness the Dalai Lama, former ICJ judge Christopher Weeramantry, former UN weapons inspector Dr Hans Blix, former UN under-secretary-general for disarmament affairs Jayantha Dhanapala, and former Australian prime minister Malcolm Fraser.

2. AUSTRALIA'S COMPLIANCE WITH ARTICLE 6

2.1 ISSUES OF CONCERN

2.1.1 ICAN believes that several policies of the Australian Government concerning nuclear weapons are inconsistent with Article 6 of the *ICCPR*, which places positive obligations on States parties to protect the right to life of people within their territory. ICAN argues that:

¹ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 225.

1. Australia, in allowing the **US Joint Defence Space Research Facility** ('Pine Gap') to operate on its territory, puts people within its territory at a heightened risk of nuclear attack by an adversary of the United States, and this is inconsistent with its obligations under Article 6. The military facility, located south-west of Alice Springs in central Australia, would likely play a role in any use of US nuclear weapons in Asia or the Middle East. It is also anticipated to play a role in US missile defence. Pine Gap's extensive surveillance and intelligence functions make it a key component of US military, including nuclear, command, control, communications and intelligence (C3I) capabilities. This makes the facility a potentially high-value target for nuclear attack by adversaries either in anticipation of a US-led nuclear assault or in retaliation for such an assault.
2. In allowing **US nuclear-armed submarines** to enter its territorial waters,² the Australian government puts people in Australia, particularly those living close to where the submarines operate, at a heightened risk of nuclear attack by adversaries of the United States, as well as a nuclear disaster resulting from human, electronic or mechanical error or failure.³ This amounts to a violation of the Australian government's obligation under Article 6 to protect the right to life of people within its territory.
3. The Australian government, in relying on the so-called protection of extended US nuclear deterrence (the '**US nuclear umbrella**'), places people within its territory at a heightened risk of nuclear attack, and this amounts to a violation of its obligations under Article 6 of the *ICCPR*.⁴ Respecting the right to life requires the Australian government to implement policies which reduce the dangers of any potential use of nuclear weapons, as any such use, even in a regional nuclear war distant from Australia, jeopardises the lives of Australians through risks of escalation of nuclear conflict that are difficult to predict and even more difficult to control; because radiation fallout disperses globally; because even regional nuclear war is likely to cause severe global social, economic and political upheaval, large numbers of refugees and disruption of trade; and because even a regional nuclear war involving only a small fraction of 1 per cent of the world's nuclear arsenal is expected to result in global climatic consequences persisting for a number of years, severely impacting on global food production. More specifically, respecting the right to life requires the Australian government to minimise the danger that its population would be directly targeted by nuclear weapons, whether those of states or of non-state groups. Respecting this right consistently requires every Australian government to do all within its power to reduce and eliminate the danger of nuclear war and work assiduously for the abolition of nuclear weapons. The Australian government has called on nuclear-armed states to reduce the role of nuclear weapons in their security policies. If it wishes to be consistent and credible, the Australian government will need to decisively reduce the role of nuclear weapons in its own security policies. This involves eschewing any policy supportive of the proposition that nuclear weapons bring security, including reliance on nuclear deterrence afforded by US nuclear weapons.

² Note that the Australian government has a policy of neither confirming nor denying the existence of US nuclear-armed submarines in Australian territorial waters.

³ UN Human Rights Committee, *General Comment 14*, para 4.

⁴ In response to a parliamentary question in 2008, Senator John Faulkner stated: 'It is longstanding Defence policy to rely on the extended umbrella of US nuclear forces to provide a comprehensive deterrent to nuclear attack on Australia. There are no US bases in Australia. However, as part of Australia's close alliance with the United States and our joint commitment to maintaining global security, Australia hosts joint facilities including the Joint Defence Facility Pine Gap. The Government understands and respects the longstanding US policy to neither confirm nor deny the presence or absence of nuclear weapons at any specific or general location.'

4. The international system of nuclear safeguards continues to suffer profound limitations, and has been unable to prevent nuclear weapons development by a number of States, both parties (such as North Korea and Iraq) and non-parties (Israel, India and Pakistan) to the *Treaty on the Non-Proliferation of Nuclear Weapons*. Even this severely limited system, unable to prevent proliferation by a determined state, applies to voluntary and minimal extent in nuclear weapons states, where civilian and military nuclear facilities and materials are frequently intertwined. Australia, in **exporting uranium to States with nuclear weapons** and elsewhere under safeguards which can provide no effective guarantee of non-diversion to weapons over the hundreds of thousands of years over which uranium and plutonium derived from it are both hazardous and weapons-usable,⁵ is in violation of its obligation under Article 6 to refrain from actions which would hinder progress on nuclear disarmament and sustained achievement of a world free of nuclear weapons. This obligation is implicit in the Committee's second general comment on the right to life, which cannot be without legal effect.

2.1.2 ICAN calls on the Committee, as supervisor of the implementation of the *ICCPR*, to raise these four matters with Australia during the reporting process. We concur wholeheartedly with the Committee's opinion that nuclear weapons are among the greatest threats to the right to life that confront humankind today. Indeed, as recognised by the World Health Organisation, they are the most potentially catastrophic and acute of such threats.

2.2 PROPOSED QUESTIONS FOR LIST OF ISSUES

ICAN proposes the following questions for the Committee's list of issues in relation to Australia's compliance with Article 6 of the *ICCPR*:

- Please provide information as to how Australia's law and policy in relation to the US military facility at Pine Gap, and other joint US-Australian military facilities, aim to protect and promote the right to life of people within its territory;
- Please provide information as to how Australia's law and policy in relation to the use of its territorial waters by US nuclear-armed submarines aim to protect and promote the right to life of people within its territory;
- Please provide information as to how Australia's law and policy in relation to its reliance on US nuclear forces protect and promote the right to life of people within its territory, and how this is consistent with Australian government support for the abolition of nuclear weapons; and
- Please provide information as to how Australia's laws and policies regulating the exportation of uranium, particularly to nuclear-armed countries, are consistent with the obligation under Article 6 of the *ICCPR* to refrain from actions which would hinder progress on nuclear disarmament.

⁵ See, eg, Australian Conservation Foundation and Medical Association for Prevention of War, *An Illusion of Protection: The Unavoidable Limitations of Safeguards on Nuclear Materials and the Export of Uranium to China*; Beyond Nuclear Initiative, *Yellowcake Country?: Australia's Uranium Industry*.

2.3 PROPOSED RECOMMENDATIONS FOR CONCLUDING OBSERVATIONS

ICAN proposes the following recommendations for the Committee's concluding observations in relation to Australia's compliance with Article 6 of the *ICCPR*:

- THAT the Australian government cease its support for military bases or facilities which play any role in the preparation for and possible conduct of nuclear war;
- THAT Australia prohibit submarines or other vessels potentially carrying nuclear weapons from entering its territorial waters;
- THAT Australia reject any role for nuclear weapons in the defence of Australia and those who live in Australia; and
- THAT Australia cease contributing to the dangers of nuclear proliferation by exporting uranium, most particularly to nuclear-armed countries.

2.4 CONCLUSION

ICAN argues that there is a clear conflict between Article 6 of the *ICCPR* and the policies of Australia which support the threat or potential use of nuclear weapons. Moreover, ICAN argues that the Committee, through its general comments on Article 6, has given rise to a broad public expectation that it will play a part in advancing nuclear disarmament by placing pressure on States parties whose policies and practices reinforce the continued existence of nuclear weapons. We believe that the right to life is sufficiently broad to deal with nuclear weapons issues, and that the Committee, as supervisor of the implementation of the *ICCPR*, should question Australia about its compliance with Article 6 in respect of nuclear weapons. The right to life underpins the exercise and protection of all other rights.

3. NUCLEAR WEAPONS AND ARTICLE 6

3.1 GENERAL

3.1.1 Since the 1980s, many States have argued in various international forums that the use of nuclear weapons is prohibited by Article 6 of the *ICCPR*. In addition, thousands of individuals have asserted, in communications submitted to the Committee, that Article 6 also prohibits the possession, testing and deployment of nuclear weapons. The Committee, the ICJ and the UN General Assembly have all declared nuclear weapons to be incompatible with the right to life.

3.1.2 Article 6 of the *ICCPR* expressly provides that every human being has the inherent right to life, that this right shall be protected by law, and that no one shall be arbitrarily deprived of his or her life. According to the Committee, the right 'is basic to all human rights'⁶ and no derogation from it is permitted 'even in time of public emergency which threatens the life of the nation'.⁷ It is generally considered to be a norm of *jus cogens*. Significantly, Article 6 requires States parties actively to protect the life of their citizens and to avert threats to their life.⁸

⁶ UN Human Rights Committee, *General Comment 14*, para 1.

⁷ UN Human Rights Committee, *General Comment 6*, para 1.

⁸ See, eg, *Dermitt Barbato v Uruguay*, Communication No 84/1981 (21 October 1982); *Bleier v Uruguay*, Communication No 30/1978 (29 March 1982); *Herrera Rubio v Colombia*, Communication No 161/1983 (2 November 1987).

3.1.3 In 1983, the UN General Assembly adopted a resolution denouncing nuclear war as ‘a violation of the foremost human right — the right to life’.⁹ This prompted the Committee a year later to issue a general comment clarifying the obligations of States under Article 6 of the *ICCPR* in respect of nuclear weapons.¹⁰ The Committee said that ‘nuclear weapons are among the greatest threats to the right to life which confront [hu]mankind today’,¹¹ and that their production, testing, possession, deployment and use ‘should be prohibited and recognized as crimes against humanity’.¹² The Committee has also considered 10 individual complaints, the most recent in 2006, made under the *First Optional Protocol* in which the authors alleged that a particular State party had violated their right to life by possessing, deploying, testing or threatening to use nuclear weapons.¹³

3.2 SITUATIONS OF ARMED CONFLICT

3.2.1 In 1996, the ICJ directly considered in an advisory opinion whether Article 6 of the *ICCPR* prohibits the threat or use of nuclear weapons.¹⁴ It held that, ‘[i]n principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities’,¹⁵ but the test of what constitutes an arbitrary deprivation of life should be determined by the law applicable in armed conflict.¹⁶ However, this should not be considered an outright dismissal by the ICJ of the applicability of human rights law to questions concerning nuclear weapons and war.

3.2.2 By including the word *arbitrary* in the definition of the right to life under Article 6 of the *ICCPR*, the drafters of the treaty clearly intended to limit the scope of the right, and it is widely accepted that killings as a result of lawful acts of war are an exception to the right to life.¹⁷ But ICAN would argue that, despite the ICJ’s advisory opinion, the meaning of *arbitrary* must still be interpreted in the context of the *ICCPR* as a whole, in the light of its object and purpose, and against constantly evolving standards, and not exclusively by reference to international humanitarian law.

3.2.3 Human rights law has as its *raison d’être* the protection of the individual, both in peacetime and wartime. Like the *UN Charter*, the *ICCPR* and other similar instruments emerged out of the shadow of grave human rights violations committed in World War II, including the atomic bombings of Hiroshima and Nagasaki. Human rights norms and standards are so well ingrained today in global consciousness ‘that they flood through into every corner of humanitarian law’.¹⁸

3.2.4 The ICJ held that the deliberate use of nuclear weapons by a State, in any circumstances, would be incompatible with respect for ‘basic human dignity’,¹⁹ and it

⁹ *Condemnation of Nuclear War*, GA Res 38/75, UN GAOR, 93rd plen mtg, UN Doc A/RES/38/75 (15 December 1983), operative para 1.

¹⁰ UN Human Rights Committee, *General Comment 14*.

¹¹ *Ibid*, para 4.

¹² *Ibid*, para 6.

¹³ *CBD v The Netherlands*, Communication No 394/1990 (9 January 1990); *JPK v The Netherlands*, Communication No 401/1990 (11 April 1990); *Brinkhof v The Netherlands*, Communication No 402/1990 (11 April 1990); *TWMB v The Netherlands*, Communication No 403/1990 (11 April 1990); *EW et al v The Netherlands*, Communication No 429/90 (19 November 1990); *ARU v The Netherlands*, Communication No 509/1992 (21 April 1992); *ECW v The Netherlands*, Communication No 524/1992 (22 October 1992); *Vaihere Bordes and John Temeharo v France*, Communication No 645/1995 (26 July 1995); *Leonard John Lindon v Australia*, Communication No 646/1995 (25 November 1998); *Aalbersberg et al v The Netherlands*, Communication No 1440/2005 (2 August 2005).

¹⁴ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 225, para 23.

¹⁵ *Ibid*, para 25.

¹⁶ *Ibid*.

¹⁷ See *Report of the Secretary-General on Respect for Human Rights in Armed Conflicts*, UN Doc A/8052 (1970), p 104.

¹⁸ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 225, p 356.

¹⁹ *Ibid*.

rejected the argument put by some States that the taking of life in armed hostilities is a necessary exception to the principle that the right to life is non-derogable: ‘when a weapon has the potential to kill between one million and one billion people ... human life becomes reduced to a level of worthlessness that totally belies human dignity as understood in any culture.’²⁰

3.2.5 During the proceedings, Professor Philippe Sands noted that, while ‘a small but important minority’ of States consider international human rights norms to be ‘irrelevant’ or ‘inapplicable’ to questions involving nuclear weapons, ‘this position is contradicted by State practice, by doctrine, by jurisprudence, and by common sense ... Nuclear weapons are not above these laws’.²¹ The *Helsinki Resolution* of 1985 provides that ‘[t]he existence of an armed conflict does not entitle a party unilaterally to terminate or suspend the operation of treaty provisions relating to the protection of the human person’.²²

3.2.6 However, even if the use of nuclear weapons against a target State were lawful according to the rules of armed conflict — as the ICJ considers possible²³ — it is difficult to imagine that in any circumstances such use would not, owing to the radioactive fallout it would create, directly affect third States beyond the target State’s national boundaries, and the use of nuclear weapons would necessarily violate the right to life of civilians living in such States.

3.3 THE COMMITTEE’S GENERAL COMMENTS

3.3.1 Significantly, the ICJ advisory opinion provided little insight as to whether the mere possession, deployment, testing or threat of use of nuclear weapons would violate Article 6 of the *ICCPR*. On this question, the authority of the Committee, as contained in its general comments and decisions on individual complaints, remains highly relevant. ICAN commends the Committee on the boldness of its general comments on the right to life, but expresses concern that no individual complaint concerning nuclear weapons has, to date, been successful. Moreover, we urge the Committee, in keeping with the spirit of its second general comment on the right to life, to utilise the reporting process to challenge States that possess or in some way support nuclear weapons.

3.3.2 As noted, the Committee has issued two general comments on Article 6 of the *ICCPR*. The first attached positive obligations on States parties in respect of the right to life, including a ‘duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life’.²⁴ The Committee argued that any effort by a State party to avert war, especially thermonuclear war, would help to safeguard the right to life,²⁵ and that a State must protect against the arbitrary deprivation of life not only by non-State criminals but also by its own security forces.²⁶ The Committee’s second general comment on Article 6 went a step further in censuring States with nuclear capabilities on the basis that nuclear weapons pose one of the greatest threats to the right to life in the world today. It called upon all States, whether parties to the *ICCPR* or not, ‘to take urgent steps, unilaterally and by agreement, to rid the world of this menace’.²⁷

²⁰ Ibid.

²¹ Transcript of Proceedings, *Case in Legality of the Use by a State of Nuclear Weapons in Armed Conflict and in Legality of the Threat or Use of Nuclear Weapons* (International Court of Justice, President Bedjaoui presiding, 14 November 1995, The Hague) p 53, para 3.

²² Institute of International Law, *The Effects of Armed Conflicts on Treaties* (1985), art 2.

²³ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 225, para 105(2)(e).

²⁴ UN Human Rights Committee, *General Comment 6*, para 2.

²⁵ UN Human Rights Committee, *General Comment 14*, para 2.

²⁶ Ibid, para 3.

²⁷ Ibid, para 7.

3.3.3 Both general comments have been cited extensively in communications submitted to the Committee. For example, in *EW et al v The Netherlands*, the authors argued that the Netherlands, in preparing to deploy cruise missiles, had violated their right to life because it had not acted in accordance with the second general comment.²⁸ Although general comments do not reflect the Committee's views on individual complaints, it was relevant to this communication that the Committee had condemned in its general comment not only the use of nuclear weapons but also their deployment.

3.3.4 In a number of cases, the Committee restated elements of its general comments on Article 6.²⁹ However, their influence on the Committee's individual decisions has been more limited than some advocates might have hoped for or expected. ICAN would argue that it is within the Committee's role, as supervisor of the implementation of the *ICCPR*, to challenge States parties including Australia which support the continued existence of nuclear weapons. ICAN believes that, flowing from the Committee's general comments on Article 6, Australia has both positive and negative obligations with respect to nuclear weapons:

- Australia is required to take steps aimed at safeguarding the right to life, particularly steps aimed at averting nuclear war;
- Australia must not pass laws, adopt policies or act in such a way that would increase the likelihood of nuclear war.

Australia is clearly not meeting these obligations.

²⁸ *EW et al v The Netherlands*, Communication No 429/90 (19 November 1990) p 4, para 3.2.

²⁹ See, eg, *Vaihere Bordes and John Temeharo v France*, Communication No 645/1995 (26 July 1995), para 5.9. The ICJ also affirmed the general comment in its 1996 advisory opinion on the legality of the threat or use of nuclear weapons.