



**Open-ended Working Group taking forward
multilateral nuclear disarmament negotiations¹****Geneva 2016**

Item 5 of the agenda

Taking forward multilateral nuclear disarmament negotiations**A Legal Instrument for the Prohibition and Elimination of
Nuclear Weapons****Submitted by the International Association of Lawyers Against Nuclear
Arms**

1. The issue of finding a path toward a nuclear weapons-free world has reappeared on the world's screen with the urgency which it deserves. The conferences on the humanitarian consequences of nuclear explosions, the agreement with Iran, the Nuclear Security Summit and calls to move on to nuclear disarmament summits, reports of nuclear arms racing by the United States of America and the Russian Federation and by India and Pakistan, the People's Democratic Republic of Korea's pursuit of deliverable nuclear weapons, all have underscored the necessity of fulfilling a core mission of the Open-ended Working Group, development of legal measures and norms for achieving and sustaining a world without nuclear weapons. The opportunity must not be lost and we are grateful that the Open-ended Working Group has, in Mr. Thani Thongphakdi, Ambassador of Thailand a leader well aware of the challenge.

2. One of the options before the Open-ended Working Group is a comprehensive instrument on the prohibition and elimination of nuclear weapons, a nuclear weapons convention (NWC). A Model Nuclear Weapons Convention has been circulated in the United Nations at the request of Costa Rica and Malaysia.² The model was drafted by a consortium of experts led by and largely drawn from the International Association of Lawyers Against Nuclear Arms (IALANA), the International Network of Engineers and Scientists Against Proliferation (INESAP), and the International Physicians for the Prevention of Nuclear War (IPPNW).

¹ Established pursuant to resolution 70/33 of the General Assembly of the United Nations.

² http://inesap.org/sites/default/files/inesap_old/mNWC_2007_Unversion_English_N0821377.pdf. See also A/AC.286/WP.11, 24 February 2016, Model nuclear weapons convention, submitted by Costa Rica and Malaysia to the OEWG. For background, see <http://lcnp.org/mnwc/index.htm>.

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3. In this paper, IALANA explains why the model NWC could serve, as United Nations Secretary-General Ban Ki-moon has said,³ as a “good point of departure” for negotiations on a convention. Taking the Model Nuclear Weapons Convention as a point of departure would discipline the negotiations to at all times remain focused on the end goal to be achieved, the comprehensive prohibition and elimination of nuclear weapons. Under the umbrella of negotiations on a comprehensive outcome, supportive measures could be implemented, including unilateral, bilateral and plurilateral reductions, and creation of an official international institutional capability to monitor nuclear weapons. The Model Nuclear Weapons Convention can also serve as a guide to elements of other forms of nuclear disarmament agreements, including a framework agreement.

4. As the Open-ended Working Group continues its deliberations, it is imperative to bear in mind that all states are under a legal obligation under NPT Article VI and also customary international law, as stated by the International Court of Justice, “to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”⁴ To fulfil that obligation, negotiations aimed at complete nuclear disarmament must first of all begin, which the Open-ended Working Group should do its utmost to facilitate.

Nuclear Weapons Convention

5. A large majority of United Nations Member States over many years have called for negotiation of a nuclear weapons convention, as in the annual General Assembly resolution, first adopted in 1996, on follow-up to the Advisory Opinion of the International Court of Justice,⁵ and the more recent series of resolutions on follow-up to the United Nations High-level Meeting on Nuclear Disarmament.⁶ Moreover, in addition to United Nations Secretary-General Ban Ki-moon, many prominent persons have called for negotiation of an NWC, for example Nobel peace laureates including Mr. Mikhail Gorbachev, Mr. Frederik Willem De Klerk, Mr. Lech Walesa, Mr. Muhammad Yunus, and Mr. Mairead Corrigan Maguire.⁷ Most of the world’s parliaments, including nearly all of those of the nuclear-armed and reliant states, supported the 2014 Inter-Parliamentary Union resolution calling for negotiations on an NWC or package of agreements.⁸ Mayors for Peace, comprising

³ UN Secretary-General Ban Ki-moon, 24 October 2008, Address to the East-West Institute: "The United Nations and Security in a Nuclear-Weapon-Free World," available at http://www.un.org/apps/news/infocus/speeches/search_full.asp?statID=351.

Concerning a convention, the Secretary-General said in full: “First, I urge all NPT parties, in particular the nuclear-weapon-states, to fulfil their obligation under the treaty to undertake negotiations on effective measures leading to nuclear disarmament. [¶] They could pursue this goal by agreement on a framework of separate, mutually reinforcing instruments. Or they could consider negotiating a nuclear-weapons convention, backed by a strong system of verification, as has long been proposed at the United Nations. Upon the request of Costa Rica and Malaysia, I have circulated to all UN member states a draft of such a convention, which offers a good point of departure. [¶] The nuclear powers should actively engage with other states on this issue at the Conference on Disarmament in Geneva, the world’s single multilateral disarmament negotiating forum.”

⁴ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, para. 105(2)F.

⁵ Most recently, A/RES/70/56, 7 December 2015.

⁶ Most recently, A/RES/70/34, 7 December 2015.

⁷ See 10th World Summit of Nobel Peace Laureates, Berlin, Germany, Summit Final Statement, November 11, 2009, available online at <http://www.nobelpeace-summits.org/the-world-summit-of-nobel-peace-laureates/berlin-2009>.

⁸ See <http://www.pnnd.org/article/world-body-parliaments-calls-negotiations-abolish-nuclear-weapons>.

more than 7,000 member cities around the world, has called for negotiation and conclusion of an NWC.⁹

6. The crux of the Model Nuclear Weapons Convention¹⁰ is Article I, general obligations, which prohibits development, testing, production, acquisition, stockpiling, transfer, funding, use and threat of use of nuclear weapons. Subsequent articles require States parties to the Convention to declare all nuclear weapons, nuclear material, nuclear facilities and nuclear weapons delivery vehicles they possess or control, and their locations,¹¹ and require the elimination of all nuclear weapons, nuclear weapons components and nuclear weapons delivery vehicles in five phases, ending no later than fifteen years from the coming into force of the convention.¹²

7. The Model Nuclear Weapons Convention provides for an elaborate system of verification, including data sharing agreements, open skies, a registry, international monitoring, onsite inspections and, as a novel contribution to disarmament practice, “citizen reporting and protection.”¹³ It calls for national implementation procedures, including the enactment of necessary legislation¹⁴ and, importantly, for the criminal prosecution of violators.¹⁵ It foresees the establishment of an Agency for the Prohibition of Nuclear Weapons, with a Conference of States Parties, an Executive Council and a Technical Secretariat.¹⁶ There is an Optional Protocol Concerning the Compulsory Settlement of Disputes and an Optional Protocol Concerning Energy Assistance.

8. The Model Nuclear Weapons Convention is in good measure based on the approach taken in the Chemical Weapons Convention. But an important difference must be noted. An NWC is often thought of as a single legal instrument addressing all aspects of elimination of nuclear weapons. However, unlike the CWC, given the already well-developed state of nuclear arms control and non-proliferation, in fact an NWC almost surely would incorporate or link to instruments including the NPT, regional NWFZs, the CTBT, possibly a fissile materials treaty, safeguards agreements and the Additional Protocol, Security Council resolution 1540, treaties on nuclear terrorism and nuclear safety, and more. The Model Nuclear Weapons Convention reflects these relationships to some extent by providing that it would not limit or detract from existing obligations under other agreements.¹⁷ More development in this area is needed, to determine to what extent existing obligations and arrangements should be preserved and whether the NWC should serve as the overriding treaty and regime.

9. In that vein, IALANA would certainly be glad to work with states to modify the Model Nuclear Weapons Convention, for example with regard to the following points:

⁹ See A/AC.286/NGO.9, 22 April 2016, Open Letter from Mayors for Peace.

¹⁰ *Supra* n. 1. For explanation and commentary, see Peter Weiss, “Taking the Law Seriously: The Imperative Need for a Nuclear Weapons Convention,” *Fordham International Law Journal* (Vol. 34, 2011), p. 776 – 787, available at http://lcnp.org/wcourt/Weiss_FinaltoAuthor.pdf; Merav Datan, et al., *Securing Our Survival: The Case for a Nuclear Weapons Convention* (IALANA, INESAP, IPPNW, 2007), available at <http://lcnp.org/pubs/2007-securing-our-survival.pdf>.

¹¹ Article III, Declarations.

¹² Article IV, Phases for Implementation.

¹³ Article V, Verification.

¹⁴ Article VI, National Implementation Measures.

¹⁵ Article VII, Rights and Obligations of Persons.

¹⁶ Article VIII, Agency.

¹⁷ Article 5, Verification, E, Relation to Other Verification Arrangements; Article VIII, Agency, G, International Monitoring System, para. 65; Article VIII, Scope and Application of Convention, A, Relation to other International Agreements.

- The Model Nuclear Weapons Convention provides that the Agency for the Prohibition of Nuclear Weapons may enter into agreements with other agencies regarding verification arrangements.¹⁸ The role of the IAEA and CTBO could be made more specific. It would also be possible not to establish a full-fledged technical agency for an NWC, but rather to assign technical tasks to the IAEA and CTBO.
- Advocates of a ban treaty, as well as states such as Fiji, Nauru, Palau, Samoa and Tuvalu,¹⁹ have rightly pointed to the need to recognize and address the rights and needs of victims of nuclear weapons explosions and nuclear testing.
- The Model Nuclear Weapons Convention provides that entry into force requires ratifications by all nuclear-armed States.²⁰ An alternative approach would be to make entry into force less restrictive, but also to provide that the implementation of certain obligations, for example reduction of nuclear arsenals below a certain point, will require that all nuclear-armed states have become parties, or that they have been subjected to basic requirements of the convention by the Security Council.

10. An egregious shortcoming of the current international nuclear order is that there is no official international institutional body or mechanism that impartially monitors nuclear weapons – stockpiles, arms racing, etc. – and the state of arms control and disarmament. Such an institutional capability would help develop reliable information and thus the trust needed for a workable process of nuclear disarmament. For that reason, its near-term creation under the umbrella of negotiations towards a convention should be considered.²¹

11. Given the comprehensive nature of an NWC, the usual assumption is that some or all nuclear-armed States would participate in its negotiation. However, the nuclear-armed states are not participating in the Open-ended Working Group, a stance which in and of itself is a breach of the obligation to pursue negotiations toward complete nuclear disarmament. And the five NPT nuclear-weapon States have shown no interest in commencement of negotiations on complete nuclear disarmament, through an NWC or other form of agreement. In the face of this resistance, what course of action could a continued Open-ended Working Group, or a process outside the United Nations, take with respect to an NWC? One possibility would be to draft an NWC and to present it to appropriate forums in which nuclear-armed states participate, including the Conference on Disarmament, United Nations High-Level Conference on Nuclear Disarmament to be held by 2018, and the 2020 NPT Review Conference. In general, despite the frustration involved, the nature of the problem requires an ongoing effort to seek to engage the nuclear-armed states in fulfilment of their legal obligation of good-faith negotiation toward complete nuclear disarmament.

Other Forms of Agreement

12. A framework agreement on nuclear disarmament may be considered a variant of a nuclear weapons convention. An ambitious framework agreement could set forth an obligation of non-use of nuclear weapons and a timeframe in which they are to be eliminated; prohibit the expansion and the modernization of nuclear forces; limit the

¹⁸ Article 5, Verification, E, Relation to Other Verification Arrangements; Article VIII, Agency, G, International Monitoring System, para. 65.

¹⁹ See A/AC.286/WP.14, Elements for a treaty banning nuclear weapons, 3 March 2016, submitted to the OEWG by Fiji, Nauru, Palau, Samoa and Tuvalu, para. 16.

²⁰ Article XV, Entry into Force.

²¹ Cf. Chair's Synthesis Paper, para. 30: "calls were also made to establish a reporting mechanism within the framework of the United Nations".

deployment of nuclear weapons, for example not outside the territory of possessor states; create a body to increase transparency regarding nuclear weapons and monitor progress on disarmament; and provide for further negotiations on matters that could not be settled at the outset, for example the phasing of reductions, verification, enforcement, and control and disposition of fissile materials.

13. The concept of a framework agreement is well established in international practice, for example the United Nations Framework Convention on Climate Change. A framework agreement on nuclear disarmament would be more consequential if it had an obligation of non-use and set a timeframe for elimination. Early treaty codification of the obligation of non-use would contribute to further delegitimization of nuclear weapons that must accompany their elimination. In IALANA's view, nuclear weapons simply cannot be used in compliance with fundamental principles of customary international law protecting civilians from the effects of warfare, protecting combatants from unnecessary suffering, and protecting the natural environment.²² In this sense, there is no "legal gap"; there is first and foremost a compliance gap due to the failure to meet the obligation to pursue and conclude negotiations on nuclear disarmament,²³ as the Marshall Islands has forcefully claimed in its cases in the International Court of Justice. However, the nuclear-armed states have refused to squarely accept that use of nuclear weapons is contrary to international law, although they have never been able to provide sound legal reasoning in support of that refusal. Indeed, the use of nuclear weapons has been threatened, directly or implicitly, on numerous occasions, to say nothing of doctrines of 'deterrence'. Treaty codification of a categorical obligation of non-use would be a straightforward way to record an unambiguously binding recognition of the illegality of use under customary international law.

14. Because it is a more flexible concept than an NWC, deliberations or negotiations in the Open-ended Working Group or elsewhere on a framework agreement might have more potential for engaging the nuclear-armed states. It also has some compatibility with the building blocks or progressive approach in that a framework agreement envisages that there are distinct tasks to be accomplished, e.g. control and disposition of fissile materials, reductions leading to elimination, establishment of a verification system. But under a framework agreement, those tasks would be accomplished subject to the requirements and process of a multilateral treaty in accord with values of global democracy and equity, even if nuclear-armed states took the lead on reduction of their arsenals or other matters.

15. A ban treaty, an agreement on prohibition of nuclear weapons, could take the form of a stripped down framework agreement. Assuming that nuclear-armed states declined the invitation to join in its negotiation, such an agreement could set forth basic obligations of non-use and non-possession while leaving to later negotiation within the treaty framework, or outside of it, issues relating to elimination of existing stockpiles. In theory this could leave room for nuclear-armed states to later join the agreement. However, states possessing nuclear weapons will be very reluctant to join a treaty whose terms they had not negotiated – even if those terms should be basically acceptable to them at the time they would be willing and eligible to join. Alternatively, a ban treaty could be incorporated into a subsequent convention or framework agreement.

16. A ban treaty concluded by non-nuclear weapon states is promoted in part as a dramatic means of further stigmatizing nuclear weapons, having multiple effects with respect to military cooperation, financing of nuclear weapons, popular support for reliance

²² See IALANA, "Nuclear Disarmament: The Road Ahead," April 2015, available at <http://icnp.org/pubs/nuclear-disarmament-the-road-ahead-2015.pdf>.

²³ See John Burroughs and Peter Weiss, "Legal Gap or Compliance Gap?" *Arms Control Today*, October 2015, available at http://www.armscontrol.org/ACT/2015_10/Letter-to-the-Editor/Legal%20Gap%20or%20Compliance%20Gap.

on nuclear weapons, etc. In terms of the basic obligations, however, if a ban treaty's prohibition of possession essentially reproduced the existing obligations under the NPT, NWFZs, and the findings of the International Court of Justice in its Advisory Opinion, the main contribution of a ban treaty would be to confirm existing obligations of non-use of nuclear weapons under customary principles of IHL and other international law. There is a potential downside: it could be implied that there is not an existing obligation of non-use applying to states not joining a ban treaty. This is not an entirely hypothetical concern. A similar argument was deployed by nuclear-armed states in the proceedings for the 1996 Advisory Opinion of the International Court of Justice, with respect to protocols to regional nuclear weapon free zones and negative security assurances; in more general form, the argument was made that partial prohibitions on deployment such as those with respect to outer space or the sea-bed imply that there is not a general prohibition. This could be an especially glaring problem if a ban treaty did not have as members a large majority of the world's states. It could be mitigated by presenting the obligation of non-use as a codification of an existing norm and practice and a confirmation of the existing illegality of use under customary principles of humanitarian and other international law, and by stating generally that obligations already existing under international law remain valid and are not affected by entry into force of the treaty.

17. Depending on how the prohibition of possession and related prohibitions were elaborated, a ban treaty could have some effects on the positions of states within nuclear alliances, if it even proved possible for them to be both parties to a ban treaty and members of nuclear alliances. For all non-nuclear weapon States, it would be possible for a ban treaty to include obligations relating to possession going beyond existing obligations. For example, a prohibition of "development" of nuclear weapons would or could apply to steps short of acquisition/manufacture of nuclear weapons prohibited under the NPT, steps such as laboratory research relating to nuclear explosives or work on dual-use technologies. This would strengthen the existing obligation of non-acquisition, and set the stage for such a prohibition to apply to states now possessing nuclear weapons. However, a political question is whether some non-nuclear weapon states would be willing to accept additional obligations relating to non-acquisition if nuclear-armed states were not parties.

Conclusion

18. IALANA welcomed the creation of the Open-ended Working Group and appreciates the constructive spirit in which non-nuclear weapon states have engaged in its work. IALANA stands ready to support and assist states in whatever path of negotiations is chosen. The task is urgent: the world stands on the precipice of institutionalized nuclear arms racing. It is time to turn away from that precipice and institutionalize nuclear disarmament.
