

IALANA DISCUSSION PAPER

SELECTED ELEMENTS OF A TREATY PROHIBITING NUCLEAR WEAPONS

March 24, 2017

In this paper,¹ the International Association of Lawyers Against Nuclear Arms (IALANA) discusses *selected* proposed elements of a treaty prohibiting nuclear weapons, leading to their total elimination, to be negotiated this year. The elements discussed are ones of special concern to IALANA; we have made no effort to provide a comprehensive catalogue, and there are many important elements not discussed here.² IALANA draws in particular on our experience, with colleagues from other organizations,³ in the drafting of the Model Nuclear Weapons Convention.⁴

For each element, possible language is included, followed by commentary. The language is offered mostly for the purpose of explaining the element in question in a concrete manner, by way of illustration. IALANA may very well modify or expand upon this discussion as the negotiations unfold. IALANA appreciates the openness of governments to the input and participation of civil society organizations.

Preambular elements related to affirmation of existing international law

1) Affirm the illegality of use of nuclear weapons under customary international law

Possible language: Affirming that the use of nuclear weapons is contrary to international law, in particular international humanitarian law; international human rights law; and international environmental law.

Commentary: Because of their very nature, the use of nuclear weapons is illegal under customary international law. They cannot be used in compliance with fundamental principles protecting civilians and neutral states from the effects of warfare, protecting combatants from unnecessary

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² For a survey, see ILPI and UNIDIR, *A Prohibition on Nuclear Weapons: A guide to the issues* (February 2016).

³ International Physicians for the Prevention of Nuclear War and International Network of Engineers and Scientists Against Proliferation.

⁴ 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://lcn.org/mnwc/index.htm>. For commentary, see *Securing Our Survival: The Case for a Nuclear Weapons Convention* (2007), at <http://www.lcn.org/pubs/2007-securing-our-survival.pdf>.

suffering, protecting the environment from severe and irreversible damage, and safeguarding the interests of future generations. Use of nuclear weapons would constitute war crimes under the Rome Statute of the International Criminal Court, and, in many circumstances, crimes against humanity as well.

The 1996 Advisory Opinion of the International Court of Justice supports this assessment. The Court stated that “the use of [nuclear] weapons in fact seems scarcely reconcilable with respect for [the strict] requirements” of “the principles and rules of law applicable in armed conflict – at the heart of which is the overriding consideration of humanity.”⁵ So do many General Assembly resolutions. The resolution entitled “Ethical imperatives for a nuclear-weapon-free world,” adopted in 2015 and again in 2016,⁶ declares: “Given the humanitarian impact of nuclear weapons, it is inconceivable that any use of nuclear weapons, irrespective of the cause, would be compatible with the requirements of international humanitarian law or international law, or the laws of morality, or the dictates of public conscience.” A 2011 resolution of the International Red Cross and Red Crescent Movement “finds it difficult to envisage how any use of nuclear weapons could be compatible with the rules of international humanitarian law.”⁷ The Vancouver Declaration, released by IALANA and The Simons Foundation in 2011,⁸ states that nuclear weapons cannot be employed in compliance with the rules of international humanitarian law because their blast, heat, and radiation effects are uncontrollable.

It is imperative that the preamble include an affirmation of the illegality of use of nuclear weapons under existing law to reinforce the norm of non-use of nuclear weapons. It also is essential to avoid any implication that the fact that the prohibition of use contained in the operative portion will apply only to states parties implies that non-states parties are not subject to any such rule.

2) Affirm the illegality of the threat of use of nuclear weapons under the United Nations Charter and other international law

Possible language:

Recalling that the United Nations Charter obligates all Members of the United Nations to 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.

⁵ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226* (hereafter “Nuclear Weapons Advisory Opinion”), para. 95.

⁶ A/RES/71/55, 5 December 2016, adopted by a vote of 130 to 37, with 15 abstentions.

⁷ Council of Delegates of the International Red Cross and Red Crescent Movement, “Resolution 1, Working Towards the Elimination of Nuclear Weapons,” November 26, 2011, <http://www.icrc.org/eng/resources/documents/resolution/council-delegates-resolution-1-2011.htm>.

⁸ <http://www.lcnp.org/wcourt/Feb2011VancouverConference/vancouverdeclaration.pdf>. The declaration was signed by many international lawyers and others around the world. For a list of signatories, see http://www.lcnp.org/wcourt/VanDecl_Signatories_Feb15_2013.docx.

Affirming that the threat of use of nuclear weapons is contrary to the United Nations Charter and to international humanitarian law.

Commentary: Any threatened use of nuclear weapons would be a threat of force contrary to the UN Charter prohibition of threat of force inconsistent with the purposes of the United Nations; it also likely would be either an aggressive or disproportionate threat in violation of Article 2(4) or the conditions, necessity and proportionality, for the lawful exercise of self-defense pursuant to Article 51. Such a threat would also violate international humanitarian law in light of the ICJ's statement that, "If 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."⁹ It additionally could violate specific provisions of international humanitarian law, namely the prohibition of threatening that there shall be no survivors¹⁰ and the prohibition of "acts or threats of violence the primary purpose of which is to spread terror among the civilian population".¹¹

It is important to include a reference to the unlawfulness of threatened use of nuclear weapons under existing international law in the preamble due to the centrality of 'nuclear deterrence' to military postures and the role that specific threats could have in leading to actual employment of nuclear weapons. Delegitimizing 'nuclear deterrence' is essential to achieving the abolition of nuclear weapons.

3) Affirm the obligation to negotiate nuclear disarmament

Possible Language:

Recalling the obligation set forth in Article VI of the Nuclear Non-Proliferation Treaty to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.

Recalling also the unanimous conclusion of the International Court of Justice that there exists an obligation 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, and *affirming* that the obligation is universal and unconditional.

Commentary: It is important to reference the ICJ's conclusion regarding the nuclear disarmament obligation as well as Article VI of the NPT. First, the ICJ provided an authoritative interpretation of Article VI, consistent with, inter alia, NPT Review Conference adoption of "an unequivocal undertaking by the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals". Second, the clear import of the ICJ's conclusion, as the UN Secretary-General has recognized,¹² is that the obligation applies universally as a matter of customary international law,

⁹ Nuclear Weapons Advisory Opinion, para. 78.

¹⁰ Protocol I, Geneva Conventions, Article 40: "It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis."

¹¹ Protocol I, Geneva Conventions, Article 51(2).

¹² UN Secretary-General, Message to the Vienna Conference on the Humanitarian Impact of Nuclear Weapons, Vienna, 8 December 2014: "No country disputes the desirability of achieving a nuclear-

thus applying to non-NPT states. Reference to the ICJ's conclusion would in no way undermine reference to NPT Article VI and to commitments made in NPT Review Conferences if those are included.

4) Recognize that a subsequent disarmament agreement or agreements will be needed

Possible language: *Recognizing* that measures additional to this Treaty, both practical and legally binding, for the irreversible, verifiable and transparent destruction of nuclear weapons will be needed in order to achieve and maintain a world without nuclear weapons, and *regarding* this Treaty as a step toward a comprehensive, legally binding agreement on nuclear disarmament.

Commentary: The first part of the proposed language is based on a preambular provision of the General Assembly resolution deciding to commence negotiations on a prohibition treaty.¹³ The second part recognizes that a comprehensive agreement will be needed to achieve and maintain the elimination of nuclear weapons.

5) Reaffirm the Martens Clause and recognize the role of public conscience and principles of humanity

Possible language:

Reaffirming that in cases not covered by this Treaty or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law, derived from established custom, from the principles of humanity and from the dictates of public conscience.

Stressing the role of public conscience in furthering the principles of humanity as evidenced by the call for a total ban of nuclear weapons and recognizing the many efforts to that end undertaken over several decades, in particular by the Hibakusha and other victims of nuclear weapons detonations and testing around the world.

Commentary: The first paragraph is the modern version of the Martens Clause, which was included in the Oslo Convention and also in Protocol I to the Geneva Conventions. It is important to include this in view of the fact that nuclear-armed states and their allies may not join the prohibition treaty at the outset. The second paragraph is based upon a preambular provision in the Ottawa Mine Ban Convention. A recognition of the key part played by the Hibakusha and other victims in giving voice to reasons of conscience for prohibiting nuclear weapons is essential, and it also reinforces and makes concrete the Martens Clause.

weapon-free world. After all, this was the very first objective identified by the United Nations General Assembly. The universal acceptance of this goal led the International Court of Justice to determine that the disarmament obligation transcends any treaty and is a requirement under customary international law.”

¹³ A/RES 71/258, 23 December 2016, Taking forward multilateral nuclear disarmament negotiations. Access at <http://research.un.org/en/docs/ga/quick/regular/71>.

6) Underline the humanitarian consequences of nuclear explosions

Possible language:

Deeply concerned about the catastrophic humanitarian consequences of any use of nuclear weapons.

Recalling that the Treaty on the Non-Proliferation of Nuclear Weapons, which serves as the cornerstone of the nuclear non-proliferation and disarmament regime, was negotiated considering the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples.

Commentary: These provisions appear in the preamble of A/RES/71/258, the resolution deciding to commence negotiations on a prohibition treaty. The following observation of the Vancouver Declaration¹⁴ is pertinent here as well as in relation to proposed preambular element (5): “Reasons advanced for the continuing existence of nuclear weapons, including military necessity and case-by-case analysis, were once used to justify other inhumane weapons. But elementary considerations of humanity persuaded the world community that such arguments were outweighed by the need to eliminate them. This principle must now be applied to nuclear weapons, which pose an infinitely greater risk to humanity.”

Principles and objectives

Duty to respect and ensure respect for international humanitarian law

Possible language:

Recalling the duty of States to respect and ensure respect for international humanitarian law.

Commentary: This is a principle at the foundation of the humanitarian initiative leading to the negotiation of this treaty and should be included. It is drawn from Common Article 1 of the Geneva Conventions, today considered customary in nature.

Operative provisions

1) Basic obligations

Possible language:

- A. Each State Party to this Treaty undertakes never under any circumstances:
- a. To use nuclear weapons;
 - b. To threaten to use nuclear weapons;
 - c. To engage in any activity related to any military or other preparations to use nuclear weapons;
 - d. To encourage or authorize, directly or indirectly, use and threatened use of nuclear weapons;

¹⁴ *Supra* n. 8.

- e. To design, develop, test, produce, otherwise acquire, possess, deploy, stockpile, maintain, retain, or transfer nuclear weapons;
- f. To develop, test, produce, otherwise acquire, possess, stockpile, retain, transfer or use [proscribed nuclear material];
- g. To design, develop, test, produce, otherwise acquire, possess, deploy, stockpile, maintain, retain, or transfer nuclear weapons delivery vehicles;
- h. To conduct nuclear weapons research, with the exception of research related to nuclear disarmament and to assistance to victims of nuclear weapons;
- i. To permit the stationing or transit of nuclear weapons in their territory including their airspace and waters, including by ships or aircraft carrying nuclear weapons;
- j. To assist, encourage, induce or permit, in any way, directly or indirectly, anyone to engage in any activity prohibited under this Treaty;
- k. To finance anyone to engage in any activity prohibited under this Treaty.

Commentary: These provisions are mostly drawn from the Model Nuclear Weapons Convention. Because initial members of a prohibition treaty are likely to be states not possessing and not reliant on nuclear weapons, the prohibitions may seem unnecessarily specific. However, the prohibition treaty can help set the template for future disarmament agreements, and itself may serve as the foundation for denuclearization by some states now possessing or reliant upon nuclear weapons which accede to the treaty.

There is no prohibition of threatened use in the Chemical Weapons Convention and other treaties prohibiting and eliminating weapons. However, as with respect to the preamble, including threat in the operative portion of the prohibition treaty is important because of the centrality of ‘nuclear deterrence’ to military postures and the need to undermine its legitimacy as well as to prevent specific threats leading to use. Including it also helps make clear that members of the prohibition treaty may in no way cooperate with reliance on nuclear weapons.

The prohibition of research, design and development of nuclear weapons is more extensive than the prohibition in NPT Article II of manufacture or acquisition of nuclear weapons. Including these elements in the prohibition treaty underlines that there can be no cooperation with such activities carried out by nuclear-armed states, and helps set the template for future disarmament agreements and possible accession by nuclear-armed states. It should be made clear that the prohibition of design, research, and testing of nuclear weapons includes activities such as supercomputer simulations; non-nuclear explosive testing, as by hydrodynamic and X-ray facilities; laser fusion; sub-critical nuclear explosive testing; and so on – the whole suite of activities that goes under the name “Stockpile Stewardship” in the United States.¹⁵ This perhaps can be accomplished by way of definition of terms.

Regarding the prohibition of activities relating to proscribed nuclear materials, there is of course existing monitoring of fissile materials by the IAEA pursuant to safeguards agreements and the NPT. It would be desirable for the prohibition treaty at a minimum to reinforce the obligations to accept such monitoring. It should also be considered whether adherence to the Additional Protocol or comparable standard should be required or encouraged by the treaty.

¹⁵ See reports cited at <https://nnsa.energy.gov/ourmission/managingthestockpile/ssmp>.

Regarding the prohibition as to nuclear weapons delivery vehicles, for states that have never had nuclear weapons, this prohibition may seem unnecessary and also unduly complicated. However, based on experience to date, for a successful global enterprise of eliminating existing nuclear arsenals, control and/or elimination of delivery systems developed for nuclear weapons will be necessary. This was the assumption of the drafters of the Model Nuclear Weapons Convention. Again, for the purpose of setting the template for future disarmament agreements and possible accession of nuclear-armed states, the prohibition treaty should address delivery vehicles. If inclusion of a prohibition is not desired, the question could be the subject of a preambular provision. One possibility would be to draw upon the NPT preambular paragraph which refers to “the elimination from national arsenals of nuclear weapons and the means of their delivery”.

2) Prohibitions as to persons

Possible language: Each State Party shall take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction and control.

Commentary: This is a concise statement of implementation measures that should be required of states parties. It is taken from the obligations concerning “National implementation measures” contained in Article 9 of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, and the similarly numbered Article 9 of the Convention on Cluster Munitions.

This fundamental obligation includes the requirement that parties penalize what is done on their territories by anyone, or anywhere in the world by their nationals and permanent residents. This could be spelled out in more detail. For example, it could be made clear that “persons” includes “legal” (or “juridical”) persons, notably corporate entities. It could be added that criminal responsibility extends not only to the actual perpetrators but also to those who order or solicit offenses, to those who aid, abet, or otherwise assist (including those providing financing). Those who attempt to do such acts could be included. (Some broader forms of wording along these lines are contained in paragraphs 22-24 of the Model Nuclear Weapons Convention and Article 25 (3) of the Rome Statute of the International Criminal Court.) Obligations of parties to assist one another in prosecutions by means of extradition and mutual legal assistance could be included, like those in the international terrorism conventions. Questions of universal jurisdiction, or at least transferred jurisdiction among all the parties (“universal jurisdiction *inter partes*”) should be considered.

3) Promotion of aims of the treaty; non-cooperation with threat or use of nuclear weapons

Possible language: Each State Party shall encourage States not party to this Treaty to ratify, accept, approve or accede to this Treaty, with the goal of attracting the adherence of all States to this Treaty.

Each State Party shall promote the norms affirmed by this Treaty and shall make its best efforts to discourage States not party to this Treaty from possessing, using, or threatening the use of nuclear weapons.

Each State Party undertakes not to request and not to accept the use or threatened use of nuclear weapons on its behalf by a non-State Party, and not to encourage or authorize, directly or indirectly, use and threatened use of nuclear weapons.

Commentary: The first two provisions are based upon Article 21, paragraphs 1 and 2, of the Convention on Cluster Munitions.

The third provision is drawn in part from the Treaty of Tlatelolco, Article 1(2): “The Contracting Parties also undertake to refrain from engaging in, *encouraging or authorizing, directly or indirectly*, or in any way participating in the testing, use, manufacture, production, possession or control of any nuclear weapon.” (Emphasis supplied.) The prohibition of encouragement or authorization of use and threatened use can also be placed in a Basic Obligations section (see 1(A)(d), above); the prohibition of assistance to anyone engaging in an activity prohibited by the treaty (see 1(A)(j), above) also goes to this point. The above language, however, makes the point absolutely clear.

Why are such provisions needed? A key strategic issue is whether a state party may be defended by a non-party by means of use or threat of use of nuclear weapons. That issue should be squarely faced. This is true of all states parties (who knows what future circumstances will be?) but particularly those that are presently in alliances with nuclear-armed states. A state party could be in an alliance and not participate at all in nuclear arrangements but still in general and in specific instances be defended in this way – unless it was explicitly ruled out by the ban treaty. In ruling it out, it would be important to include threat as well as use, due to its key role in alliances and ‘nuclear deterrence’.

4) Provision for participation by states possessing nuclear weapons

Possible language: A State possessing nuclear weapons is eligible to [join] the Treaty when the State has assumed a legally binding, time-bound obligation verifiably and irreversibly to eliminate its nuclear arsenal.

Commentary: Probably the prohibition treaty will be a step toward a comprehensive agreement on nuclear disarmament, as stated in proposed preambular element (3), in whose negotiation some or all nuclear-armed states would participate. However, the possibility that one or more nuclear-armed states will decide to join the ban treaty should be explicitly provided for. The obligation to eliminate the arsenal could be entered into in various ways. It could be an agreement with the members of the ban treaty or perhaps with a body of the ban treaty. It could be an agreement among (some) nuclear-armed states. It could perhaps even be a unilaterally assumed legal obligation, as the International Court of Justice said could be done in the *Nuclear Tests* case. Presumably the obligation and a plan and schedule for disarmament would have to be approved in some fashion by members or a body of the ban treaty. Application of certain provisions of the treaty, such as the prohibition of possession of nuclear weapons, might have to

be suspended while the plan is implemented. All of this would require some elaboration in the treaty.

5) Administrative capability

Possible language: A [secretariat] shall be established. Its functions include: promotion of the Treaty and its aims; preparation of meetings of States Parties; assistance to States Parties in meeting their obligations, including with national measures; fostering of research and debate about nuclear disarmament, with provision for civil society involvement; facilitation of accession to the Treaty by States which are ending their possession of or reliance upon nuclear weapons.

Commentary: This approach assumes that an administrative body, however designated (secretariat, support unit, etc.), for the treaty would be modest, at least to begin with. If negotiators so desire, a more ambitious approach could be taken. An agency could be established that would undertake, e.g., the following additional tasks, or at least arrange for and coordinate them: track and report data relating to nuclear weapons in the world and related matters, thus providing the first official international body to do so; monitor and verify the obligations not to research, design, develop, test, produce, acquire, possess and deploy nuclear weapons; monitor and verify elimination of nuclear arsenals by nuclear-armed states wishing to join the treaty.

Whatever the scope of an administrative body, “promotion of the Treaty and its aims” – one of the aims being the achievement and maintenance of a world free of nuclear weapons – could encompass proactive measures, even innovative ones. Thus review meetings of state parties could adopt positions and undertake initiatives as to emerging developments, and direct the administrative body to present the positions and initiatives to appropriate UN bodies, NPT meetings, or particular states.

A treaty administrative body, together with UN bodies like UNODA and UNIDIR, could promote research and provide fora for discussion, ranging from publications to special meetings to side events at regular meetings of treaty parties, on topics ranging from the dangers of new arms racing and the interaction of nuclear, conventional, cyber, and electronic warfare to citizen and open-source verification techniques. Regular meetings of the states parties and an active administrative capability also could provide a crucial nexus for the exchange of ideas between states committed to nuclear disarmament and civil society, and for the systematic collation and publication of research and information about nuclear disarmament. These kinds of efforts would be limited only by the resources and imagination that the treaty parties are willing to put into them, and by their openness to encouraging participation by civil society. This latter element should include active efforts to promote participation by civil society voices seldom heard from in existing disarmament fora, particularly those from the global South.

6) Obligations under existing international law

Possible language: Nothing in this Treaty shall in any way limit or detract from the obligations assumed by a State Party under international law, in particular the Nuclear Non-Proliferation Treaty, the regional Nuclear Weapon Free Zone treaties, the Comprehensive Nuclear-Test-Ban Treaty, other legal instruments relating to nuclear weapons, and international humanitarian law.

Commentary: Such a provision is needed *inter alia* because a common objection to a prohibition treaty is that it will undermine the NPT, and because of the concern that states relying on nuclear arms could assert that the fact that only some states are parties to the treaty indicates that its obligations as to non-threat and non-use of nuclear weapons are not universal.

7) Rights of victims

Possible preambular language:

Recognising the catastrophic harm, including transgenerational health effects, suffered by victims of nuclear explosions and testing, and *mindful* of the need to adequately address the rights and needs of victims,

Resolved to do their utmost in providing assistance for the care and rehabilitation, including the social and economic reintegration, of victims of nuclear weapons,

Recognising the need to provide age- and gender-sensitive assistance to victims of nuclear weapons and to address the special needs of vulnerable groups,

Recognising the devastating impact of nuclear explosions on the capacity of an affected State Party to provide adequate immediate and long-term assistance to victims, and *stressing* the need for international cooperation and assistance in providing assistance to victims,

Convinced that an essential element of remedy for the Hibakusha and other victims of nuclear weapons detonations and testing around the world is a guarantee of non-repetition through achievement of a world free of nuclear weapons.

Commentary: The extent to which the treaty should address assistance to victims is uncertain. Among other things, the treaty aims to prevent future use of nuclear weapons altogether, and issues relating to victims of testing and use of nuclear weapons going back to 1945 are complex and the implications of commitments with respect to such victims are far-reaching. However, in particular due to the humanitarian thrust of the initiative leading to negotiation of a prohibition treaty, it would make sense that there at least be acknowledgement of the rights of victims. Accordingly, at this point we have provided possible language for the *preamble*.