

United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination

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Comments of the International Committee of the Red Cross on key provisions of the Draft Convention on the Prohibition of Nuclear Weapons

Submitted by the International Committee of the Red Cross

This paper outlines the principal comments of the International Committee of the Red Cross (ICRC) on the Draft Convention on the Prohibition of Nuclear Weapons.¹ Overall, the ICRC finds that the draft convention provides a solid foundation for achieving the prohibition of nuclear weapons and for advancing towards their eventual elimination.

The ICRC believes that the text of the draft convention could be clarified and strengthened in several important areas and that this would help facilitate the draft convention's implementation once it is adopted. The ICRC's textual proposals are contained in the boxes below. Additional comments and proposals will be made during the negotiating session.

The preamble

The draft preamble provides a good reflection of the concerns and motivations that underpin the nuclear weapon prohibition treaty. Importantly, it clearly highlights that the treaty is founded on the international community's deep concern about the catastrophic humanitarian consequences of nuclear weapons, recognizes the needs of victims and affirms the central role of the Treaty on the Non-proliferation of Nuclear Weapons (NPT), the Comprehensive Nuclear-Test-Ban Treaty (CTBT) and the treaties establishing nuclear weapon free zones.

1. Preambular paragraph (PP) 1 - Missing from the preamble is a recognition of the lack of any adequate humanitarian response capacity to assist victims in the aftermath of a nuclear weapon detonation. This was a key finding of studies undertaken by the ICRC (2007, 2009) and the United Nations Institute for Disarmament Research (UNIDIR, 2014). It was also highlighted in the conferences on the humanitarian impact of nuclear weapons held in Oslo

¹ UN Doc. A/CONF.229/2017/CRP.1, 22 May 2017

(2013), Nayarit (2014) and Vienna (2014) and in UN General Assembly Resolution A/Res/71/47.² The inability to provide such assistance is one of the key rationales for pursuing the prohibition and elimination of nuclear weapons.

The ICRC recommends that a recognition of the lack of adequate humanitarian assistance capacity in the aftermath of a nuclear detonation be added to PP1 in the following terms (new text in bold):

Deeply concerned about the catastrophic humanitarian consequences that would result from any use of nuclear weapons, **the lack of any adequate humanitarian response capacity to assist the victims in the aftermath of a nuclear weapon explosion** and the consequent need to ensure that nuclear weapons are never again used under any circumstances.

2. PP1bis (New preambular paragraph) - Another issue absent from the preamble is a recognition of the growing risks of the use of nuclear weapons by intent, miscalculation or accident. The scope and nature of these risks have been stressed by eminent military and security experts in recent years and in studies conducted by UNIDIR (2017) and Chatham House (2014). They were also examined at the conferences on the humanitarian impact of nuclear weapons held in Oslo, Nayarit and Vienna, as well as in UN General Assembly Resolution A/Res/71/47³ and in wider research. The increasing risk of nuclear weapon use by intention, miscalculation or accident reflects the urgent need for a prohibition treaty.

The ICRC recommends that the increasing risks of use of nuclear weapons be addressed by adding a new preambular paragraph after PP1:

Also deeply concerned about the growing risks of use of nuclear weapons by intent, miscalculation or accident,

3. PP4 - International humanitarian law (IHL) The inclusion of this important paragraph in the draft convention is meant to express the basis in IHL of the prohibition of nuclear weapons. While the paragraph indicates that States Parties are “basing themselves on the principles and rules of international humanitarian law”, it mainly focuses on the IHL rules that protect the natural environment. The rules protecting civilians and combatants are not expressly mentioned. Yet these rules were a key part of the discussions at the conferences on the humanitarian impact of nuclear weapons and were referenced in the 1996 Advisory Opinion of the International Court of Justice (ICJ).⁴ Given the central role of this preambular paragraph in identifying the legal basis for the conclusion of this treaty, an accurate presentation of the most relevant IHL rules is important. A general formulation of each rule or set of rules would suffice while keeping the paragraph succinct and easy to follow.

² Humanitarian Pledge for the Prohibition and Elimination of Nuclear Weapons, 2016.

³ Ibid.

⁴ ICJ, *Legality of the Threat or the Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, (1996) ICJ Reports.

The ICRC recommends that PP4 be modified as follows (new/modified text in bold):

Basing themselves on the principles and rules of international humanitarian law, in particular the principle that the right of the parties to an armed conflict to choose methods and means of warfare is not unlimited, **the rule of distinction, the prohibition of indiscriminate attacks, the rule on proportionality in attack, the prohibition on the use of weapons of a nature to cause superfluous injury or unnecessary suffering and the rules on the protection of the natural environment.**

4. PP6 Martens Clause – *This paragraph reproduces the* Martens Clause, a long-standing principle of IHL which establishes that, in cases not covered by existing IHL principles and rules, civilians and combatants remain protected by the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience. (see, for example, Art. 1(4) of 1977 Additional Protocol I to the Geneva Conventions and PP4 of 1977 Additional Protocol II).

As currently drafted, PP6 applies the principle to “cases not covered by this convention”, and in so doing introduces an ambiguity regarding the scope of protection of civilians and combatants under international treaty law in situations where the convention would not apply (e.g. where a State is not party to the convention). Yet, in cases involving nuclear weapons but not covered by the convention, civilians and combatants remain protected by “existing IHL principles and rules”, as the 1996 Advisory Opinion of the ICJ made clear.

In order to avoid this ambiguity, it would seem more appropriate to use this preambular paragraph to highlight the unacceptability of nuclear weapons under the principles of humanity and the dictates of public conscience, which are the key principles of the Martens Clause.

The ICRC recommends that the text of PP6 be amended to read:

Emphasizing that any use of nuclear weapons would be abhorrent to the principles of humanity and the dictates of public conscience.

5. PP14 – *This paragraph highlights the important role of a range of organizations and of those who have been affected by nuclear weapons in efforts to prohibit and eliminate nuclear weapons. It follows similar preambular paragraphs of the Convention on the Prohibition of Anti-personnel Mines (APMBC) and the Convention on Cluster Munitions (CCM).*

The ICRC is grateful to be mentioned in this paragraph. However, other components of the International Red Cross and Red Crescent Movement – namely National Red Cross and Red Crescent Societies and their International Federation – have also played a crucial role in raising awareness of the catastrophic humanitarian consequences of nuclear weapons and in calling for their elimination. Therefore, as is done in the preambles of the APMBC and CCM, PP14 should refer to the International Red Cross and Red Crescent Movement, which encompasses the ICRC, National Red Cross and Red Crescent Societies and their International Federation.

In addition, it would be important for this preambular paragraph to also recognize the significant efforts of the victims of nuclear testing.

The ICRC recommends that PP14 be modified as follows (new/modified text in bold):

Stressing the role of public conscience in the furthering of the principles of humanity as evidenced by the call for the total elimination of nuclear weapons and recognizing the efforts to that end undertaken by the United Nations, **the International Red Cross and Red Crescent Movement**, numerous non-governmental organizations, the Hibakusha, **and victims of nuclear testing.**

Operative provisions

Article 1 sets out the prohibitions and represents the core of the convention. The provision is fairly robust as drafted as it prohibits the use of nuclear weapons and a wide range of activities that enable their use. Nevertheless, the ICRC believes that the provision could be strengthened in the following areas.

Military preparations to use nuclear weapons

As the ICRC has previously emphasized, the Chemical Weapons Convention (CWC) – which is of near-universal application with 192 States Parties – provides a fitting model for the prohibition of nuclear weapons, as it contains essential prohibitions that use well-understood terminology.⁵

Article 1(1)(c) of the CWC prohibits a State Party “[t]o engage in any military preparations to use chemical weapons”. This requirement is absent from the Draft Convention on the Prohibition of Nuclear Weapons. Adding such a prohibition would significantly strengthen Article 1 and, in addition to the physical acts related to nuclear weapons currently covered, make clear that a State Party could not partake in activities such as planning, targeting or training for the use of nuclear weapons.

In addition to maintaining consistency with the CWC terminology, this new provision would prevent interpretations that such activity was permitted because such a prohibition has not been retained by the future nuclear weapon prohibition convention.

The ICRC recommends that a new paragraph be inserted, for example after Article 1(1)(d), to prohibit engagement in any military preparations to use nuclear weapons (new text in bold):

Each State Party undertakes never under any circumstances to...

(d-bis) ...engage in any military preparations to use nuclear weapons.

Article 1 (1)(c) and (g) – The ICRC questions the need to include these provisions in the draft convention. In our view, prohibitions on “receiving the transfer or control” or receiving assistance to commit a prohibited act are unnecessary given the broad prohibitions that the draft convention would establish. Any receipt of transfer or control or a receipt of assistance to

⁵ Elements of a treaty to prohibit nuclear weapons, submitted by the ICRC to the March negotiating session (A/Conf.229/2017/WP.2), 31 March 2017.

commit a prohibited act would inevitably offend the prohibitions to “otherwise acquire” and to “possess or stockpile” nuclear weapons as stated in Art. 1 (1)(a) or Art. 1 (2).

The ICRC recommends the deletion of Art. 1 (1)(c) and (g).

Articles 3-5 aim to prevent the diversion of nuclear energy to purposes prohibited by the convention, to verify that former possessor States have eliminated their nuclear weapons, and to establish a foundation for the elimination of nuclear weapons by possessor States that join the treaty. However, as currently drafted, these articles are unclear and it is difficult to fully understand their implications.

As the ICRC has previously stated, it is crucial for the treaty to allow adherence by States that currently possess nuclear-weapons, consistent with the UN conference’s mandate which refers to the prohibition of nuclear weapons “leading towards their total elimination”. This appears to be the intention behind Article 5, yet it is not clear from the terms of this provision if it would achieve this goal. Other treaties prohibiting weapons provide useful models for these situations. Each has, as one of its core provisions, an unambiguous commitment to declare stockpiled weapons and to destroy them, and sets out a timetable for achieving this. A similar stockpile destruction commitment should be included in the draft convention. The exact timetable and processes for verification could be detailed separately in subsequent agreements or protocols once a nuclear weapon possessing State becomes a State Party. This approach would allow a State that possesses nuclear weapons to join the treaty without needing to wait for the completion of its stockpile destruction and clarify that a State is not in violation of Article 1(1) while engaged in a stockpile destruction process in accordance with the Convention.

Articles 6 – Paragraph 1 is modeled on Article 5 of the CCM. However, this paragraph differs significantly from the CCM in that its obligations would only apply to States Parties “in a position to do so”. The CCM article does not contain such a qualifier but firmly establishes a requirement for each State Party that has victims to care for. In this regard, victim assistance in the CCM is an obligation with the same legal relevance as the other key commitments of that convention.

Article 5 of the CCM was widely heralded as an important development of IHL and furthering a needs based, humanitarian approach to victim assistance. In addition, the Convention on the Rights of Persons with Disabilities (CRPD) does not employ “in a position to do so” in any of its provisions. These treaties clearly set out that States have a primary responsibility for the victims and disabled in areas under their jurisdiction or control. This should also be clearly indicated in Article 6 of the draft convention.

In light of the developments in this area, there would seem to be no substantive justification to treat the obligations of the draft treaty differently than the corresponding obligations of other instruments.

The ICRC recommends the deletion of “in a position to do so” in Article 6 (1).

Article 6 (2) does not establish any obligations for the affected State Party. Rather, it grants it a right to request and to receive assistance toward the environmental remediation of affected areas.

This differs from the approach taken in other weapons treaties (APMBC, CCM, Protocol V of the Convention on Certain Conventional Weapons) where the affected State has the primary responsibility

to clear and make useable land contaminated with explosive munitions. Taking a similar approach in the draft convention treaty would uphold and reinforce this approach.

The ICRC recommends that Article 6 (2) be reformulated to clearly indicate that environmental remediation is the responsibility of the affected State. (modified text in bold):

2. Each State Party with respect to areas under its jurisdiction or control contaminated as a result of activities related to the testing or use of nuclear weapons or other nuclear explosive devices, **shall take necessary and appropriate measures** towards the environmental remediation of areas so contaminated.

Article 8 - Paragraphs 2 and 3 of Article 6 create some confusion regarding Article 8, as this latter provision also covers cooperation for implementation and establishes a general right for a State Party to seek and receive assistance. This should be clarified. The ICRC believes that, like other treaties prohibiting weapons, there should be an effective provision on assistance and cooperation in the implementation of all aspects of the convention. Article 8 should be reinforced to achieve this goal. This could be done by including in Article 8 a clear commitment for States Parties to assist and cooperate with affected States to implement the convention and by moving Article 6 (3) to Article 8.

The ICRC recommends that Article 8 be modified as follows (new text in bold):

Article 8

International cooperation **and assistance**

1. Each State Party shall cooperate with other States Parties to facilitate the implementation of the obligations of this Convention.
2. In fulfilling its obligations under this Convention each State Party has the right to seek and receive assistance.
3. **Each State Party in a position to do so shall provide technical, material and financial assistance to States Parties affected by nuclear weapon use or testing to further the implementation of this Convention.⁶**
4. **Such assistance may be provided, inter alia, through the United Nations system, international, regional or national organizations or institutions, non-governmental organizations or institutions, or on a bilateral basis.** [Moved from Article 6(3)].

Article 18 – Paragraph 3 of Article 18 is a concern as the references to the Geneva Conventions and Additional Protocol I mean that this provision is only relevant in international armed conflicts. This implies that withdrawal from the convention would be allowed after a 3-month notice period if the State concerned is engaged in a non-international armed conflict. This would create a significant gap in the application of this provision, as most armed conflicts today are of a non-international character and

⁶ Based on Art. 6 (2) of the CCM.

the possible use of nuclear weapons in such conflicts in the future cannot be excluded. Moreover, the character and the nature of armed conflicts are often disputed by the parties concerned.

The APMBC and CCM are clearer in this regard. Both treaties stipulate that if, following a six-month waiting period of its notification of withdrawal, “the withdrawing State Party is engaged in an armed conflict, the withdrawal shall not take effect before the end of the armed conflict.”

The ICRC recommends that draft Article 18 (3) be amended as follows (new/modified text in bold):

“Such withdrawal shall only take effect three months after the receipt of the instrument of withdrawal by the Depositary. If, however, on the expiry of that three-month period, the withdrawing State Party **is engaged in an armed conflict, the withdrawal shall not take effect before the end of the armed conflict**”.

Article 19 — This article focuses on the relationship between the draft convention and the NPT. Yet, there are other treaty relations to consider, such as those establishing nuclear weapon free zones and potentially the CTBT were it to ever enter into force.

As currently drafted, this paragraph might be interpreted as allowing a State Party to the NPT that possesses nuclear weapons to join the convention on the prohibition of nuclear weapons and retain its nuclear weapons, arguing that they have the “right” to do so under the NPT.

In addition to addressing this potential loophole, it is important to broaden Article 19 so as to allow it to encompass other existing instruments on nuclear weapons and potential future agreements.

The best way to address these problems would be for the draft convention to contain a more general article on its relationship to other agreements. Article 26(1) of the Arms Trade Treaty addresses this issue in clear and unambiguous terms, and the ICRC believes it would be a useful model for the nuclear weapon prohibition treaty.⁷

The ICRC recommends that the current text of Article 19 be replaced with the following:

The implementation of this Convention shall not prejudice obligations undertaken by States Parties with regard to existing or future international agreements, to which they are parties, where those obligations are consistent with the Convention.

⁷ Art. 26 (1) “The implementation of this Treaty shall not prejudice obligations undertaken by States Parties with regard to existing or future international agreements, to which they are parties, where those obligations are consistent with the Treaty.”