

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

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To Be Effective, Prohibition of Nuclear Weapons Must Include Nuclear Threats, Extended Deterrence, and Military Alliances with Nuclear States (Part I)

Submitted by the Los Alamos Study Group
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Introduction and general remarks

1. We would like to join others in extending our congratulations to the President of the Conference, Ambassador Elayne Whyte Gómez, her staff, and the states attending the first negotiating session (27-31 March, 2017) for the prompt resolution of procedural issues and the highly productive exchange of views which followed, and for this draft Convention. These accomplishments lay an excellent foundation for success in the second and final session of the Conference – *provided that certain key weaknesses in the draft are repaired.*

2. *Failure to repair these weaknesses would severely compromise the effectiveness of the Convention.*

3. The draft Convention expresses much of the general consensus that was developing in the March negotiating session. It is a fairly “lean” draft, as was desired by the states most active in the negotiations. Like these states, we also seek a simple, clear treaty, without complications that could prove impossible to negotiate, interpret, or enforce.

4. That said, the draft Convention’s prohibitions do not go far enough. *The gravest defect is that the draft Convention omits explicit prohibitions of:*

- a) nuclear threats by nuclear-armed states;
- b) nuclear threats, or assistance in making nuclear threats, by states which do not themselves possess nuclear weapons; and
- c) planning and preparation, by states not possessing nuclear weapons, for wars that could include the use of nuclear weapons possessed by allied states.

5. Failing to *explicitly* prohibit these acts could (and likely would) create a discriminatory *partial* prohibition of nuclear weapons that would undercut the

purposes, operation, and stability of the treaty. Very simple changes can repair these problems, but they are substantive issues and will need real discussion. The current implied prohibition of nuclear threat is far from clear, universal, or sufficient to change state behavior.

6. In our view, the nettle of nuclear disarmament should be truly grasped by this Conference. Prohibiting nuclear weapons is in general not analogous to prohibiting chemical weapons and other banned munitions (though *some* structures from these conventions may be good models). Nuclear weapons are emplaced deeply in the present world order. Some 77% of the world's GDP is currently attributed to the 37 nuclear-armed and nuclear-dependent states. These 37 states, to a greater or lesser degree, incorporate nuclear weapons in their national policies and national self-conception. To a greater or lesser degree, the Convention challenges the national security structures of all these states, on the grounds that these states' policies incorporate intolerable risks to humanity and nature. Nuclear disarmament requires profound change in the world's security architecture, which this Conference is tasked to lead. A legally-binding instrument prohibiting direct and indirect dependence upon nuclear weapons, in all its aspects, in every state, without discrimination, is our task. **It is of paramount importance to successfully conclude negotiations by July 7; this opportunity may not come again.**

7. Procedurally, we believe it is important to work from a single draft, the one we have now.

8. A successful conclusion to these negotiations, i.e. sufficient agreement by July 7 on a legally binding instrument to prohibit nuclear weapons, is of paramount importance. No issue, even the critical ones we raise, should be allowed to prevent a successful negotiating outcome. What unites all but a very few negotiating states is more important than what divides them.

9. The present golden negotiating opportunity, created by the work of thousands of people over many years, may not come again. Nuclear modernization commitments and arms races are continuing. Some arsenals are continuing to grow. Geopolitical contests involving nuclear states are sharpening. As nuclear risks rise, other opportunity costs and risks regarding the protection of vulnerable populations and environments – including even the fate of the living earth as a whole – are mounting fast. These costs and risks are complex, unknowable, and increasingly existential. For populations under stress, for ecosystems and species, for the earth's climate, and for confrontations between states, there may be hidden “points of no return” beyond which the momentum of events carries onward into cascading catastrophes of unimaginable scale and severity. If our work together in this Conference is successful, it will benefit humanity greatly not just in nuclear disarmament but in other crucial ways as well. Time, however, is of the essence.

10. More negotiating time is highly unlikely to produce a better result – quite the opposite in fact. A ban treaty is required to further nuclear disarmament. This was the central point in our Working Paper of 4 May 2016 (A/AC.286/NGO/19, “Progress in multilateral nuclear disarmament requires a treaty prohibiting the possession, threat,

or use of nuclear weapons.”)¹ A nuclear weapon prohibition treaty need not be, and should not be, complicated. The present draft requires a two-thirds majority of states parties present at subsequent meetings of states parties for amendment (Article 11), the same proportion as in the present (original) negotiation. This provision, which seems wise, will provide sufficient flexibility to repair and improve the treaty.²

Leadership by states not dependent on nuclear weapons has been successful so far; the temptation to avoid difficult issues affecting nuclear-dependent states should be avoided.

11. As we argued in the above working paper, the work of delegitimation has to be done by non-nuclear weapon states alone. Since 1945 nuclear weapons states have never played, and for internal structural reasons cannot play, any constructive part in multilateral nuclear disarmament negotiations. The success of the first week of negotiations was, we believe, in no small part related to the physical absence of these states.

12. By the same token, the physical absence of nearly all the twenty-eight states with nuclear security agreements with nuclear weapons states (“nuclear umbrella” states) was also helpful. None of these 37 states (these 28 plus the 9 nuclear weapon states) are on record desiring to prohibit nuclear weapons. Most are opposed – many adamantly so.

13. Successful negotiation of a ban treaty is just part of the necessary confrontation with states whose national security conception is based on nuclear weapons. It is not an exercise in building consensus with those states, or providing easy ways for those states to accede to the treaty without relinquishing their perceived dependence on nuclear weapons – either their own or those of other states. The present negotiations are an essential first step in confronting and changing the policies of nuclear-armed and nuclear-supporting states.

To be effective, the Convention must aim at confronting and dismantling structures of nuclear dependence in all states, whether or not they accede to the treaty.

14. The Convention is not primarily aimed at preventing nuclear proliferation. We have another treaty for that. The Convention aims “to prohibit nuclear weapons, leading towards their total elimination.” The Convention will be effective to the extent it can set into motion historical processes within and between states which decrease the political advantages of possessing nuclear weapons, and which increase the political disadvantages of nuclear possession *in the existing nuclear weapon*

¹ At <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/OEWG/2016/Documents/NGO19.pdf>.

² As hinted in paragraph 3 above, if states with extended deterrence agreements were able to become states parties, the flexibility built into the draft could become a liability, destabilizing the Convention. The problem would be exacerbated if nuclear weapon states, under some disarmament provision not included in the present draft, were allowed to accede. Any such provision would be very ill-advised.

states, *whether or not* they accede to the Convention. *We must assume nuclear armed states will not join, and craft the Convention to impact those states in spite of this.* The Convention should be crafted in such a way as to impinge maximally upon the nuclear prerogatives of the nuclear weapon states and their supporting allies. When we speak of the “norm-setting” influence of the Convention, we therefore should understand this in concrete diplomatic, economic, military, and foreign policy terms. *Moral suasion alone*, without dramatic changes in the foreign policies of states without nuclear weapons but which nonetheless actively or passively enable nuclear weapons, *will fail to dislodge nuclear weapons from the central position they currently hold in national policies, identities, and economies.*

15. For this reason there should be a positive obligation for states parties to promote understanding of the importance of nuclear disarmament and the illegality of nuclear deterrence, as well as an obligation to promote the purposes of the treaty generally.

The Convention should not have a withdrawal clause.

16. In Article 18, paragraphs 2 and 3, the draft Convention contemplates possible withdrawal by states parties. On balance, and despite their rigor, we believe these paragraphs should be stricken. An *explicit* withdrawal clause of any kind, beyond the *implicit* conventions of the Vienna Convention on the Law of Treaties,³ immediately undermines for all states (not just states parties), the permanence and universality of the Convention’s moral and legal norms. The treaty’s prohibitions should be universal, non-discriminatory, and independent of any and all future events. It is precisely in circumstances of deteriorating security (real or perceived) that the treaty’s prohibitions are most important. By not having a withdrawal clause the Convention in effect asserts that its prohibitions are permanent and unchangeable.

17. That stance also protects the universality of humanitarian law and the moral norms on which the Convention is based, which are being constantly undermined and corroded by nuclear deterrence. (See paragraphs 33-34 below.)

The Convention should explicitly prohibit nuclear threat and nuclear deterrence, including extended nuclear deterrence.

18. We understand that the UN Charter forbids “the threat or use of force against the territorial integrity or political independence of any state...”⁴, which might apply to some nuclear threats. We also understand that, as the International Court of Justice (ICJ) expressed it in 1996, “if the use of force itself in a given case is illegal – for whatever reason – the threat to use such force will likewise be illegal.”⁵ Some have argued that because of these and related legal principles, an explicit prohibition of

³ At <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>.

⁴ Article 2 (4), at <http://www.un.org/en/sections/un-charter/chapter-i/>.

⁵ ICJ, Advisory Opinion, “Legality of the Threat or Use of Nuclear Weapons,” 1996, paragraph 47, <http://www.icj-cij.org/docket/files/95/7495.pdf>. See also paragraph 48.

nuclear threat is not necessary. These are however lawyers' arguments, for which there are lawyers' counter-arguments.

19. Chief among these counter-arguments is that nuclear weapons, unlike other banned weapons, are (nearly but not always) described by those who wield them as *never to be used in war*. Instead, their true, continuous "use" lies solely (it is argued) in *threatened* use. The historical record since 1945 supports this contention, as do countless domestic and international statements and policy documents authored by governments with nuclear weapons and also by governments with nuclear umbrella relationships. Threats with nuclear weapons – nuclear deterrence, in other words – are said to uphold the UN Charter, prevent war, and save countless lives. If this were true, it would be a moral duty for nuclear weapon states to continue the carefully-calibrated, constantly-evolving and "modernizing" threats which constitute nuclear deterrence, at however great an expense and with whatever discomfort these activities might cause for most states, for the sake of "world peace." As John Burroughs summarizes the arguments of nuclear weapon states and their allies before the ICJ, their claim is "that nuclear weapons are not so much military means to wage war as political instruments to prevent war."⁶

20. In the centrality of *threat* (as opposed to *use*, in the ordinary sense of the word, i.e. *use in war*) as well as in other ways, prohibiting nuclear weapons is very different from prohibiting chemical weapons, biological weapons, and other munitions.

21. The central purpose of this Convention is to overthrow and discredit the ideology of nuclear deterrence along with the concrete preparations for nuclear war and the security structures based on nuclear deterrence. Nuclear deterrence in all its forms must be confronted head-on and explicitly outlawed if the Convention is to succeed. The present draft does not do that. It is evasive and discriminatory, in favor of (as it turns out) the 23 states in nuclear alliances with the United States which do not have nuclear weapons on their national territories. The present draft shields allies of the United States from the changes necessary to foster nuclear disarmament in the world.

⁶ John Burroughs, *The (Il)legality of Threat or Use of Nuclear Weapons: A Guide to the Historic Opinion of the International Court of Justice*, International Association of Lawyers Against Nuclear Arms, 1997, p.133. Burroughs quotes Perrin de Brichambaut, representing France, as an example: "For France, a nuclear weapon is a weapon intended to prevent war by depriving it of any possible rationale." Umberto Leanza, representing Italy: "...the power of deterrence, which constitutes the warrant for any threat, is a means of avoiding – not of generating – the use of armed force, through the representation of the ensuring risks. This is all the more true in the case of nuclear weapons, whose real effectiveness consists paradoxically in the deterrent power of the threat and not in their actual use."

The arguments against the legality, morality, and prudence of nuclear deterrence have been effectively rebutted in many ways; see for example the excerpts from ICJ testimony in Burroughs, pp. 132-144. The legality of nuclear deterrence *by nuclear weapons states* would be mostly settled by the Convention as drafted, since the acts it proscribes are a necessary basis for nuclear threats, i.e. deterrence. What would *not* be settled or closed is the giant loophole of (currently) 23 states which depend upon and enable nuclear threats by states not party to the Convention.

22. Another argument made is that there can be no nuclear weapons threat – no deterrence – without development, production, manufacture, acquisition, possession, stationing, stockpiling, and deployment of nuclear weapons, or assistance in these acts, all of which are barred by the draft Convention. Therefore, the argument goes, it is not necessary to specifically prohibit threats. However, with the impossibly cryptic and arguable exception of “assistance,” none of these stated prohibitions apply to 23 of the current 28 nuclear umbrella states. *If nuclear weapons states do not join the treaty, as is virtually certain, to whom will all these prohibitions apply? How would the Convention be effective, in that case?* Would the Convention then end up as merely an idealistic gesture, or merely reinforce existing nonproliferation commitments, and have little actual disarmament value? Unless this loophole is fixed, it might indeed.

23. To repair these defects, we and many others believe the treaty should explicitly prohibit nuclear threats. Nuclear umbrella states should be barred from joining the treaty. There are currently 28 such states – 25 in Europe, all of them members of NATO (including the 5 nuclear basing states), plus South Korea, Japan, and Australia.

24. The Convention’s Preamble should explicitly declare nuclear threats and nuclear deterrence illegal, in its fifth paragraph (“*threat or use*”, instead of “use”). Article I should prohibit nuclear deterrence, extended nuclear deterrence, and (as explained below) military planning and cooperation with nuclear-weapons-possessing allies. These allies deploy nuclear weapons, make nuclear threats, and plan for contingent nuclear use in alliance warfare with or without agreement by their allies.