

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 II); Nuclear States Must Remain Outside the Treaty

Submitted by the Los Alamos Study Group
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The Convention should prohibit states parties from engaging in military planning and assistance for possible wars that include nuclear weapons, whether or not states parties engage in nuclear war planning directly.

1. The nuclear planning component in military alliances such as the North Atlantic Treaty Organization (NATO) cannot be separated from conventional military planning, which uses much of the same equipment, bases, and personnel. Many conventional military assets are needed to threaten with, or to use, nuclear weapons. These “conventional” military assets acquire a partially nuclear character in nuclear alliances. They are “dual-use.” *No clear line can be drawn between purely conventional, defensive military force* (perfectly legal, including under this draft Convention) *and “dual-use” military assets necessary to deploy, transport, target, communicate in support of, protect, augment, etc., nuclear weapons.* Across the board, each element of a military alliance depends upon and “assists” the others. As long as NATO for example is a nuclear alliance, i.e. an alliance in which some members rely on a so-called nuclear “deterrent,” *all NATO members are giving material “assistance and encouragement,” in the words of the draft Convention, to preparations for nuclear war.* They are also giving moral and political support to nuclear threat and use as well. The same is true for U.S. nuclear-military alliances in the East Asia/Pacific region. The United States itself acknowledged these difficulties in a “non-paper” submitted to NATO last year.¹

2. Therefore states in military alliances with nuclear weapon states should not be allowed to join the Convention, for the simple reason that they, inescapably, will be

¹ United States Non-Paper: “Defense Impacts of Potential United Nations General Assembly Nuclear Weapons Ban Treaty,” 17 October 2016, at http://www.lasg.org/BAN/NATO_OCT2016.pdf.

assisting those states in acts prohibited by the Convention. *This needs to be explicit and clear to all parties.*

Closing the extended deterrence and military alliance loopholes are immediate, concrete actions negotiators can take to make the Convention effective.

3. In sum, the purpose of the Convention is precisely to dismantle dependence on nuclear weapons in all its forms, including international structures of nuclear deterrence and alliances based on nuclear threats. Silence on this fundamental question – letting the present loopholes stand – would greatly diminish the Convention’s influence.

4. Many people wonder how a ban treaty could possibly affect nuclear weapon states, which are highly unlikely to sign it. Explicitly prohibiting: a) nuclear deterrence, b) extended nuclear deterrence, as well as c) military planning and cooperation with nuclear allies which possess and deploy nuclear weapons, make nuclear threats, and plan for contingent nuclear use – these are the main ways the Convention would effectively promote nuclear disarmament and the “total elimination” of nuclear weapons, in the words of the Conference mandate.

5. Specifically prohibiting financial assistance by states parties for actions prohibited by the Convention is not an effective substitute for prohibitive clarity on either the question of a) extended nuclear deterrence or b) direct *military* assistance in prohibited acts. We do not believe prohibiting financial assistance would be particularly effective in leading towards nuclear disarmament, though it would not hurt. The danger for the Convention is that the most effective financial prohibitions, should they be included, would be unenforceable.

6. More broadly, we do not examine “assistance” with prohibited acts in this working paper. Discussion is merited. As noted above, we do not believe the general prohibition of “assistance” adequately covers extended deterrence relationships.

7. Partially summing up, accession to the Convention should be limited to the 156 UN member states which are not:

- nuclear possessing states (currently 9 states) (*agrees with the current draft*);
- states without nuclear weapons themselves, but which have nuclear weapons stationed on their national territories (currently an additional 5 states) (*agrees with the current draft*);
- states with nuclear transfer or sharing agreements in event of war (currently 4 states, included in the previous 5) (*agrees with the current draft*);
- states with nuclear umbrella agreements (currently 28 additional states) (*different than the current draft*); as well as

- states which rely on military alliances with a nuclear component (currently, the same 28 states) *even if* they attempt to renounce participation in nuclear planning, since that would be impossible (as well as instantly reversible in the event of war or approaching war, or as a result of changes in government or policy). *This also is different than the current draft.*

Of the states that do meet these criteria, all are non-nuclear weapon states under the NPT and 90 are members of NWFZ treaties.

8. As noted above, accession by any of the above 37 nuclear-possessing and nuclear-enabling states or their successors would considerably complicate administration of a ban treaty, slow the universalization of its norms, and potentially throw the treaty's stability into doubt. Nuclear-armed states could undermine the treaty using nuclear umbrella states parties as diplomatic proxies on the "inside" to complement these states' "outside" strategies.

Failure to clearly prohibit nuclear threat could muddy existing international law.

9. Tremendous *de facto* state commitments to nuclear threat (deterrence) will certainly continue, even in the most optimistic case, for some time. If the Convention fails to *clearly* prohibit these *threats* while prohibiting the *use* of nuclear weapons, the Convention could muddy existing international norms, including humanitarian laws, that stress the illegality of threatened action when the action in question would be illegal. Examples of such laws and norms include the Nuremberg Principles (which prohibit not just actual wars of aggression and wars in violation of treaties, such as this Convention, but also *planning* and *preparation* for those wars) and the Genocide Convention (which prohibits not just genocide but also *conspiracy*, *incitement*, *attempt*, and *complicity* in genocide).²

10. Nuclear threat is synonymous with the existence of nuclear weapons. It is incompatible with the whole body of humanitarian law, and indeed all law. As expressed by Dr. Mohammed Bedjaoui, President of the International Court of Justice in his 1996 declaration,

Nuclear weapons, the ultimate evil, destabilize humanitarian law which is the law of the lesser evil. The existence of nuclear weapons is therefore a challenge to the very existence of humanitarian law, not to mention their long-term effects of damage to the human environment, in respect to which the right to life can be exercised...Atomic

² Burroughs, op. cit. p. 133.

warfare and humanitarian law therefore appear to be mutually exclusive: the existence of the one automatically implies the non-existence of the other.³

The process of accession to this Convention should be a process of progressive rejection of nuclear threat in all its forms, a process which will gradually remove the cancer of nuclear deterrence from the body of humanitarian law.

Nuclear deterrence means planning for genocide.

11. The Genocide Convention⁴ is particularly important since the use of nuclear weapons in war could easily lead not just to genocide in the narrow sense (i.e. with respect to particular national, ethnic, racial, or religious groups), but also in a broader sense applicable to nature and most or even all of humanity.⁵ The genocidal implications of thermonuclear weapons were clearly recognized by responsible parties even prior to their invention and demonstration.⁶ Even a “small” nuclear attack is potentially a direct means of genocide. The direct and indirect effects of a *single* thermonuclear explosion can devastate a wide area and would certainly end the existence of many nation-states.⁷ States with extended nuclear deterrence agreements are certainly “conspiring,” “inciting,” and “complicit” in planning for what could be, and in many scenarios likely would be, *genocidal* nuclear war. “Nuclear war agreements” (which is what is meant by extended deterrence) should be explicitly prohibited.

The draft Convention wisely makes no current provision for accession by nuclear-armed states.

12. The conference mandate requires the prospective treaty to lead towards the total elimination of nuclear weapons. This does not mean that the *process* of elimination should be in any way a part of the treaty, now or in the future. In the

³ At <http://lcn.org/wcourt/bedjaoui.htm>. The destabilizing effect of nuclear weapons is commonly observed in domestic law of nuclear weapon states as well. Herbert Marks, the first General Counsel of the Atomic Energy Commission once wrote, regarding the complex of factories and laboratories engaged in producing nuclear weapons for the U.S., “The Manhattan District bore no relation to the industrial or social life of our country; it was a separate state, with its own airplanes and its own factories and its thousands of secrets. It had a peculiar sovereignty, one that could bring about the end, peacefully or violently, of all other sovereignties.” At a much later point in history Professor Joel Kovel summarized the usurpation of power and democracy by the (personified) nuclear weapon with the famous dictum of Louis XIV: “L’état, c’est moi.” (*Against the State of Nuclear Terror*, 1983).

⁴ “Convention on the Prevention and Punishment of the Crime of Genocide,” 1948, <https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf>.

⁵ See for example Steven Starr, “The ban treaty must address the scientifically predicted consequences of nuclear war,” 19 May 2017, at <http://thebulletin.org/ban-treaty-must-address-scientificall-predicted-consequences-nuclear-war10779>.

⁶ See for example the majority and minority reports (both) of the General Advisory Committee to the U.S. Atomic Energy Commission of 30 October, 1949, J.R. Oppenheimer, Chair. At <http://www.atomicarchive.com/Docs/Hydrogen/GACReport.shtml>.

⁷ We believe the overall resilience of societies, economies, and states with respect to even small-scale nuclear attack is lower than many appreciate.

absence of good-faith negotiations by nuclear-armed states (which have never occurred), provisions for such hypothetical processes would remain just that – completely theoretical. They would also be impossible to negotiate in a multilateral setting and in the current timeframe.

13. What the second half of the mandate does imply, in our view, is that the treaty should lead toward elimination *effectively*, which in practice means *without* the participation of nuclear-armed states and nuclear umbrella states. Maximizing the disarmament impact of the treaty on nuclear-armed states which do not become states parties is at the core of these negotiations.

14. In a nutshell, we believe the best way to accomplish this is by making sure the prospective treaty's prohibitions (which should be comprehensive and clear) and its positive obligations (which should be few but effective in undermining nuclear dependence) impinge as heavily as possible upon the prerogatives of the nuclear armed states and nuclear umbrella states. Both kinds of nuclear-dependent states should remain outside the treaty until they fully eliminate their support for nuclear weapons.

15. We believe that to join the Convention, a nuclear weapon state should first:

- dismantle its nuclear weapons and certify the same to the states party to this Convention;
- join the Treaty on the Nonproliferation of Nuclear Weapons (NPT) as a non-nuclear weapon state, which would require amending the treaty at one or more regular review conferences in the cases of the China, France, Russia, U.K., and the U.S.; and
- negotiate an IAEA inspection regime under Article III of the NPT.

This appears similar to (but simpler, and more reliant on the NPT) the “South Africa-plus” option captured in Article 4 of the draft Convention, if we understand that option rightly, with one exception. As a practical matter it will prove impossible to fully inspect and verify the status of fissile material stocks in any nuclear weapon state. The Convention should not engage with fissile material issues in any way.

16. The prospective Convention's obligations should be of immediate and complete effect for all states parties upon the treaty's original entry into force, or upon later accession. The essence of any nuclear weapons prohibition treaty is that concrete and normative support for nuclear weapons – maintaining and deploying nuclear arsenals and claiming protection by threatened nuclear use – is always illegal, without exception. We already have a treaty with exceptions and promises to disarm, namely the NPT.

17. The Convention should neither create nor perpetuate discrimination between states or groups of states. It should not provide special accession rights, or provisions

for some states but not others. Such special exceptions would, notwithstanding other language in the treaty to the contrary, condone nuclear possession, threat, and potential nuclear weapons use for *some* states for *some prospective time*, which would immediately undercut the treaty's main purpose as well as the universal humanitarian norms on which it is based.

18. That is, accession to the Convention by nuclear weapon states and nuclear supporting states, under any protocol whatsoever, has legal and normative costs but adds no value, since full disarmament (not to mention full withdrawal from nuclear alliances) can be as rapid as desired in any state (see paragraph 44 below).

19. The treaty should explicitly anticipate, and in its positive obligations materially advance, the universality of its norms and legal standards to all states over all times. Attempts to combine a prohibition treaty – the conference mandate – with a gradual disarmament treaty (a nuclear weapon convention) will invariably weaken the Convention.