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

14 June 2017

English

New York, 27-31 March 2017 and 15 June-7 July 2017

Prohibitions and the Preamble: Further Comments

Submitted by International Association of Lawyers Against Nuclear Arms

The International Association of Lawyers Against Nuclear Arms (IALANA) submitted a working paper, “Selected Elements of a Treaty Prohibiting Nuclear Weapons,” in advance of the first week of negotiations in March 2017.¹ In this paper,² IALANA offers further comments on prohibitions and the preamble,³ with particular reference to the draft convention put forward by the President on 22 May.⁴

Prohibitions

1) Threat of Use of Nuclear Weapons

1. It is crucial to add a prohibition of the threat of use of nuclear weapons to the prohibitions set forth in the draft text, for the following reasons:

- Should a nuclear-armed state accede to the convention subject to a timebound disarmament obligation or enter into a disarmament protocol incorporating convention obligations, any threat of use during the period of disarmament should be explicitly barred.
- The convention should be perfectly clear that a state party may not in any way rely for its defense upon threats of use of nuclear weapons made by non-states parties. Inclusion of a prohibition of threat, together with the prohibition of encouraging or inducing anyone to engage in acts prohibited by

¹ A/CONF.229/2017/NGO/WP.12. A longer version of the paper is at <http://lcn.org/pubs/2017/IALANA/IALANA%20Discussion%20Paper%201.0final.pdf>

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³ IALANA is separately submitting a working paper on provisions regarding nuclear-armed states, positive obligations, institutional issues, and final clauses.

⁴ A/CONF.229/2017/CRP.1.

the convention,⁵ would serve this purpose. It is true that the prohibition of encouraging anyone to commit a prohibited act, in particular use of nuclear weapons, would bar a state party from relying on “extended nuclear deterrence” arrangements as well as specific threats made by a non-state party. But this point would be underlined by the inclusion of a prohibition of threat in the convention.

- The convention should directly contribute to the delegitimization of ‘nuclear deterrence’ by including a prohibition of threat of use of nuclear weapons, including, if deemed appropriate, security doctrines providing for use of nuclear weapons.

2. As is the case with the prohibition of use of nuclear weapons, inclusion of a prohibition of threat of nuclear weapons would apply, reinforce, and specify existing law. The UN Charter prohibits a threat of force which is aggressive or contrary to the purposes of the United Nations.⁶ Protocol I to the Geneva Conventions prohibits threatening that there shall be no survivors⁷ and prohibits “acts or threats of violence the primary purpose of which is to spread terror among the civilian population.”⁸ In its advisory opinion, the International Court of Justice (ICJ) filled in the gaps in treaty law. It stated that to be lawful, a threat of force in self-defense must be of a use of force that meets the general requirements of necessity and proportionality,⁹ the latter requiring as well compliance with international humanitarian law (IHL).¹⁰ Also, the Court stated, it is illegal to threaten the commission of an act which would violate IHL.¹¹ Thus, while existing law does apply to threats in all circumstances – aggression, self-defense, particular operations and situations during an armed conflict – its application is complicated and not spelled out comprehensively in the UN Charter and in IHL treaties. Inclusion of a prohibition of threat of nuclear weapons in the convention would therefore provide desirable clarity, confirming the illegality of threat under existing law, which should also be declared in the preamble.

3. The question can be raised whether doctrines of nuclear deterrence, which do not involve particular threats in particular circumstances, are captured by a prohibition of threatened use of nuclear weapons. The question cannot be fully

⁵ Article 1(1)(f) of draft convention.

⁶ UN Charter, Article 2(4): “All Members shall 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.” Article 51 does not refer to threat. It provides in relevant part: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations”

⁷ Protocol I, 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.”

⁸ Protocol I, Article 51(2).

⁹ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226*, para 48.

¹⁰ *Id.*, para. 42.

¹¹ *Id.*, para. 78.

resolved by reference to the ICJ's opinion.¹² In IALANA's view, at its core nuclear deterrence is an ongoing, permanent threat of use of nuclear weapons should certain circumstances arise. Nuclear deterrence is not an abstract matter, nor is it just a matter of possession of nuclear weapons; it is a concrete, elaborated military posture, embodied in deployments and doctrines, and in spending and infrastructure that support deployed nuclear forces. Nonetheless, if the question is an obstacle to the inclusion of a prohibition of threat, a reference to security doctrines providing for use of nuclear weapons can be added. For example, states parties could undertake never to threaten use of nuclear weapons, including through security doctrines providing for use of nuclear weapons; or a separate provision could prohibit adoption of security doctrines providing for use of nuclear weapons.

4. The convention in part will serve to reinforce and advance normative standards for the entire world, including non-states parties and publics of those states. It aims to strengthen stigmatization of nuclear weapons through treaty codification of norms. To do so effectively, it should directly contribute to the delegitimization of nuclear deterrence. The abolition of nuclear weapons will not be possible so long as nuclear deterrence holds sway as an alleged means of defense and ensuring peace and security. The inclusion of an explicit prohibition of threat of use of nuclear weapons, and, if deemed appropriate, of security doctrines providing for use of nuclear weapons, accordingly would advance the achievement of complete nuclear disarmament.

5. Finally, threat is not prohibited in existing conventions prohibiting and eliminating biological weapons, chemical weapons, landmines, and cluster munitions. However, it cannot be said of those weapons that the threat of their use was central to military and security postures; there were no doctrines of biological deterrence or chemical deterrence.

2) Preparation for Use of Nuclear Weapons

6. The Chemical Weapons Convention prohibits "engage[ment] in any military preparations to use chemical weapons." The Model Nuclear Weapons Convention proposes prohibition of "engage[ment] in any military *or other* preparations to use

¹² Compare *id.*, para. 67 ("The Court does not intend to pronounce here upon the practice known as the 'policy of deterrence'.") and para. 48 ("Some States put forward the argument that possession of nuclear weapons is itself an unlawful threat to use force. Possession of nuclear weapons may indeed justify an inference of preparedness to use them. In order to be effective, the policy of deterrence, by which those States possessing or under the umbrella of nuclear weapons seek to discourage military aggression by demonstrating that it will serve no purpose, necessitates that the intention to use nuclear weapons be credible. Whether this is a 'threat' contrary to Article 2, paragraph 4, depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations or whether, in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality. In any of these circumstances the use of force, and the threat to use it, would be unlawful under the law of the Charter.").

nuclear weapons”.¹³ It is important to include a similar prohibition in the convention on prohibition of nuclear weapons (the draft text does not). Such a prohibition would make it crystal clear that a state party to the convention may not in any way contribute to preparation for use of nuclear weapons by a non-state party, and additionally would provide clarity with respect to activities of a nuclear-armed state that joins the treaty subject to a timebound obligation of disarmament or is party to a protocol incorporating obligations of the convention. It also would add to delegitimization of postures of nuclear deterrence by states outside the treaty.

3) Research and Design

7. It is very much to the good that the draft text prohibits both development and testing of nuclear weapons. However, unlike recent NWFZ treaties (Pelindaba and Central Asian), it does not prohibit research. “Research” is a broad term, but its scope would be limited in the context of an undertaking not to “research, design, develop, produce ...”.¹⁴ As indicated, an additional possible term is “design.” Research and design are arguably covered by a prohibition of development, but clarity on this matter is desirable. There are many activities, such as laser fusion experiments, hydrodynamic testing, sub-critical explosions, and computer simulations, which may or may not be directly linked to design and engineering leading to production of a particular warhead, but in any case contribute to the knowledge providing a foundation for such work. Prohibitions of research and design would help make clear that such activities are impermissible. At the same time, in context they would not prohibit research on disarmament verification, or research on non-nuclear military matters such as hardening conventional weapons systems against nuclear weapons effects. A prohibition on non-explosive testing, experimental activities, and simulations could also be considered.

4) Transit and Financing

8. IALANA supports the inclusion of prohibitions of transit and financing. They would be significant in containing and challenging reliance on nuclear weapons by states outside the treaty. They are also means for all states parties to the convention to demonstrate concretely their commitment to its objectives.

¹³ Model Nuclear Weapons Convention, Article I(A)(1)(b) (emphasis supplied), http://inesap.org/sites/default/files/inesap_old/mNWC_2007_Unversion_English_N0821377.pdf.

¹⁴ See Article 1(1)(a) of draft convention. The Model Nuclear Weapons Convention (MNWC) defines “nuclear weapons research” as follows: “experimental or theoretical work undertaken principally to acquire new knowledge going beyond publicly available information of phenomena and observable facts directed toward understanding, development, improvement, testing, production, deployment, or use of nuclear weapons.” Article II(F)(52). The MNWC includes at least a prohibition of funding of nuclear weapons research as so defined. Article I(A)(1)(g).

Preamble

9. The preamble to the draft convention has a number of essential elements which should be retained. Among them, IALANA especially appreciates the provisions regarding the catastrophic consequences of nuclear weapons use; the suffering of the Hibakusha and those affected by testing (which could also refer to production); principles of international humanitarian law (which provision, however, needs revision); the illegality of use of nuclear weapons; the Martens clause regarding cases not covered by the convention; further effective measures relating to the elimination from national arsenals of nuclear weapons *and the means of their delivery* (based on an element of the NPT preamble);¹⁵ the objective of general and complete nuclear disarmament; the obligation to pursue and conclude negotiations on nuclear disarmament; and the role of public conscience, including the voice of the Hibakusha.

10. Regarding preambular paragraph four of the draft convention, it inadvertently omits reference to *key principles of IHL relating to protection of civilians*. In particular, the principle of distinction and the principle of precaution should be added. The latter is highly relevant to planning for use of nuclear weapons. A possible revised version of that paragraph is as follows:

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 or means of warfare is not unlimited, the principle that the parties to a conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and the associated prohibition of indiscriminate attacks, the principle of precaution requiring that in the conduct of military operations constant care be taken to spare civilians and civilian objects, and the principle that care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage.¹⁶

11. A preambular paragraph should be added, “Recalling the duty of States to respect and *ensure respect for international humanitarian law*.” This principle is drawn from common Article 1 of the Geneva Conventions and is today considered customary in nature. It applies not only to actual armed conflict, but also to the planning or preparatory phases, for instance in the assessment of the weaponry to be used in an attack. It additionally weighs against threat of nuclear attack, which negates respect for IHL whether or not a nuclear attack is executed.

12. We also recommend a preambular paragraph on *international human rights law*, for example: “*Recognizing* that the use of nuclear weapons would violate fundamental human rights, above all the right to life.” The catastrophic consequences of use of nuclear weapons vastly exceed the ordinary boundaries of armed conflict

¹⁵ On nuclear weapons delivery systems, see first IALANA paper, p. 7, <http://lcn.org/pubs/2017/IALANA/IALANA%20Discussion%20Paper%201.0final.pdf>.

¹⁶ The suggested language is based on Protocol I to the Geneva Conventions, Arts. 35, 48, 51, 55 and 57.

and adversely impact populations in neutral states, the natural environment necessary to sustain human life, and future generations.¹⁷ For this reason reference to international human rights law as well as IHL is highly appropriate and furthers public education about the aims of the convention. The right to life is protected, *inter alia*, by Article 3 of the Universal Declaration on Human Rights, Article 6 of the International Covenant on Civil and Political Rights (ICCPR), and Article 4 of the American Convention on Human Rights. In its General Comment No. 14, adopted in 1984, the Human Rights Committee, the body charged with implementing the ICCPR, considered it “evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today.”¹⁸

13. IALANA suggests addition of the word “*climate*” to the second preambular paragraph of the draft convention on catastrophic consequences of nuclear weapons, for example “pose grave implications for human survival, the environment *and climate* ...” This would link to the evidence presented at the conferences on humanitarian impact of the global cooling and consequent famine that would result from a large-scale exchange of nuclear weapons devastating many cities, and facilitate public education on the subject.¹⁹ Also, it should be “the health of *present and future generations*”.

14. Finally, in the third preambular paragraph of the draft convention, IALANA suggests addition of a reference to **production of nuclear weapons**, as the effects of the entire life cycle of producing nuclear weapons have harmed people in large numbers. It could read: “*Mindful* of the suffering of the victims of use of nuclear weapons (Hibakusha) as well as of those affected by the testing **and production** of nuclear weapons.”

¹⁷ See IALANA, “The Right to Life and WMD,” Submission to Human Rights Committee, 7 September 2016, http://lcn.org/pubs/IALANA%202016/Draft_GC_36_Submission_IALANA_FinalRev.pdf.

¹⁸ HRC, General Comment No. 14 (Article 6), Twenty-third session, 1984, UN Doc. HRI/GEN/1/Rev.1 at 18.

¹⁹ As noted in *Securing our Survival*, nuclear weapons have “the potential to exterminate much of humanity and other species, end human civilisation, *severely damage most ecosystems and disrupt the climate*, and cause global radioactive contamination over vast timeframes.” *Securing our Survival: The Case for a Nuclear Weapons Convention* (IALANA, International Network of Engineers and Scientists Against Proliferation, International Physicians for the Prevention of Nuclear War, 2007), p. 8 (emphasis supplied), <http://lcn.org/pubs/2007-securing-our-survival.pdf>.