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

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Nuclear-Armed States, Positive Obligations, Institutional Issues, and Final Clauses: 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 as well as a working paper on issues regarding a possible withdrawal clause.² In this working paper,³ IALANA offers further comments, with particular reference to the draft convention put forward by the President on May 22,⁴ on provisions regarding nuclear-armed states, positive obligations, institutional issues, and final clauses.⁵

Provisions Regarding Nuclear-Armed States; Safeguards

1. Article 4 of the draft convention provides that a former nuclear-armed state which has eliminated its arsenal and joins the convention is subject to additional verification obligations. If requirements along the lines of those set forth in the President’s non-paper are included among those obligations, this approach seems generally satisfactory. It should be specified that the verified elimination must be transparent except as is required for the purpose of preventing dissemination of information about nuclear weapons design.

2. Article 5 wisely provides for flexibility in negotiating protocols concerning effective measures relating to nuclear disarmament, including protocols involving non-states parties. At the maximum, assuming the participation of some or all

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>

² “Withdrawal Clauses in Arms Control Treaties: Some Reflections about a Future Treaty Prohibiting Nuclear Weapons,” A/CONF.229/2017/NGO/WP.13.

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⁴ A/CONF.229/2017/CRP.1.

⁵ IALANA is separately submitting a working paper on prohibitions and the preamble.

nuclear-armed states, such a process could result in a comprehensive global agreement on non-use of nuclear weapons, elimination of nuclear arsenals, and governance of a world free of nuclear weapons. A protocol could also involve the disarmament of just one nuclear-armed state. It could provide that a party to it is subject to specified obligations (which could be most of them) of the convention, including above all the prohibitions of use and threatened use.

3. Whatever the scope of participation of nuclear-armed states, from one to all, a protocol could set in motion a disarmament process that would eventually qualify a nuclear-armed state to become a party to the convention per Article 4, should that be desired. However, it should be spelled out that another option is negotiation of a protocol under which a nuclear-armed state would assume an obligation of verified, time-bound disarmament and join the treaty prior to (complete) implementation of the obligation. If that is not explicitly provided for, there would be no basis in the convention for a nuclear-armed state to join the convention except under Article 4 after it has eliminated its arsenal.

4. A “join and destroy” option would mean that there would be different categories of states parties (this is effectively true as well of the Chemical Weapons Convention). It could embroil governance of the convention in complicated and controversial issues relating to implementation of disarmament. But it has a very desirable feature: It would subject a participating nuclear-armed state to a categorical prohibition of use of nuclear weapons during a process of disarmament, rather than after it is completed. If a prohibition of threat of use is included in the convention, it would also explicitly prohibit a participating nuclear-armed state from threatening to use nuclear weapons, including threats of retaliatory, preemptive, or ‘damage limiting’ nuclear use that constitute existing policies of ‘nuclear deterrence’. As noted, however, it would also be possible to incorporate in a disarmament protocol obligations of the convention, including prohibitions of use and threat of use, independently of a state joining the convention at the outset, or ever.

5. Regarding the *safeguards* required by Article 3 and the annex to the draft convention, they should be to the highest agreed standard as it evolves in the NPT context.

Positive Obligations and National Implementation

6. Article 13 of the draft convention obligates states parties to promote universality of adherence to the convention. IALANA strongly urges the addition, here or elsewhere, of an *obligation of a state party to promote the norms affirmed by the convention and to make its best efforts to discourage states not party to the convention from possessing, using, or threatening the use of nuclear weapons*. That obligation is based upon Article 21(2) of the Convention on Cluster Munitions. It is highly appropriate under the circumstances of a convention as to which some or all nuclear-armed states might not be parties in the near term at least.

7. Relatedly, IALANA supports the inclusion of a *positive obligation with respect to disarmament education*, including the risks posed by nuclear weapons and

the catastrophic consequences of nuclear explosions. The role of civil society should be highlighted in connection with such an obligation, for example: "Civil society is encouraged to raise awareness of the risks posed by nuclear weapons and the humanitarian and environmental consequences of nuclear explosions and to engage in disarmament education."

8. From a humanitarian point of view, a compelling case can be made for inclusion of ***obligations regarding victim assistance and environmental remediation***, as in Article 6 of the draft convention. Non-governmental organizations have also made attractive proposals for elaborating the obligations.⁶ It is of some concern, however, that representatives of affected groups by and large have so far not been part of the negotiations, nor have advocates, experts and policy-makers involved in the extensive existing programs in countries such as the United States, Russia, and Kazakhstan, nor have representatives of nuclear-armed states. One possibility would be to include general provisions or preambular elements, and provide for the possibility of elaboration of obligations in protocols to the convention.

9. Assuming the approach is basically that taken in the draft convention, IALANA will confine itself here to a few basic comments:

- The role of production of nuclear weapons, as well as testing and use of nuclear weapons, in harming people and devastating the environment needs to be included. For example, Article 6(1) should read in part: "individuals affected by the use, testing, *or production* of nuclear weapons." A similar change is needed in Article 6(2).
- The right of a state to receive assistance needs to be made clear with respect to victim assistance as well as environmental remediation.
- The obligation to undertake environmental remediation needs to be stated, perhaps with a qualifier such as "where practicable," since some production and testing sites cannot be fully remediated or the cost is prohibitive.
- The special responsibility with respect to indigenous peoples, who very disproportionately have been victims of testing and production of nuclear weapons, needs to be acknowledged. For example: "The rights and interests of groups who are particularly dependent on a healthy environment and intact lands, such as indigenous peoples, shall be taken into account."
- A savings clause should be included to specify that the provisions do not affect remedies otherwise available under international law, for example: "The present Article shall not affect the rights and obligations of States Parties based on other remedies and mechanisms available under international law, such as by virtue of the responsibility of States for internationally wrongful acts or through human rights mechanisms."

10. Regarding Article 7(2) of the draft convention as to **appropriate national measures to prevent and suppress prohibited activities**, it is drawn from the

⁶ See, e.g., "Humanitarian positive obligations for a Nuclear Weapons Ban Treaty," submitted by Pace University, A/CONF.229/2017/NGO/WP.22.

Ottawa and Oslo Conventions. However, it could be made more precise by specifying that obligation applies to any prohibited activity by “*natural or juridical persons*”.

Institutional Issues

11. The draft convention does not provide for establishment of a secretariat, implementation support unit, agency, or other treaty body, only assigning certain limited tasks to the UN Secretary General under Articles 2 (regarding declarations) and 9 (convening of meetings of states parties). Optimally a treaty body would be established if adequate and stable financial support is guaranteed. If a treaty body is not now established, the convention could specify that meetings of states parties may later do so. Assuming that as in the draft convention functions are assigned to the UN Secretary General and therefore to the UN Office for Disarmament Affairs, adequate financial support for the work of that office should be provided in some fashion.

12. IALANA urges that additional tasks be assigned to the Secretary General, or to a treaty body, by the convention or by meetings of states parties. Such tasks include: promotion of the aims of the convention, especially to the wider world; assistance to states parties in meeting their obligations; fostering of research and debate about nuclear disarmament; and facilitation of civil society involvement, with an emphasis on expanding geographic and social diversity.

13. Serious consideration should be given to including a provision protecting whistleblowers. It would provide at a minimum that persons who report violations of the convention to the Secretary General/treaty body would be protected by the Secretary General/treaty body and by all states parties and, in the case of natural persons, would have the right of asylum in all states parties if their safety or security is endangered in the state party in which they permanently reside.⁷

14. Article 9(3) of the draft convention should provide that meetings of states parties may decide to convene *review conferences* (plural) additional to the first one.

Final Clauses

15. Article 19 of the draft convention, “*Relations with other agreements*,” now refers only to the NPT. This is too narrow. In its first paper, IALANA proposed: “Nothing in this [Convention] 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

⁷ See the Model Nuclear Weapons Convention, Article VII, for this and other provisions regarding the protection of whistleblowers. Concerning ‘societal verification’, see, *inter alia*, J. Rotblat, J. Steinberger, B. M. Udgaonkar, *A Nuclear-weapon-free World: Desirable? Feasible?* (Boulder: Westview Press, 1993); “The potential and pitfalls of societal verification,” Development and Disarmament Roundtable, Bulletin of the Atomic Scientists, May-June 2013, <http://thebulletin.org/potential-and-pitfalls-societal-verification>.

weapons, and international humanitarian law.” If a less expansive clause is preferred, it could be simply: “This convention does not affect the rights and obligations of the State Parties under the [NPT] and other relevant rules of international law.”

16. Regarding a *withdrawal clause*, as set forth in Article 18 of the draft convention, there are strong reasons not to have any such clause at all when it comes to an instrument codifying fundamental norms regarding nuclear weapons. However, if negotiators want to include a withdrawal clause, IALANA suggests several changes:

- Make the standard for withdrawal an objective one by deleting the words “if it decides that” and also “in exercising its national sovereignty” from the first sentence of paragraph two, so it would read: “Each State Party shall have the right to withdraw from the Convention if extraordinary events”
- Provision should be made for consideration of a notice of withdrawal by a meeting of states parties, special if necessary.
- The second sentence in paragraph 3 of draft Article 18 is too narrow because it does not cover situations of non-international armed conflict. It should be replaced by the following sentence: “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.” Such a clause was inserted, *inter alia*, in the Chemical Weapons Convention, as well as the Ottawa and Oslo Conventions.⁸
- Finally, IALANA proposes that the following clause be inserted as paragraph 3: “The withdrawal of a State Party from this Convention shall not in any way affect the duty of States to continue fulfilling the obligations assumed under any relevant rules of international law.” Such a clause has been inserted in other arms control treaties.⁹ “Any relevant rules” refers both to treaty law and customary law, including those treaty and custom-based rules whose application renders illegal the use and threat of use of nuclear weapons.

17. Regarding *accession*, a provision is needed to authorize it after entry into force. For example: “This Convention shall be open for accession by any State that has not signed it.”¹⁰

⁸ See, for an overview, “Withdrawal Clauses in Arms Control Treaties: Some Reflections about a Future Treaty Prohibiting Nuclear Weapons,” submitted by IALANA, A/CONF.229/2017/NGO/WP.13.

⁹ See, for instance, Article XVI § 3 of the Chemical Weapons Convention, or Article 20 § 4 of the Ottawa Convention.

¹⁰ See Convention on Cluster Munitions, Article 16(2).