



Los Alamos Study Group

Nuclear Disarmament • Environmental Protection • Social Justice • Economic Sustainability

Working Paper

for the

United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, Leading Towards their Total Elimination

Comments on the “Draft Convention on the Prohibition of Nuclear Weapons”¹

To Be Effective, Prohibition of Nuclear Weapons Must Be Non-Discriminatory, Complete, and Permanent

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

¹ A/CONF.229/2017/CP.1, 22 May 2017, at <https://www.un.org/disarmament/ptnw/president.html>.

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](http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/OEWG/2016/Documents/NGO19.pdf), “Progress in multilateral nuclear disarmament requires a treaty prohibiting the possession, threat, or use of nuclear weapons.”)² 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.³

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 states, whether or not they accede to the Convention.* We must assume

² At <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/OEWG/2016/Documents/NGO19.pdf>.

³ 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.

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,⁴ 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...”,⁵ 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.”⁶ Some have argued that because of these and related legal principles, an explicit prohibition of nuclear threat is not necessary. These are however lawyers’ arguments, for which there are lawyers’ counter-arguments.

⁴ At <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>.

⁵ Article 2 (4), at <http://www.un.org/en/sections/un-charter/chapter-i/>.

⁶ 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.

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.”⁷

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.

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

⁷ 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.

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.

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.

25. 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.⁸

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

⁸ United States Non-Paper: "Defence Impacts of Potential United Nations General Assembly Nuclear Weapons Ban Treaty," 17 October 2016, at http://www.lasg.org/BAN/NATO_OCT2016.pdf.

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

27. 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.

28. 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.

29. 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.

30. 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.

31. 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.

32. 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.

33. 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).⁹

34. 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 warfare and humanitarian law therefore appear to be mutually exclusive: the existence of the one automatically implies the non-existence of the other.¹⁰

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.

⁹ Burroughs, op. cit. p. 133.

¹⁰ At <http://lcnp.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).

Nuclear deterrence means planning for genocide.

35. The Genocide Convention¹¹ 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.¹² The genocidal implications of thermonuclear weapons were clearly recognized by responsible parties even prior to their invention and demonstration.¹³ 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.¹⁴ 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.

36. 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 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.

37. 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.*

38. 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.

¹¹ “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>.

¹² 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-scientific-predicted-consequences-nuclear-war10779>.

¹³ 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>.

¹⁴ We believe the overall resilience of societies, economies, and states with respect to even small-scale nuclear attack is lower than many appreciate.

Both kinds of nuclear-dependent states should remain outside the treaty until they fully eliminate their support for nuclear weapons.

39. 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.*

40. 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.

41. 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.

42. 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).

43. 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.

44. As a technical note, all nuclear weapon states maintain and operate facilities capable of prompt, complete national nuclear disarmament. In the cases of the U.S. and Russia, these facilities have proven post-Cold War capacities of thousands of nuclear weapons dismantled per

year (while simultaneously producing new, replacement, or upgraded warheads). For all states, current dismantlement capacities exceed historical (and any conceivable prospective) disarmament rates. Only the U.S. and Russia have arsenals in the thousands today; neither of these states would consider complete disarmament until both have drawn down their inventories to much lower levels, building trust and instituting verification mechanisms along the way. For these reasons, the practical aspects of warhead dismantlement need not impede accession of nuclear weapons state to a ban treaty as a fully-disarmed *former* nuclear weapon state. If a state's disarmament commitment is genuine and firm, and there are no external and internal political barriers, its complete disarmament can be swift. If there are such barriers, such states should not be in the treaty.¹⁵

The Convention's Preamble properly includes the goal of general and complete disarmament.

45. This is not a *pro forma* matter. For example, the 25 nuclear umbrella states in Europe, and the three nuclear-armed states allied with them in NATO – currently a conventional military *and* a nuclear alliance – and Russia on the other side of the “deterrence divide,” together possess 96% of all nuclear weapons today. Defusing even this one confrontation is of signal importance to nuclear disarmament, human development, and climate protection. As this situation demonstrates (as does the nuclear confrontations in South Asia and East Asia), nuclear disarmament cannot be fully separated from conventional military threats and the need for general disarmament. The answer to a conventional threat can be a nuclear deterrent with deep domestic support. Nuclear weapons do not replace conventional armaments; they foster more of

¹⁵ “If dismantlement were made a top priority, it is likely that Pantex could again dismantle more than 1,000 nuclear weapons per year. The situation appears to be similar in Russia... Like the United States, it is likely that if Russia made dismantlement a priority, it would have the capability to dismantle more than 1,000 nuclear weapons per year. “Transparent and Irreversible Dismantlement of Nuclear Weapons,” Matthew Bunn, Dec 9, 2008, Hoover Institution, http://www.hoover.org/sites/default/files/uploads/documents/9780817949211_ch5.pdf.

These estimates, large as they are, are conservative. Both states are simultaneously producing refurbished and modernized warheads, as well as planning and preparing future production runs. These, not dismantlement, are the dominant activities at the production centers, especially in the U.S. As many have pointed out, these are single-shift rate estimates, which could be effectively doubled or tripled.

"... the Pantex plant in the United States can... dismantle 3,500-4,500 warheads per year." “Breakdown of Breakout: U.S. and Russian Warhead Production Capabilities,” Oleg Bukharin, Oct. 1, 2002, Arms Control Association, https://www.armscontrol.org/act/2002_10/bukharinoct02. We are very familiar with the Pantex facility, the inherent dismantlement capacity of which has not changed in decades, and believe Bukharin's estimate is in the right ballpark.

Russian dismantlement capabilities are also very large relative to any conceivable negotiations. Although by 2003 Russia had closed its two smaller dismantlement-capable facilities (Penza-19 at Zarechny and Arzamas-16 at Sarov), the larger two remain (Sverdlosk-45 at Lesnoy and Zlatoust-36 at Trekhgorny) (Bunn, *op. cit.*).

Transparency, verification (and of course fissile material disposition if included) are of course enormous practical problems. Almost any state could hide nuclear explosives. Delivery systems could also be hidden, especially in a large country. Fortunately, nuclear possession is highly-scrutinized. These problems are not germane to the present negotiation – *if* nuclear weapon states cannot accede to the Convention. If, on the other hand, the treaty is crafted to include time-bound disarmament commitments by nuclear weapon states parties, highly-problematic technical issues will almost certainly delay disarmament and break these commitments, undermining the Convention later. The Convention would become hostage to the doubtful performance of nuclear contractors and bureaucracies.

them. The entire nuclear weapons complex creates existential threats, exacerbates postures of confrontation, and fosters arms races of all kinds.

The Convention's Preamble should include stronger reference to human development and climate protection goals.

46. Continued financial, political, diplomatic, and military commitments to nuclear weapons, and the militaries in which they are embedded, will prevent realization of United Nations development goals. Nuclear weapons, without ever being exploded, are “anti-development” devices. They produce poverty and precarity, not security. Their destabilizing effect is the same as regards climate and other environmental goals: nuclear weapons, and the complex of existential confrontation they create and sustain, will prevent climate goals from being realized, jeopardizing humanity and countless other species in this way as well. Nuclear weapons and civilizational goals are utterly incompatible. Nuclear weapons symbolize and constantly help produce a political culture of human and environmental disposability, and despair.

The Convention should not include disarmament provisions, technical content, fissile material issues, or obligations which are onerous to potential states parties.

47. The purpose of this Conference is to produce a treaty to prohibit nuclear weapons in all their aspects. Examples of purposes *not* in the narrow but highly practical Conference mandate include:

- negotiating a treaty containing a framework or process for gradual nuclear disarmament (a complex and purely theoretical endeavor);
- establishing obligations on any parties actually using nuclear weapons in war (which could never be enforced); and
- negotiating any issues involving fissile materials (which would impossibly broaden negotiations).

48. The Convention should not contain technical content (such as inspection and verification protocols). It can and should depend upon available IAEA mechanisms and NPT requirements for these.

49. The Convention should not create onerous new obligations for states parties, to avoid creating general barriers to accession by the 156 states without nuclear weapons or nuclear alliances.

Prohibiting nuclear weapons is a political process that will be aided to a greater – or a lesser – degree by the Convention's formal prohibitions.

50. The Convention is a big step toward banning nuclear weapons, not the conclusion of the prohibition process. The treaty's prohibitive norms (refreshed, and new, norms -- both) will influence governments not just through the actions of other governments but also, and

fundamentally, through the agencies of civil society that it strengthens. The treaty should be crafted in such a way as to strengthen popular movements against nuclear weapons, especially in the 37 states currently possessing, or otherwise assisting and supporting nuclear weapons. The treaty itself will not do the work of banning nuclear weapons, except in the (indispensable) formal sense.

Other comments

51. In the Preamble, we object to the characterization of the NPT as “an essential foundation for the pursuit of nuclear disarmament.” The provisional, temporary legitimacy accorded by the NPT to the nuclear arsenals of five states is frequently (and erroneously) cited by most of these states as evidence of unqualified, essentially permanent *de jure* legitimacy. Nuclear *might*, in other words, is now asserted as *right*, using the NPT. As a foundation of nuclear disarmament, the NPT has failed. That is why this Convention is being negotiated.

52. In the Preamble, we object to the characterization of the Comprehensive Test Ban Treaty (CTBT) as “a core element of the nuclear disarmament...regime.” It is far from being that. First, there is no nuclear disarmament regime. Second, the CTBT has no disarmament component. Disarmament is an aspiration of the CTBT, not an obligation or operative requirement. In practice, the CTBT has not fostered nuclear disarmament.

53. Regarding Article 3 (“Safeguards”) with its associated Annex, the intent appears to be to create a nonproliferation structure within the Convention that is parallel to that of the NPT, in part to forestall any possible exodus of states from the NPT to the Convention. Three sets of questions must be asked about this.

- First, is this really necessary or valuable in any way? Why would states want to leave the NPT to join the prohibition Convention? With or without a withdrawal clause any state party could withdraw from this Convention, citing the criteria in Article 18 (if any remain) or in the Vienna Convention on the Law of Treaties, just as any state party can withdraw from the NPT at any time with appropriate notice. What added nonproliferation protection does Article 3 really add?
- Second, is the price paid for Article 3 – in terms of administration, verification, and coordination with the International Atomic Energy Agency (IAEA) really worth it? Doesn't this Article turn the Convention into a kind of “backup NPT?” Isn't that redundant?
- Third, don't these Safeguards implicitly rely upon the same combination of economic, diplomatic, and sometimes military¹⁶ sanctions for enforcement as do existing IAEA agreements? If so, don't these implied enforcement provisions in the Convention

¹⁶ E.g. Security Council Resolution 678 (29 November 1990), “Authorizes Member States cooperating with the Government of Kuwait...to use all necessary means to uphold and implement Resolution 660 and all subsequent relevant resolutions and to restore international peace and security in the area.” This was the Security Council blessing for Operation Desert Storm. At [http://undocs.org/S/RES/678\(1990\)](http://undocs.org/S/RES/678(1990)).

privilege the five permanent members of the Security Council, who are also the five nuclear weapon states under the NPT? Does this Article therefore tend to reproduce the nuclear prerogatives of nuclear weapons states, instead of diminishing them? Would this Article, especially considered along with Articles 5 and 10, provide a “back door” for nuclear weapon states to influence the operation of this Convention overall?

54. We phrase these as questions because we are not experts on IAEA sanctions. Our initial judgment is that Article 3 weakens the Convention.

55. Article 4 (“Measures for States that have eliminated their nuclear weapons”) also appears unnecessary. The accession procedures of Paragraph 39 make a) accession to the Convention by former nuclear weapon states, and b) (re-)accession to the NPT by those same states as non-nuclear weapon states, much the same procedure. It makes no sense to us to allow states that have eliminated their nuclear weapons to join this treaty without *also* joining the NPT as non-nuclear weapon states.

56. Article 5 (“Measures for situations not covered by Article 4”) is unwise, as discussed above. This Convention should not try to become a disarmament convention. A universal, multilateral nuclear prohibition treaty is not the place for disarmament procedures. Article 5 is also repetitive to Article 11, which covers amendments in general.

57. By the same token, Article 9, we believe paragraph 1.(d) is unwise and destabilizing.

58. The Convention, especially the core prohibitions, should be clear, comprehensive, and explicit for the layperson as well as the specialist, given the pronounced role that civil society will play in advancing the treaty’s objectives.

59. We are pleased that the draft Convention would prohibit nuclear “possession” in addition to “stockpiling.” Possession is a simpler concept less given to technical redefinition, more inclusive of small quantities. It is more objective, lacking as it does any need to impute intent. Were possession not prohibited, states might claim that some intact warheads, ostensibly in a dismantlement queue, would not “stockpiled” even though they could be deployed and used (with or without refurbishment) if their administrative status were changed.