



# Los Alamos Study Group

*Nuclear Disarmament • Environmental Protection • Social Justice • Economic Sustainability*

## **To foster nuclear (and general) disarmament, a ban treaty should prohibit nuclear threats and preparations, and ban alliances with nuclear states**

Greg Mello, Los Alamos Study Group, June 15, 2017

On May 22 in Geneva, Ambassador Elayne Whyte Gómez, President of the “[United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, Leading Towards their Total Elimination](#),” released the draft text of a new treaty to ban nuclear weapons, the “[Convention on the Prohibition of Nuclear Weapons](#).”

Negotiations on this treaty [began in late March](#) pursuant to a General Assembly mandate passed [last December](#). Elements of a ban treaty were discussed in the spring and summer of 2016 in Geneva by a special [Open-Ended Working Group](#).

Negotiations based on the current draft will resume June 15 and conclude on July 7.

There was broad agreement in March among the 130 or so states attending the negotiating session on core issues, which augurs for success in the upcoming, final session. Thorny issues remain, of course.

We are cautiously optimistic that the Conference will produce a final treaty by July 7. Amendments to the text can be accepted or rejected on the basis of a two-thirds majority vote of the states present, which should help avoid deadlock.

These negotiations are unprecedented and we believe momentous. This opportunity, created by the work of thousands of people over many years, may not come again. History is on the move, conspicuously not toward disarmament and peace. Extending negotiations past July 7 – which realistically means well into 2018 or beyond – is neither necessary nor desirable for this relatively straightforward Convention.

A successful conclusion by July 7 – a final Convention text – is therefore of paramount importance to humanity and civilization. No issue, even the ones we raise here, should be allowed to get in the way. What unites all but a very few negotiating states is much more than anything which could divide them. The same is true for we NGOs.

Our initial views were submitted to the Conference on June 6 in four working papers.<sup>1</sup> (These are available on our web site as a [single paper](#).) These remarks summarize and rephrase a few of these comments.



The draft Convention is fairly “lean,” as was desired by the states most active in the negotiations. Like these states we also seek a simple, clear treaty, without unnecessary complications that could prove impossible to negotiate, interpret, or enforce.<sup>2</sup>

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<sup>1</sup> [A/CONF.229/2017/NGO/WP.26 \(“To Be Effective, Prohibition of Nuclear Weapons Must Include Nuclear Threats, Extended Deterrence, and Military Alliances with Nuclear States \(Part I\)”\)](#); [A/CONF.229/2017/NGO/WP.27 \(“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”\)](#); [A/CONF.229/2017/NGO/WP.28 \(The Convention Prohibiting Nuclear Weapons Should Not Include Disarmament, Fissile Material, or Verification Protocols; Other Comments”\)](#); [A/CONF.229/2017/NGO/WP.29 \(“All nuclear weapon states maintain and operate facilities capable of prompt, complete national nuclear disarmament”\)](#).

<sup>2</sup> As explained further in our comments, unnecessary and unwise complications in the present draft include, in our view, Article 3 (“Safeguards,” with its annex), Article 5 (unstated possible future provisions for progressive disarmament by states parties), and the withdrawal provisions of Article 18 (paragraphs 2 and 3). Regarding Article 3, we believe that only non-nuclear states parties to the Treaty on the Nonproliferation of Nuclear Weapons (NPT), with NPT Article 3 safeguards, should be allowed to join the new Convention, when accepted by the states parties. This would avoid having to create an NPT-like structure in the new Convention while also emphasizing the complementarity of the two treaties. It would also avoid creating a new discriminatory regime (in the

At the outset it is important to accept the reality that nuclear-armed states will not join this Convention for the foreseeable future, if ever. And how *could* they join, without riddling the treaty with internal contradictions, as well as impossible negotiation and verification burdens?

Given the fact that the states with nuclear weapons will remain outside the treaty, how can it be crafted in such a way as to effectively lead toward nuclear disarmament, as the Conference mandate requires?

We think the way forward is fairly clear.

It starts with the realization that it is essential to keep nuclear armed states, as well as nuclear-dependent states of all kinds, outside the Convention. Until both groups of states relinquish all forms of dependence on nuclear weapons, they are (and should be stigmatized as) nuclear outlaws.

Leaving aside what we think are compelling legal arguments supporting this approach, much of the leverage for nuclear disarmament created by the Convention inheres in the clear “outlaw status” it would create and the political tension that status would enable in some countries.<sup>3</sup>

The Convention should therefore clarify (in its preamble) and codify (in the thoroughness of its core prohibitions) that all dependence on nuclear weapons is illegal.

The central purpose of this Convention is to overthrow and discredit the ideology of nuclear deterrence once and for all, along with 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.

This means the present Cold War security structures and alliances which depend on and perpetuate nuclear weapons must be challenged head-on.

The present draft does not outlaw nuclear deterrence. By failing to prohibit: a) *nuclear threats*, especially those implied by formal and informal “nuclear umbrella” relationships; b) *planning and preparations for nuclear threat and use*; and c) *military alliances with nuclear armed states*, it discriminates in favor of the 28 or 29 non-nuclear states presently in nuclear alliances.<sup>4</sup>

Said differently, the present draft contains a loophole that shields NATO and Western Pacific nuclear allies of the United States (and less convincingly, one or more allies of Russia) from the changes necessary to foster nuclear disarmament in the world.

Negotiation of a ban treaty implies confrontation with states whose national security conception and practices are based on nuclear weapons. It is not an exercise in building consensus with those states, or one of providing easy ways for those states to accede to the treaty without first relinquishing their investment in nuclear weapons.



To close this loophole, we would start with explicitly prohibiting nuclear threats, not just nuclear use. This should be done both in the treaty’s preamble (as an assertion of universal legal and moral principles) and in its Article 1 core prohibitions (applying to states parties).<sup>5</sup> This is a very simple change.

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Convention) while offering a clear path to heal the existing one (the NPT). In such a Convention the five NPT nuclear weapon states could not join without first modifying the NPT to become non-nuclear states under that treaty. Nuclear weapon states not party to the NPT would, after disarmament, need to join the NPT as non-nuclear weapon states to accede to the Convention.

<sup>3</sup> The United States actually discussed some of the potential political impacts of this Convention in a “non-paper” given to NATO allies: "[Defense Impacts of Potential United Nations General Assembly Nuclear Weapons Ban Treaty](#)," 17 October 2016.

<sup>4</sup> This group includes the 25 non-nuclear NATO states and the three US allies in the Western Pacific. Belarus, an ally of Russia, might also be included. See "[Under my umbrella: Understanding the terms ‘nuclear umbrella’ and ‘nuclear umbrella state’](#)," International Law and Policy Institute (ILPI), 5 August 2016.

<sup>5</sup> Three kinds or degrees of nuclear threat might be distinguished: *direct* (by nuclear-armed states, on their own behalf); *extended* (by nuclear-armed states, on behalf of other states, supposedly); and *inherent* (the ever-present nuclear threat implied by possession of nuclear weapons, with which all members of alliances with these states assist, willingly or not).

At first glance, the draft treaty's prohibition of *possession* would seem to take care of the "threat problem," since one must *possess* nuclear weapons in order to *threaten* with them. But a ban on possession won't apply to states not party to the treaty, which realistically will include all the nuclear weapons states. These states can and do threaten nuclear use on behalf of other states – including states that might join the Convention if this loophole is not closed.

The second step in closing this loophole is to ban *planning and preparations for nuclear threat or use*.

Third and most difficult, the Convention should prohibit *mutual defense alliances, military exercises, and military planning and preparations involving nuclear-armed states*.

Why is this last step necessary? Because military planning and collaboration with allies which possess and deploy nuclear weapons, or with nuclear umbrella states, *assists* those threats and any nuclear use that might result from them.

In practice, all sorts of "conventional" military assets are needed to effectively threaten with, or use, nuclear weapons. "Conventional" military assets of a nuclear state or nuclear alliance (including assets contributed by non-nuclear states) have a partially nuclear character. They are "dual-use." Extensive "dual-use" assets are used to deploy, transport, target, communicate in support of, protect, and leverage the military and diplomatic value of nuclear weapons. Furthermore, each element of a military alliance, across the board, depends upon and in turn "assists" all the others. A posture of inherent nuclear threat thus thoroughly taints the military alliances of nuclear weapon states.

As long as some members of a military alliance rely on a nuclear "deterrent" all alliance 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.

Therefore, states wishing to join a Convention prohibiting nuclear weapons must abandon military alliances with nuclear-armed states. Any participation in such alliances assists in planning and preparation for nuclear use and is, whether admitted or not, part of a nuclear threat.



With these three additions, which work together with the draft Convention's prohibitions of *assistance, encouragement, and inducement*, and its prohibition of *seeking or receiving assistance in any prohibited activity*, the draft Convention's "extended nuclear deterrence" loophole will be closed.

Banning nuclear threat is necessary to bring the Convention into harmony with existing international law. For example, any nuclear use could well be genocidal, by design given that nuclear weapon effects are fairly predictable. The [Genocide Convention](#) bars not only genocide per se but also *conspiracy, incitement, attempt, and complicity* in genocide, all of which apply to nuclear war preparations. The predictable "collateral damage" threatened to populations and infrastructure from nuclear use – from blast, fire, and radiation – is that puts the "terror" in nuclear "deterrence." Nuclear effects that approach (and surpass) genocide in their total effect are the essence and *raison d'être* of nuclear deterrence and the nuclear weapons enterprise overall.

*Clarity* is essential. The Convention itself will not do the work of disarmament. Civil society will, once we have the Convention. To be effective, the Convention must set up a stark, easily-communicated confrontation in global civil society against all security policies that depend directly or indirectly on nuclear weapons.

Failing to effectively prohibit nuclear deterrence in its varied forms would create a discriminatory *partial* prohibition of nuclear weapons, applying more to *some* non-nuclear weapons states than others.

It would also undermine the UN Charter (at [Article 2](#)) because *for the first time* it would legally separate, in conventional law, *threat* from *use* in the case of nuclear weapons.

Since 1945, nuclear weapons have been first and foremost devices with which to threaten. They have not been used and are generally meant not to be. As *threats*, they are said to keep the peace and fulfill the purposes of the United Nations Charter. Their possession, deployment, and modernization are seen by nuclear weapon states as moral imperatives, no matter what the cost. For nuclear weapons, prohibition of use *merely*, without prohibiting *threat*, misses the essential point of nuclear weapons entirely.

A Convention that does not comprehensively ban nuclear threats, *including assisting in nuclear threat preparations by participation in any military alliance with a nuclear state*, would have not only have little effect on the nine existing nuclear weapons states (because they will not sign the treaty), but also on the 28 or 29 “nuclear umbrella” states allied with them, which in that case could become parties to the Convention with only superficial changes to their security postures.

Under the present draft, any of this latter group of states could accede to the Convention after terminating any nuclear basing agreements they might have (in the cases of five states) and nuclear sharing agreements (in four of these five states), along with some sort of disclaimer that they would not participate in nuclear planning and don't want to be “protected” by nuclear deterrence. These states' ambiguous (“weasel”) status vis-à-vis nuclear weapons could continue largely untroubled. Nuclear weapons states with which they are allied might still use nuclear weapons in their “defense.” They would still be assisting nuclear threats and plans for nuclear use every day, just as they are today.

In other words, failure to bar alliances with nuclear states by states parties would allow the world's present nuclear security arrangements to remain more or less intact. The new Convention would, in such a case, provide only limited means to exert disarmament leverage.

We do not believe a prohibition of financial assistance would be anywhere near as effective as a prohibition of *military* assistance. We are not sure financial prohibitions would be effective at all, as regards nuclear weapons states.

When we speak of the “norm-setting” influence of the Convention, we should understand this in concrete diplomatic, economic, military, and foreign policy terms. Moral suasion and new conventional law alone will fail to dislodge nuclear weapons from the central position they currently hold in national policies, identities, and economies.

To foster nuclear disarmament, prevent nuclear war, and to foster general and complete disarmament, deep changes in the security policies of states without nuclear weapons, but which nonetheless actively or passively enable and assist nuclear threats, are required. These states are, in effect, the “swing states” in the disarmament struggle.

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