

## International Association of Lawyers Against Nuclear Arms

### **SELECTED ELEMENTS OF A TREATY PROHIBITING NUCLEAR WEAPONS**

In this paper, the International Association of Lawyers Against Nuclear Arms (IALANA) discusses *selected* proposed elements of a treaty prohibiting nuclear weapons, leading to their total elimination, to be negotiated this year. IALANA draws in particular on our experience, with colleagues from other organizations,<sup>1</sup> in the drafting of the Model Nuclear Weapons Convention.<sup>2</sup> A longer version of this paper is available at the Conference and at [www.lcnp.org](http://www.lcnp.org).

#### **Preambular elements related to affirmation of existing international law**

##### **1) Affirm the illegality of use of nuclear weapons under customary international law**

*Possible language: Affirming* that the use of nuclear weapons is contrary to international law, in particular international humanitarian law; international human rights law; and international environmental law.

*Commentary:* Because of their very nature, the use of nuclear weapons is illegal under customary international law. They cannot be used in compliance with fundamental principles protecting civilians and neutral states from the effects of warfare, protecting combatants from unnecessary suffering, protecting the environment from severe and irreversible damage, and safeguarding the interests of future generations. Use of nuclear weapons would constitute war crimes under the Rome Statute of the International Criminal Court, and, in many circumstances, crimes against humanity as well.

The 1996 Advisory Opinion of the International Court of Justice supports this assessment. The Court stated that “the use of [nuclear] weapons in fact seems scarcely reconcilable with respect for [the strict] requirements” of “the principles and rules of law applicable in armed conflict – at the heart of which is the overriding consideration of humanity.”<sup>3</sup> So do many General Assembly resolutions. The resolution entitled “Ethical imperatives for a nuclear-weapon-free world,” adopted in 2015 and again in 2016,<sup>4</sup> declares: “Given the humanitarian impact of nuclear weapons, it is inconceivable that any use of nuclear weapons, irrespective of the cause, would be compatible with the requirements of international humanitarian law or international law, or the laws of morality, or the dictates of public conscience.” A 2011 resolution of the International Red Cross and Red Crescent Movement “finds it difficult to envisage how any use of nuclear weapons could be compatible with the rules of international humanitarian law.”<sup>5</sup> The Vancouver Declaration, released by IALANA and The Simons Foundation in 2011,<sup>6</sup> states that nuclear weapons cannot be employed in compliance with international humanitarian law because their effects are uncontrollable.

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<sup>1</sup> International Physicians for the Prevention of Nuclear War and International Network of Engineers and Scientists Against Proliferation.

<sup>2</sup> [http://inesap.org/sites/default/files/inesap\\_old/mNWC\\_2007\\_Unversion\\_English\\_N0821377.pdf](http://inesap.org/sites/default/files/inesap_old/mNWC_2007_Unversion_English_N0821377.pdf). See also A/AC.286/WP.11, 24 February 2016, Model nuclear weapons convention, submitted by Costa Rica and Malaysia to the OEWG. For commentary, see *Securing Our Survival: The Case for a Nuclear Weapons Convention* (2007), at <http://www.lcnp.org/pubs/2007-securing-our-survival.pdf>.

<sup>3</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226* (hereafter “Nuclear Weapons Advisory Opinion”), para. 95.

<sup>4</sup> A/RES/71/55, 5 December 2016.

<sup>5</sup> “Resolution 1, Working Towards the Elimination of Nuclear Weapons,” November 26, 2011, <http://www.icrc.org/eng/resources/documents/resolution/council-delegates-resolution-1-2011.htm>.

<sup>6</sup> <http://www.lcnp.org/wcourt/Feb2011VancouverConference/vancouverdeclaration.pdf>. For signatories, see [http://www.lcnp.org/wcourt/VanDecl\\_Signatories\\_Feb15\\_2013.docx](http://www.lcnp.org/wcourt/VanDecl_Signatories_Feb15_2013.docx).

It is imperative that the preamble include an affirmation of the illegality of use of nuclear weapons under existing law to reinforce the norm of non-use of nuclear weapons. It also is essential to avoid any implication that the fact that the prohibition of use contained in the operative portion will apply only to states parties implies that non-states parties are not subject to any such rule.

## **2) Affirm the illegality of the threat of use of nuclear weapons under the United Nations Charter and other international law**

*Possible language:*

*Recalling* that the United Nations Charter obligates all Members of the United Nations to 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.

*Affirming* that the threat of use of nuclear weapons is contrary to the United Nations Charter and to international humanitarian law.

*Commentary:* Any threatened use of nuclear weapons would be a threat of force contrary to the UN Charter prohibition of threat of force inconsistent with the purposes of the United Nations; it also likely would be either an aggressive or disproportionate threat in violation of Article 2(4) or the conditions, necessity and proportionality, for the lawful exercise of self-defense pursuant to Article 51. Such a threat would also violate international humanitarian law in light of the ICJ's statement that, "If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law."<sup>7</sup> It additionally could violate specific provisions of international humanitarian law, namely the prohibition of threatening that there shall be no survivors<sup>8</sup> and the prohibition of "acts or threats of violence the primary purpose of which is to spread terror among the civilian population".<sup>9</sup>

It is important to include a reference to the unlawfulness of threatened use of nuclear weapons under existing international law in the preamble due to the centrality of 'nuclear deterrence' to military postures and the role that specific threats could have in leading to actual employment of nuclear weapons. Delegitimizing 'nuclear deterrence' is essential to achieving the abolition of nuclear weapons.

## **3) Affirm the obligation to negotiate nuclear disarmament**

*Possible Language:*

*Recalling* the obligation set forth in Article VI of the Nuclear Non-Proliferation Treaty [...].

*Recalling also* the unanimous conclusion of the International Court of Justice that there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control, and *affirming* that the obligation is universal and unconditional.

*Commentary:* It is important to reference the ICJ's conclusion regarding the nuclear disarmament obligation as well as Article VI of the NPT. First, the ICJ provided an authoritative interpretation of Article VI, consistent with, inter alia, NPT Review Conference adoption of "an unequivocal undertaking by the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals". Second, the clear import of the ICJ's conclusion is that the obligation applies universally as a matter of customary international law, thus applying to non-NPT

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<sup>7</sup> Nuclear Weapons Advisory Opinion, para. 78.

<sup>8</sup> Protocol I, Geneva Conventions, Article 40.

<sup>9</sup> Protocol I, Geneva Conventions, Article 51(2).

states. Reference to the ICJ's conclusion would in no way undermine reference to NPT Article VI and to commitments made in NPT Review Conferences if those are included.

#### **4) Recognize that a subsequent disarmament agreement or agreements will be needed**

*Possible language:* Recognizing that measures additional to this Treaty, both practical and legally binding, for the irreversible, verifiable and transparent destruction of nuclear weapons will be needed in order to achieve and maintain a world without nuclear weapons, and *regarding* this Treaty as a step toward a comprehensive, legally binding agreement on nuclear disarmament.

*Commentary:* The first part of the proposed language is based on a preambular provision of the General Assembly resolution deciding to commence negotiations on a prohibition treaty.<sup>10</sup>

#### **5) Reaffirm the Martens Clause and recognize the role of public conscience and principles of humanity; recognize the rights of victims**

*Possible language:*

*Reaffirming* that in cases not covered by this Treaty or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law, derived from established custom, from the principles of humanity and from the dictates of public conscience.

*Stressing* the role of public conscience in furthering the principles of humanity as evidenced by the call for a total ban of nuclear weapons and recognizing the many efforts to that end undertaken over several decades, in particular by the Hibakusha and other victims of nuclear weapons detonations and testing around the world.

*Recognising* the catastrophic harm, including transgenerational health effects, suffered by victims of nuclear explosions and testing, and *mindful* of the need to adequately address the rights and needs of victims,

*Commentary:* The first paragraph is the modern version of the Martens Clause. It is important to include this in view of the fact that nuclear-armed states and their allies likely will not join the prohibition treaty at the outset. The second paragraph is based upon a preambular provision in the Ottawa Mine Ban Convention.

### **Principles and objectives**

#### **Duty to respect and ensure respect for international humanitarian law**

*Possible language:* *Recalling* the duty of States to respect and ensure respect for international humanitarian law.

*Commentary:* This principle is drawn from Common Article 1 of the Geneva Conventions, today considered customary in nature.

### **Operative provisions**

#### **1) Basic obligations**

*Possible language:*

A. Each State Party to this Treaty undertakes never under any circumstances:  
a. To use nuclear weapons;

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<sup>10</sup> A/RES 71/258, 23 December 2016.

- b. To threaten to use nuclear weapons;
- c. To engage in any activity related to any military or other preparations to use nuclear weapons;
- d. To encourage or authorize, directly or indirectly, use and threatened use of nuclear weapons;
- e. To design, develop, test, produce, otherwise acquire, possess, deploy, stockpile, maintain, retain, or transfer nuclear weapons;
- f. To develop, test, produce, otherwise acquire, possess, stockpile, retain, transfer or use [proscribed nuclear material];
- g. To design, develop, test, produce, otherwise acquire, possess, deploy, stockpile, maintain, retain, or transfer nuclear weapons delivery vehicles;
- h. To conduct nuclear weapons research, with the exception of research related to nuclear disarmament and to assistance to victims of nuclear weapons;
- i. To permit the stationing or transit of nuclear weapons in their territory including their airspace and waters, including by ships or aircraft carrying nuclear weapons;
- j. To assist, encourage, induce or permit, in any way, directly or indirectly, anyone to engage in any activity prohibited under this Treaty;
- k. To finance anyone to engage in any activity prohibited under this Treaty.

*Commentary:* These provisions are mostly drawn from the Model Nuclear Weapons Convention. Because initial members of a prohibition treaty are likely to be states not possessing and not reliant on nuclear weapons, the prohibitions may seem unnecessarily specific. However, the prohibition treaty can help set the template for future disarmament agreements, and itself may serve as the foundation for denuclearization by some states now possessing or reliant upon nuclear weapons which accede to the treaty. As with respect to the preamble, including threat in the operative portion of the prohibition treaty is important because of the centrality of ‘nuclear deterrence’ to military postures and the need to undermine its legitimacy as well as to prevent specific threats leading to use. If inclusion of a prohibition as to nuclear weapons delivery vehicles is not desired, the matter could be the subject of a preambular provision, possibly invoking the NPT preamble’s reference to the elimination of the “means of delivery” of nuclear weapons.

## **2) Prohibitions as to persons**

*Possible language:* Each State Party shall take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction and control.

*Commentary:* This is a concise statement of implementation measures that should be required of states parties. It is taken from the obligations concerning “National implementation measures” contained in Article 9 of the Ottawa Mine Ban Convention, and the similarly numbered Article 9 of the Convention on Cluster Munitions. This fundamental obligation includes the requirement that parties penalize what is done on their territories by anyone, or anywhere in the world by their nationals and permanent residents. This could be spelled out in more detail. For example, it could be made clear that “persons” includes “legal” (or “juridical”) persons, notably corporate entities. It could be added that criminal responsibility extends not only to the actual perpetrators but also to those who order or solicit offenses, to those who aid, abet, or otherwise assist (including those providing financing). Those who attempt to do such acts could be included. Obligations of parties to assist one another in prosecutions by means of extradition and mutual legal assistance could be included, like those in the international terrorism conventions. Questions of universal jurisdiction, or at least transferred jurisdiction among all the parties (“universal jurisdiction *inter partes*”) should be considered.

## **3) Promotion of aims of treaty; non-cooperation with threat or use of nuclear weapons**

*Possible language:* Each State Party shall encourage States not party to this Treaty to ratify, accept, approve or accede to this Treaty, with the goal of attracting the adherence of all States to this Treaty.

Each State Party shall promote the norms affirmed by this Treaty and shall make its best efforts to discourage States not party to this Treaty from possessing, using, or threatening the use of nuclear weapons.

Each State Party undertakes not to request and not to accept the use or threatened use of nuclear weapons on its behalf by a non-State Party, and not to encourage or authorize, directly or indirectly, use and threatened use of nuclear weapons.

*Commentary:* The first two provisions are based upon Article 21, paragraphs 1 and 2, of the Convention on Cluster Munitions. The third provision is drawn in part from the Treaty of Tlatelolco, Article 1(2): “The Contracting Parties also undertake to refrain from engaging in, *encouraging or authorizing, directly or indirectly*, or in any way participating in the testing, use, manufacture, production, possession or control of any nuclear weapon.” (Emphasis supplied.) This provision makes crystal clear that a state party, which itself does not participate in threat or use of nuclear weapons, may not rely on defense by a non-party by such means.

#### **4) Provision for participation by states possessing nuclear weapons**

*Possible language:* A State possessing nuclear weapons is eligible to [join] the Treaty when the State has assumed a legally binding, time-bound obligation verifiably and irreversibly to eliminate its nuclear arsenal.

*Commentary:* Probably the prohibition treaty will be a step toward a comprehensive agreement on nuclear disarmament, as stated in proposed preambular element (3), in whose negotiation some or all nuclear-armed states would participate. However, the possibility that one or more nuclear-armed states will decide to join the ban treaty should be explicitly provided for. The obligation, plan, and schedule would have to be approved in some fashion by members or a body of the ban treaty. Application of certain provisions of the treaty would have to be suspended while the plan is implemented. All of this would require some elaboration in the treaty.

#### **5) Administrative capability**

*Possible language:* A [secretariat] shall be established. Its functions include: promotion of the Treaty and its aims; preparation of meetings of States Parties; assistance to States Parties in meeting their obligations, including with national measures; fostering of research and debate about nuclear disarmament, with provision for civil society involvement; facilitation of accession to the Treaty by States which are ending their possession of or reliance upon nuclear weapons.

*Commentary:* If desired, a more ambitious approach could be taken, extending e.g. to reporting of data and to verification, or at least coordinating such tasks. Whatever the scope of an administrative body, “promotion of the Treaty and its aims” – one of the aims being the achievement and maintenance of a world free of nuclear weapons – could encompass proactive measures, even innovative ones. Thus review meetings of state parties could adopt positions and undertake initiatives as to emerging developments, and direct the administrative body to present the positions and initiatives to appropriate UN bodies, NPT meetings, or particular states.

#### **6) Obligations under existing international law**

*Possible language:* Nothing in this Treaty 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 weapons, and international humanitarian law.

*Commentary:* Such a provision is needed inter alia because a common objection to a prohibition treaty is that it will undermine the NPT.