



**UNIDIR**

**Negotiation of a  
Nuclear Weapons Prohibition Treaty:  
Nuts and Bolts of the Ban**

## **Acknowledgement**

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## Contents

Introduction .....	1
<b>UNIDIR's comments on miscellaneous prohibitions, obligations, and organizational Issues</b>	
<i>Tim Caughley</i> .....	3
Definitions .....	3
Transit (article 1.1(b) and (c)) .....	4
Threat of use (article 1.1(d)) .....	5
Testing (articles 1.1(e) and 1.2(b)) .....	7
Victim assistance (article 6) .....	8
Environmental remediation (article 6) .....	10
Financing (article 7; also article 1.1(f) and (g)) .....	11
National implementation measures (article 7).....	12
Operationalizing the CPNW (articles 9 and 10) .....	13
Other articles relevant to its facilitation and organization (articles 2, 8, 13, and 21) .....	15
Amendments to the CPNW (article 11) .....	17
Settlement of disputes (article 12) .....	17
Universality (article 13).....	18
Arrangement for signature by States (article 14) .....	18
Arrangement for ratification by States (article 15) .....	18
Entry into force (article 16).....	20
Reservations (article 17) .....	20
Duration and withdrawal from the CPNW (article 18) .....	21
Relationship to other international agreements or obligations under existing international law (article 19).....	23
Depositary of the CPNW (article 20) .....	25
Possible additional provision to the CPNW: Status of the Annexes .....	25
<b>Provision for the nuclear-armed States' accession to the Convention on the Prohibition of Nuclear Weapons</b>	
<i>Gaukhar Mukhatzhanova</i> .....	27
Introduction .....	27
Declarations (article 2 of the draft CPNW) .....	28
“Destruction before accession” or “South Africa Plus” (article 4 of the draft CPNW) .....	30

“Accession before destruction” (article 5 of the draft CPNW) ..... 32  
Conclusion ..... 34  
  
Abbreviations ..... 35

## Introduction

In December 2016, the General Assembly adopted a resolution on “taking forward multilateral nuclear disarmament negotiations” (A/RES/71/258). The resolution, which passed with a large majority, decided to convene a United Nations conference in 2017 to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination. Negotiations took place from 27 to 31 March and will continue from 15 June to 7 July in New York.

These negotiations for a treaty to prohibit nuclear weapons follow years of heightening concerns about obstacles to nuclear disarmament progress and greater renewed awareness of the causes and consequences associated with nuclear weapon detonation events. Nevertheless, at the time of writing the nature of the central prohibitions in the treaty as well as the scope of its positive obligations and other matters have yet to be finally settled. In addition, particular thought is required about the impacts of a prohibition treaty on the States that have yet to offer their support—including the five States party to the Nuclear Non-Proliferation Treaty (NPT) that possess nuclear weapons, along with some other States that depend on nuclear weapons for their security in military alliances such as the North Atlantic Treaty Organization (NATO).

UNIDIR, in line with its Mandate to assist ongoing negotiations on disarmament as well as to promote informed participation by all States, has followed the process of negotiating a treaty to prohibit nuclear weapons since its emergence. In February 2016, the Institute co-published a guide to the issues around any international prohibition on nuclear weapons. This study remains a useful resource and can be found online at [bit.ly/Guide2TheIssues](http://bit.ly/Guide2TheIssues).

The two papers in this publication were prepared in advance of the 15 June to 7 July 2017 negotiations session, and build upon the 2016 guide to the issues. The papers aim to constitute a practical resource for practitioners involved in the negotiations. They identify a number of the specific issues that will have to be addressed in any agreement to prohibit nuclear weapons. Funded by the Governments of Ireland and Sweden, the independent analysis provided by this project is intended to sensitize States to potential “solution pathways” in those areas. Findings will be presented at a panel event held on the margins of the negotiations in New York on 22 June 2017.

The first of these papers focuses on a wide array of the “nuts and bolts” of the draft treaty tabled by the Chair of the negotiations on 22 May 2017.<sup>1</sup> Written by UNIDIR Senior Resident Fellow Tim Caughley, the paper draws on his long experience as a former diplomat, senior United Nations official, and international lawyer, with support from his colleagues at the Institute, John Borrie, Wilfred Wan, and Yasmin Afina. For reasons of limited time and space this paper covers many, although not all, issues extant in the negotiations on the draft text.

The second paper was prepared by Gaukhar Mukhatzhanova, Director of the International Organizations and Nonproliferation Program of the James Martin Center for Nonproliferation Studies. In her paper, Gaukhar focuses on options for the accession of nuclear-armed States to the future treaty, and analyses some of the verification implications. These issues are accorded special prominence here as they have been central in many recent discussions about the shape of the regime, and the draft text in particular.

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<sup>1</sup> Draft Convention on the Prohibition of Nuclear Weapons, document A/CONF.229/2017/CRP.1.

The completion of these UNIDIR papers would not have been possible without the support of the Governments of Ireland and Sweden. Beside the contributors to the papers, the Institute would like to thank anonymous reviewers of the text, as well as Jarmo Sareva, Kerstin Vignard, Tae Takahashi, and Oleksandr Nazarenko for their practical advice and support.

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# UNIDIR's comments on miscellaneous prohibitions, obligations and organizational issues

Tim Caughley

This paper provides comments on various aspects of the draft Convention on the Prohibition of Nuclear Weapons (CPNW) of 22 May 2017 focusing on several issues arising from articles 1 and 6 to 21. It is not an article-by-article analysis of the entire negotiating text. Rather it addresses a number of the issues raised by participants in the first round of the negotiations in March 2017 on a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination. In particular, it deals with organizational and practical matters arising from the draft CPNW. It complements the following paper by Gaukhar Mukhatzhanova, which concentrates on articles 2 to 5.

## Subject Definitions<sup>2</sup>

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**Status** The draft CPNW does not include an article on definitions.

**Issue** The case for including or excluding an article containing definitions has centred on the need to define what is covered by “nuclear weapon”.

**For** Arguments in support of defining a nuclear weapon are to make the obligations as clear as possible.<sup>3</sup> It has also been argued that definitions might help ensure that there is no unforeseen impact on permissible trade in nuclear material and equipment for peaceful purposes.<sup>4</sup>

**Against** Other States assert that definitions are unnecessary. Their absence in the NPT has not proved problematic.<sup>5</sup> Their negotiation would be time-consuming and perhaps unavailing.<sup>6</sup> Attention has been drawn to the glossary of terms developed by the five nuclear weapons-possessing parties to the NPT as an informal substitute. For instance, these parties define “nuclear weapon” as a “weapon assembly that is capable of producing an explosion and massive damage by the sudden release of energy instantaneously released from self-sustaining nuclear fission and/or fusion”.<sup>7</sup>

Efforts to agree on a definition of a nuclear weapon would be compounded by the differing definitions among Nuclear-Weapon-Free Zone (NWFZ) treaties.<sup>8</sup>

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<sup>2</sup> For a fuller discussion on possible definitions, see “A Prohibition on Nuclear Weapons, a Guide to the Issues”, ILPI/UNIDIR, February 2016, p. 32.

<sup>3</sup> Sweden, statement to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, 29 March 2017.

<sup>4</sup> Switzerland, statement to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, 28 March 2017.

<sup>5</sup> Similarly, neither the Biological and Toxin Weapons Convention nor the Arms Trade Treaty include definitions. On the other hand, the Chemical Weapons Convention defines “chemical weapons” and the Convention on Cluster Munitions defines “cluster munition”.

<sup>6</sup> Austria, statement to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, 28 March 2017.

<sup>7</sup> “P5 Glossary of Key Nuclear Terms”, publication of the P5 Working Group on the Glossary of Key Nuclear Terms, April 2015.

<sup>8</sup> Mexico, statement to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, 31 March 2017.

**Comment** The Vienna Convention on the Law of Treaties (VCLT)<sup>9</sup> offers a useful aid to interpretation in the event that the lack of a definitions article eventuated as an issue for States Parties. Article 31 of that instrument provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The VCLT provides additional guidance in article 32 on recourse to supplementary means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.

As a general comment on definitions, or indeed on any term or phraseology, it makes sense to draw on language used in relevant counterpart treaties—e.g. the NPT, Biological and Toxin Weapons Convention (BTWC), Chemical Weapons Convention (CWC), or Comprehensive Nuclear-Test-Ban Treaty (CTBT)—to the greatest extent possible.

## **Subject Transit (article 1.1 (b) and (c))**

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**Status** The draft CPNW does not specifically prohibit transit of nuclear weapons, but leaves it to be covered under “transfer” (covered in two subparagraphs in terms that parallel articles 1 and 2 of the NPT):

*Article 1 – General obligations*

*1. Each State Party undertakes never under any circumstances to:*

*... (b) Transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly;*

*(c) Receive the transfer or control over nuclear weapons or other nuclear explosive devices directly, or indirectly;*

**Issue** Whether the CPNW should explicitly prohibit the transit of nuclear weapons, for example by sea and air.

**For** At the March meeting, there was some support for a specific prohibition of transit.<sup>10</sup>

**Against** Although no state has opposed a prohibition on transit, there are practical reasons for its exclusion. It would be difficult to exert any control over sea-based transit, but more particularly States are bound to observe the freedoms of navigation under international law<sup>11</sup> with regard to the law of the seas.

**Comment** Transit is generally understood to involve the movement (or transportation) of items (or persons) through a state territory on its way from one State to another. The point of departure under international law is that a state can only restrict transit in its own territory (including territorial waters), and thus the prohibition convention will only oblige its States Parties to regulate transit where they have jurisdiction.

As discussed in greater length in the guide published by the International Law and Policy Institute (ILPI) and UNIDIR,<sup>12</sup> the question of transit, or movement, of nuclear weapons into the territory of non-nuclear-weapon States (NNWS) has been highly controversial over the years. This has even included restrictions on or refusals of port visits involving

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<sup>9</sup> Available at <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>.

<sup>10</sup> See for example Indonesia, Ecuador, and South Africa, statements to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, 29 March 2017.

<sup>11</sup> See United Nations Convention on the Law of the Sea, particularly arts. 17–19, 53, 58, 87–91, and 125.

<sup>12</sup> “A Prohibition on Nuclear Weapons, a Guide to the Issues”, ILPI/UNIDIR, February 2016, pp. 31–32.

nuclear-weapon-capable naval units by members of nuclear alliances. The NWFZ treaties are relatively vague on the issue of transit. In the Treaty of Tlatelolco there is no reference to the term, and in the other four treaties the word is only used to stress that each State shall decide for itself whether it will accept transit.

The text goes one step further in the Treaty of Bangkok, emphasizing that nothing in the treaty shall prejudice the rights of States under the law of the seas, including the “rights of innocent passage, archipelagic sea lanes passage or transit passage of ships and aircraft”. This language may have been included as a way to soften reaction to the first part of that article, which states that the treaty and its protocol “shall apply to the territories, continental shelves, and [exclusive economic zones] of the States Parties within the Zone in which this Treaty is in force”. The uncertain legal implications of this wording on transit of nuclear weapons seem to be one of the main reasons why the five NPT nuclear-weapon States (NWS) have yet to sign and ratify the protocols of the treaty.<sup>13</sup>

The Arms Trade Treaty (ATT)<sup>14</sup> requires parties to take appropriate measures to “regulate, where necessary and feasible, the transit or trans-shipment under its jurisdiction of conventional arms ... through its territory in accordance with relevant international law”. But it is questionable whether this highly caveated language serves as a useful precedent for the CPNW.

One final comment on “transfer” is that consideration should be given to whether the CPNW, like the Anti-Personnel Mine Ban Convention (APMBC), should permit transfer for the purpose of destruction<sup>15</sup> of weapons and, if so, whether transit also requires coverage.

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**Subject** Threat of use (article 1.1(d))

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**Status** The draft CPNW does not include an article on this subject.

**Issue** Whether the CPNW should explicitly prohibit the threat of use of nuclear weapons.

**For** Arguments in support of a “threat of use” ban<sup>16</sup> refer to its value in preventing the possibility of use, and also in delegitimizing the concept of deterrence that underwrites the continued existence of nuclear stockpiles. They also refer to existing bans on threat of use by NWS in protocols to the various NWFZ treaties.

**Against** Other States point to the general prohibition on the threat of use of armed force that already exists in the Charter of the United Nations, article 2(4).<sup>17</sup> A specific prohibition on the “threat of use” of nuclear weapons could be seen as challenging the validity of the more general norm.

**Comment** As just mentioned, the threat of use of armed force, including nuclear weapons, is already prohibited under article 2(4) of the Charter. The inclusion of a threat-of-use ban in the CPNW would mark a significant departure from the CWC, APMBC, and the Convention on Cluster Munitions (CCM), all of which regulate only use and not threat of use. Inclusion

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<sup>13</sup> Ibid., p. 32.

<sup>14</sup> ATT, art. 9.

<sup>15</sup> APMBC, art. 3.2.

<sup>16</sup> See Chile, Ecuador, South Africa, International Association of Lawyers Against Nuclear Arms, and Women’s International League for Peace and Freedom, statements to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, 29 March 2017.

<sup>17</sup> See Austria, Sweden, and Switzerland, statements to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, 29 March 2017.

would thus call into question whether there are exceptions to the general prohibition given that the threat of use was not explicitly stated in those other instruments.<sup>18</sup> It is the actual conduct of hostilities that is regulated by international law including international humanitarian law (IHL), not the political rhetoric surrounding the hostilities. This is the reason why only use, and not threats of use, are regulated in those other instruments.

In regard to the protocols to NWFZ treaties on negative security assurances, it is there specified that both the threat of use and use of nuclear weapons against the members of the NWFZ are prohibited. The implication of these prohibitions is that threat of use must be a more qualified act than just possessing the weapon: otherwise these provisions would be redundant.<sup>19</sup> On the other hand, their presence in those agreements can be argued as undermining the Charter-based norm prohibiting the threat of use of armed force.

However, mention needs to be made of the 1996 Advisory Opinion of the International Court of Justice (ICJ), where the Court was asked by the United Nations General Assembly whether the use or threat of use of nuclear weapons was “in any circumstance permitted under international law”.<sup>20</sup> In answering the question, the ICJ said “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”.<sup>21</sup>

Whether the omission from the CPNW of a ban on the threat of use would condone the practice of deterrence or whether from that perspective the inclusion of such a prohibition will directly address it<sup>22</sup> and help “delegitimize” nuclear weapons, are matters of some debate.<sup>23</sup> One reading of the current draft is that its combination of prohibitions against “possession” and “assistance, encouragement, and inducement” of prohibited acts would challenge the practice of nuclear deterrence, whereas banning the “threat of use” of nuclear weapons would not. In this regard, it has been pointed out that while the doctrine of nuclear deterrence relies, at a minimum, on an *implicit* threat of use—a “possibility of use”—the mere possession of a weapon cannot reasonably be described as a “threat”.<sup>24</sup> In other words, unless a threat of use was interpreted as including not only a specific threat but also the mere possibility of use as a potential tool at the disposal of a nuclear-armed state, the inclusion of a prohibition of threat of use would have a limited impact on the deterrence doctrine.

Given these complex issues surrounding threats, inclusion of “threat of use” would entail time-consuming discussions about the definition and scope of “threat of use”, thus complicating negotiations and achieving an outcome of limited impact. Including a prohibition against “preparing for use” would give rise to the problems not only of defining the scope of any such preparation but also of undermining the fundamental prohibition of actual possession itself.

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<sup>18</sup> For a fuller discussion on threat of use, see “A Prohibition on Nuclear Weapons, a Guide to the Issues”, ILPI/UNIDIR, February 2016, pp. 28–29.

<sup>19</sup> See the Treaty of Bangkok, protocol 1, article 2, and the Treaty of Rarotonga, protocol 2, article 1.

<sup>20</sup> General Assembly, *General and Complete Disarmament*, A/RES/49/75, 15 December 1994.

<sup>21</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, 1996, para. 47.

<sup>22</sup> Working Paper submitted by International Physicians for the Prevention of Nuclear War, A/CONF.229/2017/NGO/WP.21, 20 April 2017, para. 17.

<sup>23</sup> Working Paper submitted by International Association of Lawyers Against Nuclear Arms, A/CONF.229/2017/NGO/WP.12, 28 March 2017, para. 8.

<sup>24</sup> K. Egeland, “To ban nuclear deterrence, ban possession, not threat of use”, 22 May 2017, <https://headofmimir.org/>.

## **Subject** Testing (articles 1.1(e) and 1.2(b))

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**Status** The draft CPNW includes the following article:

*Article 1 – General obligations*

1. Each State Party undertakes never under any circumstances to:

... (e) Carry out any nuclear weapon test explosion or any other nuclear explosion

2. Each State Party undertakes to prohibit and prevent in its territory or at any place under its jurisdiction or control:

... (b) Any nuclear weapon test explosion or any other nuclear explosion.

**Issue** Whether the CPNW should explicitly prohibit the testing of nuclear weapons, or any aspects thereof.

**For** Arguments in support of a specific prohibition on testing are to prevent any loopholes.<sup>25</sup> In addition, such phrasing would further reinforce the norms set forth by the Partial Test Ban Treaty (PTBT) and the CTBT. Others recommend that the treaty should update and strengthen those principles by including specific mention of new forms of testing that are not included in the CTBT.<sup>26</sup>

**Against** Other States assert there is no added value in a specific testing clause, as the activity is already included under the prohibition against development.<sup>27</sup> Further, as there exists a testing prohibition in an existing legal instrument, there is some concern that explicit mention of testing in the CPNW would create an alternative norm to the CTBT, creating tension as to the relationship between the two instruments.<sup>28</sup>

**Comment** The text of the CPNW largely replicates the language found in article I.1 of the CTBT. As such, it lacks clarity on coverage of new forms of testing outside the realm of explosions, such as subcritical experiments and computer simulations as sought by several delegations.<sup>29</sup> The question arises as to whether they would fall under the umbrella of the general obligation not to “develop” nuclear weapons. However, it has been asserted that references to forms of non-explosive testing, such as subcritical nuclear experiments, is neither productive nor necessary as it could “reopen the issue of CTBT scope, and/or create a conflict with the CTBT”.<sup>30</sup>

Moreover, as Jon Wolfsthal notes,<sup>31</sup> the CPNW lacks the framework for implementation—including monitoring and inspection—that accompanies the CTBT; the barrier for compliance with a CPNW prohibition on testing would thus actually be lower, which could allow non-CTBT parties to join it and undermine the CTBT norm in the process.

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<sup>25</sup> Ireland and New Zealand, statements to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, 29 March 2017.

<sup>26</sup> South Africa and Brazil, statements to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, 29 March 2017.

<sup>27</sup> Austria, Indonesia, and Ireland, statements to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, 29 March 2017.

<sup>28</sup> Mexico and Switzerland, statements to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, 29 March 2017.

<sup>29</sup> Ireland, statement to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, 29 March 2017.

<sup>30</sup> Working Paper submitted by the Arms Control Association, A/CONF.229/2017/NGO/WP.18, 31 March 2017.

<sup>31</sup> J. Wolfsthal, “The 1st Nuclear Ban Draft is Out”, Arms Control Wonk, 22 May 2017, [www.armscontrolwonk.com/archive/1203255/the-1st-nuclear-ban-draft-is-out/](http://www.armscontrolwonk.com/archive/1203255/the-1st-nuclear-ban-draft-is-out/).

The argument that inclusion of an article on testing would have no added value and might conceivably undermine or detract from the CTBT,<sup>32</sup> possibly compromising efforts to bring it into force and, in consequence, the existence of the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO), warrants close scrutiny. As a matter of international law, repetition of an obligation in an international instrument would not automatically bring about such consequences. When two treaties deal with overlapping subject matter but with differing States Parties, the VCLT provides that when the parties to a later treaty do not include all the parties to an earlier treaty, the later treaty does not affect or disrupt the existing treaty relationships for States not joining the later treaty.<sup>33</sup>

This applies certainly in respect of the NPT. In the case of the CTBT, the situation is less clear cut because that instrument is not yet in force. However, there is nothing in the negotiations of the CPNW to date to suggest that there is any intention to substitute or compromise the CTBT. In fact, the CTBT is cited as “a core element” of the non-proliferation and disarmament regime in the preamble. As to the issue of whether testing is covered by “development”, an argument can be made that the reconstitution of an arsenal after a prohibition has been put in place might entail testing not so much for development but for rebuilding.

It should be noted that positive obligations associated with testing can be found in the CCM, in which States affected by use or testing of cluster munitions under their jurisdiction should “adequately provide age- and gender-sensitive assistance” and also “have the right to request and to receive assistance toward the environmental remediation of areas so contained”.<sup>34</sup>

On balance, inclusion of a carefully drafted article prohibiting testing would, in conjunction with appropriate wording in article 19 of the CPNW, be consistent with the objectives and purposes of the CPNW without diminishing the CTBT.

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**Subject** **Victim assistance (article 6)**

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**Status** Article 6 of the draft CPNW includes the following provisions:

*1. Each State Party in a position to do so shall with respect to individuals affected by the use or testing of nuclear weapons in areas under its jurisdiction or control, in accordance with applicable international humanitarian and human rights law, adequately provide age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion. ...*

*3. Such assistance may be provided, inter alia, through the United Nations system, international, regional or national organizations or institutions, non-governmental organizations or institutions, or on a bilateral basis.*

**Issue** Given the enormous impact on life and health that a nuclear explosion would have, the issue is how to ensure that such a provision is implementable and does not impose unfair obligations on parties such as responsibility for remediating the wrongs of others.

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<sup>32</sup> Mexico, statement to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, 29 March 2017.

<sup>33</sup> T. Dunworth, “Negotiating Nuclear Disarmament: Clarifying the Law”, October 2016.

<sup>34</sup> CCM, article 6.7.

**For** At the March negotiating session, widespread support was voiced for including an obligation on victim assistance.<sup>35</sup> Committing parties to providing international cooperation and assistance to victims where they are in a position to do so is relatively uncontroversial, although a question arises whether it should be expressed as an obligation or as a preambular objective. The victim assistance obligation in the CCM is premised on States' general obligations towards their own citizens and on the needs and rights of victims, rather than as compensation based on responsibility for the harm caused. (The precise scale of assistance is less clear.)

**Against** The far-reaching and catastrophic consequences that might result from any use of nuclear weapons is an argument against including a provision that seeks to redress the loss and suffering of victims. In practical terms, the scope of such obligations would be difficult both to quantify and implement and might therefore complicate CPNW negotiations and delay agreement unnecessarily. Such additional obligations may instead be addressed at a later stage or through the CPNW's implementation process.<sup>36</sup>

**Comment** The most recently concluded treaties prohibiting specific weapons, namely the APMBC and the CCM, both contain provisions for victim assistance, as does the Convention on Certain Conventional Weapons' (CCW) Protocol V on explosive remnants of war (ERW). Under Protocol V, parties "in a position to do so" are required to provide assistance through the United Nations system, the International Committee of the Red Cross (ICRC), or other relevant organizations for the care and rehabilitation and social and economic reintegration of ERW victims. Article X of the CWC on assistance and protection in the event of chemical weapons use or the threat of such use also includes a provision for emergency measures to protect victims in cases where immediate action is indispensable. However, this CWC provision is limited to emergency assistance and is directed at the Director-General of the Organisation for the Prohibition of Chemical Weapons (OPCW), not States Parties.

The adoption of the Convention on the Rights of Persons with Disabilities (CRPD) in 2006 strongly influenced the negotiation of the victim assistance provisions in the CCM. This is reflected in the explicit references to the rights of cluster munition victims and the CRPD in the CCM's preamble, as well as in article 5, which requires that victim assistance be provided "in accordance with applicable international humanitarian and human rights law". The CCM thus placed victim assistance in a weapons-ban treaty for the first time within a broader human rights-based framework.

The Humanitarian Pledge underlines the harm that victims of nuclear explosions and testing have experienced and recognizes that the "rights and needs of victims have not yet been adequately addressed".<sup>37</sup> Like the CCM, the APMBC includes language on victims in the preamble as well as in the operative provisions. Preambular language acknowledging the challenges of victims and their need for assistance is also found in the ATT since there was insufficient support to include assistance to victims as an actual obligation in that treaty.

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<sup>35</sup> See, for example, Working Paper submitted by Article 36, A/CONF.229/2017/NGO/WP.10, 27 March 2017, paras. 19–20.

<sup>36</sup> For a fuller discussion on victim assistance, see "A Prohibition on Nuclear Weapons, a Guide to the Issues", ILPI/UNIDIR, February 2016, pp. 50–53.

<sup>37</sup> Humanitarian Pledge, [https://www.bmeia.gv.at/fileadmin/user\\_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/HINW14vienna\\_Pledge\\_Document.pdf](https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Abruestung/HINW14/HINW14vienna_Pledge_Document.pdf).

Against this background, article 6 of the CPNW seems to reflect fairly the ambitions of its negotiators to date, the need to be realistic in the face of the potential suffering that a nuclear detonation is capable of inflicting, and States' general obligations towards their own citizens and on the needs and rights of victims.

**Subject Environmental remediation (article 6)**

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**Status** Article 6 of the draft CPNW also provides that:

*2. Each State Party with respect to areas under its jurisdiction or control that have been contaminated by the testing or use of nuclear weapons, shall have the right to request and to receive assistance toward the environmental remediation of areas so contaminated.*

*3. Such assistance may be provided, inter alia, through the United Nations system, international, regional or national organizations or institutions, non-governmental organizations or institutions, or on a bilateral basis.*

**Issue** Given the enormous destruction a nuclear explosion could cause, the issue is how to ensure that such a provision is implementable and does not impose unfair obligations on parties such as responsibility for remediating the wrongs of others.

**Comment** At the March meeting, some support for including an obligation on environmental remediation was evident.<sup>38</sup> The precise scale of such assistance is less clear. Committing parties to providing international cooperation and assistance to affected States where they are in a position to do so is relatively uncontroversial, although whether it should be expressed as an obligation or a preambular objective is less clear.

One option would be to include a provision calling in more general terms for the rehabilitation of affected areas and encouraging States to assist. The provision on "environmental security" (article 6) in the Central Asian NWFZ Treaty provides an example in this regard. In that article, parties undertake to "assist any efforts toward the environmental rehabilitation of territories contaminated as a result of past activities related to the development, production or storage of nuclear weapons or other nuclear explosive devices, in particular uranium tailings storage sites and nuclear test sites".

**Providing assistance:** Article 6 of the draft CPNW contains a provision—paragraph 3—that applies both to victim assistance and environmental remediation. In this broader regard and in regard also to the right under draft article 8.2 to seek and receive assistance, we should note the following. While mechanisms exist to respond to civil nuclear accidents or radiological emergencies through the International Atomic Energy Agency (IAEA) and the Inter-Agency Committee on Radiological and Nuclear Emergencies, no coherent framework is in place to coordinate an international response in the event of a nuclear weapon explosion.<sup>39</sup> A prohibition regime could provide a vehicle for improving international coordination and cooperation in this regard. A parallel can be found in article X in the CWC, under which States Parties have the right to seek or receive assistance and protection in cases of use or the threat of use of chemical weapons (article X (8)). This may include the provision of assistance, such as detection, protection and decontamination equipment, as well as medical antidotes and treatment. Article X also

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<sup>38</sup> See, for example, Working Paper submitted by Article 36, A/CONF.229/2017/NGO/WP.10, 27 March 2017, para. 18.

<sup>39</sup> J. Borrie and T. Caughley, "An Illusion of Safety", UNIDIR, August 2014.



calls for the exchange of equipment, material, and information concerning means of protection, and establishes a voluntary fund for assistance to be managed by the OPCW. However, the consequences resulting from a nuclear weapon detonation would present qualitatively different and more complex challenges than those caused by chemical weapons. There is also limited experience on which to base emergency response measures. This could make it a difficult task to develop and agree on appropriate provisions related to emergency assistance and protection. Rather than including specific provisions for assistance in the CPNW itself, attention to this task could be deferred to the implementation process.<sup>40</sup>

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**Subject** **Financing (article 7; also article 1.1(f) and (g))**

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**Status** The draft CPNW does not include a specific article on this subject. However, see:

*Article 7 – National implementation*

*2. 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 or control.*

*Article 1 – General obligations*

*1. Each State Party undertakes never under any circumstances to: ...*

*(f) Assist, encourage, or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention;*

*(g) Seek or receive any assistance, in any way, from anyone to engage in any activity prohibited to a State Party under this Convention.*

**Issue** Whether the CPNW should contain language that explicitly prohibits financing, or investment in, nuclear weapons.

**Comment** Views of States on this subject are very mixed and tentative. Some States suggest that a CPNW will need clarity and comprehensiveness, clarifying prohibitions that were left implicit in the NPT.<sup>41</sup> Explicit language would prevent any ambiguity or loopholes, they say.

But it may also be argued that the prohibition on assistance-related activities is already sufficient to cover financing. Interventions from non-governmental organizations (NGOs) are more forceful on the subject however.<sup>42</sup> PAX submitted a working paper suggesting the need to make explicit that “financing constitutes a form of assistance”.<sup>43</sup> The Women’s International League for Peace and Freedom (WILPF) similarly argues that a prohibition could have significant impact on the nuclear weapon complex.<sup>44</sup>

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<sup>40</sup> For a fuller discussion on possible definitions, see “A Prohibition on Nuclear Weapons, a Guide to the Issues”, ILPI/UNIDIR, February 2016, pp. 49–50.

<sup>41</sup> See, for example, Ireland and New Zealand, statements to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, 29 March 2017.

<sup>42</sup> See for example Working Paper submitted by Basel Peace Office, Parliamentarians for Nuclear Non-proliferation and Disarmament and UNFOLD ZERO, A/CONF.229/2017/NGO/WP.6, 17 March 2017.

<sup>43</sup> Working Paper submitted by PAX, A/CONF.229/2017/NGO/WP.5, 17 March 2017.

<sup>44</sup> WILPF, statement to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, 29 March 2017.

While there is no explicit mention of financing or investment in the draft CPNW, such activities would seem to fall under the auspices of “assist, encourage, and induce”, as suggested in the ILPI/UNIDIR guide.<sup>45</sup> The CCM provides a parallel, representing a growing understanding that finance constitutes a form of assistance with prohibited acts even without an explicit prohibition on financing.<sup>46</sup> Some States have nonetheless adopted national implementation to that end,<sup>47</sup> something article 7 clearly allows for in the case of the CPNW. Others have long-standing practices excluding producers of various weapons (including nuclear weapons) from their governmental investment portfolios.<sup>48</sup> Still, the lack of explicit mention of financing does contrast with the language in resolution 1540 (prohibiting efforts to “participate in [prohibited activities] as an accomplice, assist or finance them”), which WILPF had suggested could serve as a model for the CPNW.<sup>49</sup>

## **Subject National implementation measures (article 7)**

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**Status** Article 7 of the draft CPNW provides that:

- 1. Each State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention.*
- 2. 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 or control.*

**Comment** Inclusion in a prohibition agreement of a provision on national implementation is consistent with treaties of this kind (for example, the CWC article 7 and CCM article 9). Its purpose is to require States Parties to implement national legal, administrative, and regulatory measures to prevent and suppress any activity prohibited to a State under the agreement. Such measures are principally intended to prevent non-State actors from committing acts that would be inconsistent with the prohibitions under the agreement. Another important function of the national implementation requirement is to ensure that all States Parties contribute as much as possible to the aggregated normative effect of the regime.

Examples of this could include integration of the obligations under the treaty in national laws, including the penal code of the States Parties, as recommended in the March

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<sup>45</sup> For a fuller discussion on possible definitions, see “A Prohibition on Nuclear Weapons, a Guide to the Issues”, ILPI/UNIDIR, February 2016, p. 37, partially excerpted here.

<sup>46</sup> Working Paper submitted by PAX, A/CONF.229/2017/NGO/WP.5, 17 March 2017.

<sup>47</sup> For example, R. Moyes, R. Acheson and T. Nash, “A Treaty Banning Nuclear Weapons”, Article 36/Reaching Critical Will, 2014. See also Working Paper submitted by Basel Peace Office, Parliamentarians for Nuclear Non-proliferation and Disarmament and UNFOLD ZERO, A/CONF.229/2017/NGO/WP.6, 17 March 2017, para. 16, p. 3: “For Cluster Munitions, approximately 40 States Parties have made interpretative statements that investments in cluster munitions are, or can be seen as, prohibited by the Convention on Cluster Munitions. At least 10 have already adopted legislation prohibiting such investments.”

<sup>48</sup> See, for instance, the Ethical Guidelines for the Norwegian Pension Fund, § 2 (a), <http://etikkradet.no/en/guidelines/>. See also PAX, “States banning investments in cluster munitions”, September 2015, [www.paxforpeace.nl/media/files/States-banninginvestments-september-2015.pdf](http://www.paxforpeace.nl/media/files/States-banninginvestments-september-2015.pdf).

<sup>49</sup> WILPF, statement to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, 29 March 2017.

negotiations by the ICRC and the Caribbean Community (CARICOM), for instance.<sup>50</sup> It could moreover take the form of restrictions on investments in nuclear weapons or even trade in sensitive materials with non-parties (as is the case in the CWC). Currently, neither the NPT nor any of the NWFZ treaties include explicit national implementation requirements, something that arguably forms part of the legal gap asserted during the Conferences on the Humanitarian Impact of Nuclear Weapons.

Both the CWC and the CTBT contain specific articles on national implementation, requiring States Parties to ensure that the prohibitions and obligations under the treaty also apply to all natural persons under its jurisdiction. These two treaties further require States Parties to cooperate and support each other in the process of implementing the treaty obligations on a national level. With regard to nuclear weapons, similar obligations exist as part of the 2005 Nuclear Terrorism Convention (NTC)<sup>51</sup> as well as United Nations Security Council resolution 1540 (2004).<sup>52</sup>

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**Subject Operationalizing the CPNW (articles 9 and 10)**

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**Issue** How best to facilitate and support the operation of the CPNW.

**Status** The draft CPNW includes a number of articles relevant to institutionalizing and implementing the Convention, as discussed below:

**Article 9 – Meeting of States Parties**

This article sets out how Meetings of States Parties (MSPs) will be convened (by the United Nations Secretary-General) and outlines the purpose of such meetings:

- MSPs will take decisions on how to apply and implement the CPNW and on elaborating further effective measures for nuclear disarmament;
- MSPs will also deal with reporting by States Parties and matters arising from the declarations submitted under article 2 of the CPNW; and
- MSPs will also decide on proposals for the verified and irreversible elimination of nuclear weapon programmes, including additional protocols to the CPNW.

Art. 9.3 provides that after a period of five years following the entry into force of the CPNW, the MSPs may decide to convene a conference to review the operation of the CPNW with a view to assuring that the purposes of its preamble and articles, including the provisions concerning negotiations on effective measures for nuclear disarmament, are being realized.

Art 9.4 enables States not party to the CPNW, as well as the United Nations, other relevant international organizations or institutions, regional organizations, the ICRC, and relevant NGOs to attend MSPs and the Review Conferences as observers.

**Comment** It is common practice—and common sense—for international agreements that prohibit or regulate weapons to build in a requirement for regular review. Formal five-yearly reviews are normal but treaty implementation is monitored often by regular interim

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<sup>50</sup> See for example Working Paper submitted by the ICRC, A/CONF.229/2017/WP.2, 31 March 2017; CARICOM, statement to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, 31 March 2017.

<sup>51</sup> The NTC, or International Convention for the Suppression of Acts of Nuclear Terrorism (14 September 2005), requires States Parties to criminalize the possession of nuclear material that can be used for weapons.

<sup>52</sup> United Nations Security Council resolution 1540 (2004) requires all States to put in place effective measures to prevent illegal transport of nuclear material.

reviews (often annual as in this case) through short meetings of States Parties. A legal prohibition of nuclear weapons should be no exception. By spelling out the purposes of MSPs and Review Conferences, the CPNW also provides specific focus for the parties as to the key items of business of those meetings.

The length of the review cycle, the regularity of interim reviews and the number of days allocated for such meetings<sup>53</sup> need not be specified in the treaty (although see further under our comments on article 10 below). Instead, as in this case, agreements sometimes provide—e.g., in the case of the ATT—for the convening of a first conference of States Parties’ within a year of the instrument’s entry into force. The purpose of such a meeting is to decide upon budgetary rules, the need for a secretariat (where not specified in the treaty itself), rules of procedure for meetings of States Parties, and other organizational essentials.<sup>54</sup>

### **Article 10 – Costs**

This article stipulates that the costs of MSPs and the Review Conferences are to be borne by States Parties and non-party participants in accordance with the United Nations scale of assessment adjusted appropriately (i.e., scaled to reflect the actual participants rather than to the entire United Nations membership). The costs incurred by the Secretary-General in administering the declarations under article 2 will be borne by the States Parties on the same basis.

**Comment** To obviate protracted arguments after entry into force over how the implementation of an agreement will be funded, this matter is best settled in the treaty itself so that States contemplating ratification or accession can gauge at the outset the financial contributions they will need to make as parties. In doing so, article 10 of the CPNW reflects very closely the wording of the CCM.

In the CCM, assessed contributions do not, however, cover non-meeting costs such as those incurred by an implementation support unit as a dedicated secretariat. For the CPNW, ideally such details—as well as establishing mechanisms such as an Executive Council as in the CWC—would be settled during the negotiation of the proposed ban to forestall protracted wrangling thereafter. Although the ATT provided that its Conference of States Parties “shall adopt a budget for the financial period until the next ordinary session”, the important issue of how to fund the implementation support unit was left open. It was subsequently resolved that each calendar year States Parties would be charged an assessed contribution for the secretariat’s costs in undertaking the core tasks of the ATT as spelled out in the treaty (article 18.3).

Ultimately the need for a secretariat or implementation support unit to facilitate the CPNW’s implementation will depend on the workload that may arise from provisions on declarations, reporting, and other such activities. No delegation in the March negotiations envisaged other than a small unit.<sup>55</sup> Of relevant arms control and disarmament agreements, only the NPT has no mechanism for institutional support. In the NPT’s case,

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<sup>53</sup> Several States have recommended short annual meetings along ATT lines; see Sweden and Philippines, statements to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, 31 March 2017.

<sup>54</sup> See New Zealand, statement to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, 31 March 2017.

<sup>55</sup> For example, Sweden, statement to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, 31 March 2017.

the support of the United Nations Office for Disarmament Affairs (ODA) is essential, and its support for the CPNW is seen by many participants in the negotiations as desirable and cost-effective.

In introducing the draft CPNW, the Chair indicated that the text was predicated on ODA being the implementing agency (although several delegations noted during the March session that support by the IAEA and the CTBTO could be explored in relation to certain activities such as verification).<sup>56</sup> ODA's assumption of the role is logical given that it is envisaged that the United Nations Secretary-General should be the depositary (article 20) and play an active part in handling declarations (article 2) and convening MSPs (article 9).

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**Subject Other articles of the CPNW relevant to its facilitation and organization (articles 2, 8, 13, and 21)**

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Note should be made of the following articles that would affect the implementation of the CPNW.

**Article 2 – Declarations**

This article requires each State Party to submit to the United Nations Secretary-General, not later than 30 days after the CPNW enters into force for it, a declaration as to whether it has manufactured, possessed or otherwise acquired nuclear weapons or other nuclear explosive devices after 5 December 2001. The Secretary-General is required to transmit all such declarations to the States Parties.

**Comment** The significance of 5 December 2001 is this: States such as South Africa, Belarus, Kazakhstan and Ukraine that ceased to have nuclear arsenals by that date will be able to declare, consistent with their NPT party status that for the purposes of the CPNW they no longer possess nuclear weapons. In the event that any of the nine States<sup>57</sup> known or thought to still possess such armaments wished to join the CPNW, it would need to make an article 2 declaration. Declarations are also relevant to the operation of the draft CPNW's articles 4, 9, and 10.

**Article 8 – International cooperation**

This article reads as follows:

- 1. Each State Party shall cooperate with other States Parties to facilitate the implementation of the obligations of this Convention.*
- 2. In fulfilling its obligations under this Convention each State Party has the right to seek and receive assistance.*

**Comment** Article 8 creates an obligation for States Parties to cooperate in implementing the CPNW, an activity that implicitly underlines the importance of achieving the objectives of the convention and its universalization (see article 13 below). This appears to reflect calls for assistance mechanisms during the March negotiations, for example from South Africa and

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<sup>56</sup> See New Zealand, statement to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, 31 March 2017.

<sup>57</sup> China, Democratic People's Republic of Korea, France, India, Israel, Pakistan, Russian Federation, United Kingdom, United States.

the Philippines.<sup>58</sup> The second part of the article ties the right of a party to receive assistance to the fulfilment of its obligations.

### **Article 13 – Universality**

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

**Comment** Seeking “universality”, i.e. global membership (and thus global validity), of a treaty is a common objective of other conventions on weapons of mass destruction (the CWC and the BTWC) and other arms prohibitions (e.g., the APMBC and the CCM). The classic case is that of the four Geneva Conventions that establish the standards of international law for humanitarian treatment in war. Those treaties are ratified by all States and thus enjoy universal support, the ideal status for cementing in place the norms they create under international law. During the March negotiations, the importance of universalization was emphasized (for example by Brazil) as a focus for five-yearly Review Conferences.<sup>59</sup>

Encouraging the “adherence” of all States to become party to the CPNW is elevated by the draft text to an actual obligation. The more States that become bound by the CPNW, the greater its international influence and standing. And the wider the adherence to a prohibition on nuclear weapons, the greater its effectiveness is likely to be in fulfilling its objectives and in having a normative impact on the conduct of non-State Party. For example, patient lobbying of States to renounce biological and chemical weapons and nuclear-weapons-testing under the BTWC, CWC, and CTBT respectively have borne fruit as those treaties approach universality.

Although a nuclear weapons prohibition regime would not itself achieve nuclear disarmament, efforts to elevate its international acceptance would have associated benefits, including for non-proliferation. For instance, advocates see a CPNW as reinforcing the taboo against the use and possession of nuclear weapons among NNWS. Reinforcement of that taboo through widespread adherence to such an agreement would at the same time serve to remind the possessors of nuclear weapons of the depth of aversion to their use and the likely humanitarian consequences.<sup>60</sup>

### **Article 21 – Authentic texts**

*The Arabic, Chinese, English, French, Russian and Spanish texts of this Convention shall be equally authentic.*

**Comment** To date, considerable support exists for the six official languages of the United Nations as reflected in article 21. This is appropriate in assisting the objective of universalizing the CPNW (article 13), but necessarily entails cost considerations.

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<sup>58</sup> See South Africa, statement to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, 29 March 2017, and the Philippines, statement to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, 31 March 2017.

<sup>59</sup> Brazil, statement to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, 31 March 2017.

<sup>60</sup> R. Price and N. Tannenwald, “Norms and Deterrence: The Nuclear and Chemical Weapons Taboos” in P.J. Katzenstein (ed), *The Culture of National Security: Norms and Identity in World Politics*, Columbia University Press, 1996.

## **Subject Amendments to the CPNW (article 11)**

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**Status** Article 11 of the draft CPNW provides that MSPs or Review Conferences may give consideration to any proposal for amendment of the instrument. A majority of two-thirds of States Parties present and voting is required for adoption of an amendment. How an amendment would enter into force is also covered in the draft article.<sup>61</sup>

**Issue** Whether to allow the CPNW to be opened for the purposes of amending it.

**For** The need for an amendment might arise as a result of some unforeseen development that affects the operation of the treaty in a fundamental way.

**Against** Reopening any legal agreement for the purposes of amending it risks the renegotiation of delicately reached compromises in the original instrument. Or it could give rise to a messy situation under international law where the parties to the original treaty are not identical to those ratifying or acceding to the amending instrument. This could lead to confused legal relations between parties.

**Comment** In the case of the CPNW, the question arises whether, in the absence of participation in the negotiations to date of nuclear-weapons-possessing States and most of their allies, an issue will emerge over time that would justify reopening the agreement in order to accommodate increased membership from among current outliers. If the agreement (together with its protocols) is to serve the ultimate purpose—once nuclear weapons are eliminated—of providing that their re-emergence in national arsenals is precluded under international law, amending it may prove necessary over time. In any event, careful attention should be taken to setting an appropriately high threshold for decisions on amendments.<sup>62</sup>

An informal way of dealing with the issue of amendment, however, is to institute an ad hoc arrangement whereby the parties reach a particular understanding without the need for a formal amendment of the original. The text of such an understanding would be circulated to parties under a “silence” procedure. In the absence of any challenge to the understanding it would govern the future practice of parties, without legal force but with strong moral and political effect. Whether that is practical or desirable in the case of something as significant as a prohibition on nuclear weapons is questionable.

## **Subject Settlement of disputes (article 12)**

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**Status** Article 12 of the draft CPNW reads as follows:

*1. When a dispute arises between two or more States Parties relating to the interpretation or application of this Convention, the parties concerned shall consult together with a view to the expeditious settlement of the dispute by negotiation or by other peaceful means of the parties' choice, including recourse to the Meetings of States Parties and, by mutual consent, referral to the International Court of Justice in conformity with the Statute of the Court.*

*2. The Meeting of States Parties may contribute to the settlement of the dispute by whatever means it deems appropriate, including offering its good offices, calling upon the States Parties concerned to start the settlement procedure of their choice and recommending a time limit for any agreed procedure.*

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<sup>61</sup> The two-thirds rule was proposed by, among others, Brazil and the Philippines, in their respective 31 March 2017 statements.

<sup>62</sup> see for example ATT, article 20.3.

**Comment** During the March negotiations a number of States supported the inclusion of dispute settlement. Article 12 of the CPNW replicates article 10 of the CCM. In contrast, the ATT contains a narrower approach based on “negotiations, mediation, conciliation, judicial settlement or other peaceful means”, or arbitration, and makes no specific mention of the ICJ.<sup>63</sup>

The CWC, on the other hand, embodies a more detailed provision reflecting the substantial organizational structure established by that treaty. It amounts to a similar but more elaborate version of the approach taken by the CCM involving possible referral to the ICJ. There is no dispute settlement provision in the NPT.

The issue for the negotiators of the CPNW is whether—among the options—to provide specifically for recourse to the ICJ (as in the current draft) or to fall back on to the ATT’s more general approach of “judicial settlement”.

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**Subject** **Universality (article 13)**

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For brief notes on this article, see comments provided under articles 9 and in respect of articles 15 and 21.

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**Subject** **Arrangement for signature by States (article 14)**

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**Status** Article 14 of the draft CPNW reads as follows:

*This Convention shall be open for signature to all States before its entry into force.*

**Comment** It is common for States to sign a treaty prior to ratifying it, as the signature may establish the text of the treaty as authentic and definitive (absent any other authentication procedure agreed upon by the States participating in its drawing up).<sup>64</sup> Article 14 thus corresponds to the standard procedure for the conclusion of treaties.

Under the VCLT, the consent of a state to be bound by a treaty may be expressed simply by signature (article 11). However, the draft CPNW requires that the Convention be subject also to ratification by signatory States (see article 15 below). Ratification is the act of becoming legally bound by a treaty (if in force). When a signature is subject to ratification (as in the CPNW), the signature does not establish the consent of the signing State to be bound. However, it is a means of authentication and expression of the willingness of the signatory State to proceed to ratification. It also creates an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty.<sup>65</sup>

States participating in the CPNW negotiations should follow ODA’s advice as to the need to present Full Powers from their Head of State or Foreign Minister certifying that they have formal authority to sign on behalf of their nation.

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**Subject** **Arrangement for ratification by States (article 15)**

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**Status** Article 15 of the draft CPNW reads as follows:

*This Convention shall be subject to ratification by signatory States.*

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<sup>63</sup> ATT, article 19.

<sup>64</sup> VCLT, article 10(a).

<sup>65</sup> Ibid., articles 10 and 18.



**Comment** A signatory State cannot be bound to a treaty that is subject to ratification unless it has deposited with the designated Depository (see article 20 of the CPNW) an instrument of ratification. A signatory State cannot express its consent to be bound to the CPNW simply by signature. It will need to go through its internal ratification process. This process varies from one State to another: the speed of entry into force of a treaty often depends on the complexity or otherwise of the treaty ratification procedures of signatory States. However, in the case of the CPNW—depending on its final terms—for NNWS there may be no burdensome new legal obligations beyond those that they have already assumed under the NPT and, where relevant, NWFZ and other treaties.

The VCLT defines ratification as such: “‘Ratification’, ‘acceptance’, ‘approval’ and ‘accession’ mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty”.<sup>66</sup> As drafted, the CPNW has chosen not to include an article specifically providing for the formal acts of acceptance, approval, or accession (terms also used in articles 13 and 16), but covers them instead as part of article 16 (see paragraph 2).

The United Nations Treaty Collection Glossary defines “accession” as the following: “‘Accession’ is the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force.”<sup>67</sup> The inclusion of an explicit provision on accession might facilitate the circumstances in which States that have not participated in the negotiations of the CPNW, nor signed and ratified it, wish to become party to it in due course. One way of dealing with accession, approval, and acceptance is to add those actions to the article on ratification in the manner used by the CCM (article 16) and to provide that “instruments of ratification, acceptance, approval or accession shall be deposited with the Depository”.

The BTWC contains specific provisions on accession. Article 20 stipulates that “Any State which does not sign this Convention before its entry into force may accede to it at any time thereafter.” Article 14 states that “Any State which does not sign the Convention before its entry into force in accordance with paragraph 3 of this Article may accede to it at any time.” The CWC dedicates an entire article on accession. The absence of provision related to accession in the draft CPNW is therefore out of step with the treaties prohibiting the two other categories of weapons of mass destruction.

Such a provision would also be consistent with the draft CPNW’s article 13 on universality, as it would explicitly invite States to join even after entry into force. As Austria has stated:

*The goal of a nuclear-weapon-free world can only be achieved by maximum inclusiveness. An accession clause should reiterate that any State which does not sign the Treaty before its entry into force may accede to it at any time thereafter. Logic requires that States currently possessing nuclear weapons should commit specifically to actual elimination of their nuclear weapons upon becoming Party to the treaty.*<sup>68</sup>

A provision on accession would therefore underline the intended universal character of the CPNW.

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<sup>66</sup> VCLT, article 2.1(b).

<sup>67</sup> United Nations Treaty Collection, “Glossary of terms relating to Treaty actions”, 30 May 2017, [https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1\\_en.xml](https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml).

<sup>68</sup> Austria, statement to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, 31 March 2017.

## **Subject** Entry into force (article 16)

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**Status** Article 16 of the draft CPNW includes the following text:

*1. This Convention shall enter into force 90 days after the fortieth instrument of ratification, acceptance, approval or accession has been deposited.*

**Issue** To ensure that the threshold for entry into force—40 in the CPNW—is sensible rather than prohibitive. Two tests are involved: that entry into force (i) should not be contingent on ratification by any particular State or group of States; and (ii) should require a sufficient number of States to ratify it to ensure its credibility, i.e., demonstrate its international significance.

**Comment** As to (i), any assertion that, like the CTBT, the CPNW should specify that the ratifiers required to bring the treaty into force should include certain named States has been muted. This may be because of the absence of participation in the negotiations to date of the NWS and most of their allies. It may also be a consequence of the failure to date of securing the entry into force of the CTBT with its flawed entry into force provision. By actually specifying which States were required to become party before the agreement would enter into force, the CTBT in effect invested each of those States with the power to prevent the agreement from becoming part of international treaty law.

In any event, the negotiations to date have been preoccupied with test (ii), the number of ratifications needed for entry into force. In the negotiations of the CPNW so far, proposals range from 25 (Guatemala)<sup>69</sup> to 80 (Sweden)<sup>70</sup>.

If the CPNW draft had taken the approach that it would enter into force only after one or more current possessors of nuclear weapons had become party, the treaty might suffer the same fate as the CTBT which, more than 20 years after its conclusion, has yet to be consummated in formal international legal terms. The BTWC, CWC and NPT required 22, 43, and 65 States Parties, respectively, before entry into force. The four Geneva Conventions, in contrast, only needed two ratifying or acceding States for their entry into force. The logic of this latter arrangement was that even two States adhering to the humanitarian standards the Geneva Conventions set would be better than none, while waiting for a larger number of States to accede. The CCM required 13 ratifications; the APMBC 40. As a possible benchmark, the ATT required 50 ratifications before entry into force.

In the case of the BTWC and the NPT, three States<sup>71</sup> in each case that had been designated depositaries of the treaty were also required to become party in order to bring it into force.

## **Subject** Reservations (article 17)

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**Status** Article 17 of the draft CPNW includes the following article:

*The Articles of this Convention shall not be subject to reservations.*

**Issue** Whether to allow a State Party to make a reservation in respect of any article of the treaty.

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<sup>69</sup> “Nuclear Ban Daily”, vol. 1, no. 6, 4 April 2017, “News in Brief”, p. 7.

<sup>70</sup> Sweden, statement to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, 31 March 2017.

<sup>71</sup> In both instances, the United Kingdom, the United States, and the (former) Union of Soviet Socialist Republics.

**For** The ability of a State to enter a reservation to the CPNW on becoming Party to it may be the difference between joining the treaty or remaining outside it.

**Against** Given the specific and narrow nature of the CPNW, it is difficult to envisage any reservation that would not be regarded by other contracting parties as contrary to the Convention's object and purpose.

**Comment** The VCLT provides that a state may, when signing, ratifying, accepting, approving, or acceding to a treaty, formulate a reservation unless:

- a) The reservation is prohibited by the treaty;
- b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- c) In cases not falling under subparagraphs a) and b), the reservation is incompatible with the object and purpose of the treaty.

The inclusion in a CPNW of an article allowing States to attach reservations to their obligations warrants careful reflection. During the March negotiations, there was both opposition to allowing reservations<sup>72</sup> and support for permitting them, albeit provided that any such reservations were not compatible with the CPNW's object and purpose.<sup>73</sup> If reservations were permitted, a State Party intending to join would be able to unilaterally modify the application of a particular obligation to it, so long as the reservation did not defeat the object and purposes of the treaty.

Best practice in negotiating a treaty having such high significance as a prohibition on nuclear weapons would be to entertain the inclusion of a reservation only if its use would assist a state to become party in circumstances when its domestic legal system would otherwise preclude it based on some legal technicality. Both the CTBT and the CWC specify that reservations are not possible<sup>74</sup> (although the CWC provides that its annexes "shall not be subject to reservations incompatible with its object and purpose", thus leaving open the possibility of limited reservations to its annexes). If a treaty does not contain a reservations article (as is the case with the BTWC and the NPT), lawful reservations are permitted in certain circumstances.<sup>75</sup> Crucially, the reservation must be compatible with the object and purpose of the agreement.

## **Subject** Duration and withdrawal from the CPNW (article 18)

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**Status** Article 18 of the draft CPNW includes the following text:

1. *This Convention shall be of unlimited duration.*
2. *Each State Party shall in exercising its national sovereignty have the right to withdraw from the Convention if it decides that extraordinary events, related to the subject matter of this Convention, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Convention and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.*

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<sup>72</sup> See, for example, Austria and Brazil, statements to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, 31 March 2017.

<sup>73</sup> "Nuclear Ban Daily", vol. 1, no. 6, 4 April 2017, "News in Brief", p. 7 in respect of Malaysia.

<sup>74</sup> CTBT, article 15; CWC, article 22.

<sup>75</sup> VCLT, article 19: the reservation must be compatible with the object and purpose of the treaty.

3. *Such withdrawal shall only take effect three months after the receipt of the instrument of withdrawal by the Depositary. If, however, on the expiry of that three-month period, the withdrawing State Party is engaged in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article 1 of Additional Protocol I to these Conventions, the Party shall continue to be bound by the obligations of this Convention and of any annexed Protocols until the end of the armed conflict or occupation.*

**Issues** Whether (a) a State that is party to the CPNW should be able to withdraw from it under certain circumstances; and whether (b) the CPNW should have a finite life.

**For** The ability of a State to withdraw from a treaty to which it is party may make it easier for that state to become party in the first place. Or to reverse the proposition, the inability to withdraw from a treaty in the event of some circumstances unforeseen at the time of becoming party may deter a state from joining the treaty at all.

**Against** Opposition to an article that permits withdrawal is based on this argument: a treaty which is setting a global norm on something as fundamental as prohibiting nuclear weapons should not contemplate the prospect of the withdrawal of any of its Parties. The ability to withdraw may prevent the norms set by the CPNW from ever becoming customary law.

**Comment** Under the VCLT a party to an agreement such as the CPNW could withdraw either according to the terms of the instrument or at any time by consent of all the parties after consultation with them.<sup>76</sup> While the ability of a party to withdraw from a treaty has the potential to weaken it, the knowledge that it can do so may be instrumental in overcoming its initial hesitancy in becoming a party. Some agreements therefore include an article that permits withdrawal but impose a threshold that it must meet to successfully withdraw. The NPT for instance says that a party may withdraw “if it decides that extraordinary events, related to the subject matter of that treaty, have jeopardized the supreme interests of its country”. The BTWC has a similar provision. The CWC stipulates that a party, after giving 90-days notice in a specified manner “shall, in exercising its national sovereignty, have the right to withdraw from this Convention if it decides that extraordinary events, related to the subject matter of this Convention, have jeopardized the supreme interests of its country”.<sup>77</sup> The CTBT has a similar provision.<sup>78</sup>

NPT parties will be conscious, however, that a national assessment of “extraordinary events” that have jeopardized supreme national interests may be expressed in vague and subjective terms and thus be susceptible to challenge by other parties as happened in the case of the withdrawal of the Democratic People’s Republic of Korea from the NPT in 2003. Finally, it would be open to States to consider the inclusion of a restriction that withdrawal may not take effect where a State Party is engaged in armed conflict, as is the case in the APMBBC and the CCM.<sup>79</sup>

In the case of a CPNW, any withdrawal article would need to make it patently clear not only that such a test must be to the satisfaction of the other parties but that any recourse to nuclear weapons by the intending party would be a matter for international sanctions against it.

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<sup>76</sup> Article 54.

<sup>77</sup> CWC, article 16.

<sup>78</sup> CTBT, article 9.

<sup>79</sup> APMBBC, article 20.3; CCM, article 20.3.

Withdrawal from the CPNW will only take effect three months after the receipt of the instrument of withdrawal by the Depositary. Withdrawing States are therefore not legally bound to the CPNW beyond the expiry of the three-month period. However, article 18.3 contains a significant proviso. It stipulates that in international armed conflict and occupation situations, the withdrawing party will continue to be bound by the obligations of the CPNW and of any annexed protocols, even on the expiry of the three-month period required to withdraw.

From a legal standpoint, this article raises questions regarding its application. The VCLT provides that the withdrawal of a party from a treaty, as a result of the application of the Vienna Convention or of the provisions of the treaty from which it is withdrawing, “shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty”.<sup>80</sup>

In other words, a State that has effectively withdrawn from a treaty remains subject to obligations arising from the other international treaties it is a party to, as well as to international customary law, or any other obligation arising from the international law sources cited in article 38 of the statute of the ICJ. This is consistent with the relative effect of treaties, a principle widely recognized in international law. The intention of article 18.3 appears to be to ensure that withdrawal from the CPNW cannot be regarded by the withdrawing state as licence during armed conflict to repudiate the object and purposes of the CPNW.

The BTWC, CWC, and the NPT contain no such a stipulation. On the other hand, both the APMBC (article 20), and the CCM (article 20) require that withdrawing States shall continue to be legally bound to the respective Conventions in situations of international armed conflict. This may suggest the formation of a new international customary law in relation to the use of weapons circumscribed by IHL during international armed conflict.

As for duration, treaties occasionally are given a circumscribed lifespan. The NPT’s duration was made conditional on a decision by the States Parties 25 years after entry into force to continue it in force or to extend it for an additional fixed period or periods.<sup>81</sup> One argument for limiting the duration of the CPNW might be if it was thought likely to be overtaken by events currently unforeseen. But the mechanisms to augment the CPNW contained in article 5 (e.g., for annexing additional protocols to the Convention) provide sufficient flexibility for what would seem to loom as the most major ramifications for the CPNW, i.e., relations with States possessing nuclear weapons as part of future multilateral nuclear disarmament moves.

**Subject Relationship to other international agreements or obligations under existing international law (article 19)**

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**Status** Article 19 of the draft treaty reads as follows:

*This Convention does not affect the rights and obligations of the States Parties under the Treaty on the Non-Proliferation of Nuclear Weapons.*

**Comment** This kind of article is necessary for these reasons:

- to ensure that the CPNW does not compromise or undermine relevant existing agreements such as the NPT (as specified in article 19); and

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<sup>80</sup> VCLT, article 43.

<sup>81</sup> NPT, article 8.3.

- to make it clear that the CPNW is compatible with relevant existing agreements such as the NPT.

This kind of article may be seen as:

- helping to complement and strengthen obligations in the NPT including those relating to non-proliferation;
- precluding any interpretation that the CPNW is setting up a parallel regime; and
- being consistent with article 30 of the VCLT<sup>82</sup> which provides that when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

A number of delegations<sup>83</sup> emphasized the need for the CPNW to be compatible with the NPT. A new nuclear disarmament treaty (whether negotiated, for example, like the CPNW under the auspices of the General Assembly or not), cannot supplant the rights and obligations of those States Parties to the NPT that choose not to adhere to the new treaty. For NPT parties that do not join the new regime, the rights and obligations in the NPT would continue to exist without any change whatsoever. For NPT parties that do join the new regime, its obligations to fulfil the prohibitions which it will establish would complement, not undermine, the NPT. Moreover, for all States Parties, it would be a partial but concrete realization of article 6 of the NPT and entirely consistent with its object and purpose.

The formulation suggested in the draft CPNW in fact refers only to the NPT. Article 19 does not refer by name to other relevant treaties and instruments such as the CTBT and NWFZ treaties as proposed by the International Association of Lawyers Against Nuclear Arms.<sup>84</sup> This may be because any reference to NWFZ treaties is unnecessary given that the NPT spells out that nothing in that treaty affects the rights of any group of States to conclude regional treaties in order to assure the total absence of nuclear weapons in the respective territories.<sup>85</sup> As for the CTBT, for so long as it awaits entry into force it creates no binding legal obligations.

Other possible precedents include the ATT and the BTWC. The ATT says that the implementation of that treaty “shall not prejudice obligations undertaken by parties with regard to existing or future international agreements, to which they are parties, where those obligations are consistent with this Treaty”.<sup>86</sup> The BTWC stipulates that nothing in it shall be interpreted as in any way limiting or detracting from the obligations assumed by any state under the Geneva Protocol of 17 June 1925.<sup>87</sup>

Both those precedents refer only to obligations rather than rights *and* obligations. This point is made because there is some concern that mention of “rights” (as in article 19 of the CPNW) may leave open an interpretation of the NPT as mounted by some NWS that that treaty is essentially about non-proliferation. To the extent that the NPT goes beyond the issue of proliferation, it implicitly recognizes (so the argument runs) the continued

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<sup>82</sup> Application of Successive Treaties Relating to the Same Subject-Matter.

<sup>83</sup> See, for example, the Netherlands and Sweden, statements to the United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, 28 March 2017.

<sup>84</sup> Working Paper submitted by the International Association of Lawyers Against Nuclear Arms, A/CONF.229/2017/NGO/WP.12, 28 March 2017.

<sup>85</sup> NPT, article 7.

<sup>86</sup> ATT, article 26.

<sup>87</sup> BTWC, article 8.

retention by those States of their nuclear arsenals subject only to the vague requirement in article 6 to pursue negotiations for nuclear disarmament. However, omitting “rights” from draft article 19 would compromise the rights, for example, to develop research, production and use of nuclear energy for peaceful purposes without discrimination.<sup>88</sup>

A broader approach to the issue of relations with other elements of international law was taken by the International Convention for the Suppression of Acts of Nuclear Terrorism. Article 4.1 of that treaty provides that “Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law”.

For this important and sensitive issue, safety may best be pursued by drawing on precedents that are general in nature such as that just mentioned or article 26 of the ATT.

### **Subject** Depositary of the CPNW (article 20)

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**Status** Article 20 of the draft treaty reads as follows:

*The Secretary-General of the United Nations is hereby designated as the Depositary of this Convention.*

**Comment** The VCLT provides that the negotiating States may designate as Depositary one or more States, an international organization or the chief administering officer of the organization.<sup>89</sup> It also lists the functions of the Depositary, which include informing parties of progress in signature, ratification, accession and entry into force.<sup>90</sup> To date, it seems that the CPNW’s negotiators are content that the United Nations Secretary-General should be designated as Depositary, as is the case with the ATT, CTBT, CWC, CCM, and APMBC. Practical reasons for such an outcome are budgetary and organizational in terms of enlisting support and resources for the role ODA can play in the implementation of the treaty (as noted earlier).

### **Possible additional provision to the CPNW: Status of the Annexes**

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For the sake of clarity, it might be advisable to add a provision commonly found in treaties, along these lines:

“The Annexes form an integral part of this Convention. Any reference to this Convention includes the Annexes”.

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<sup>88</sup> NPT, article 4.

<sup>89</sup> VCLT, article 76.

<sup>90</sup> VCLT, article 77.





# Provision for the nuclear-armed States' accession to the Convention on the Prohibition of Nuclear Weapons

*Gaukhar Mukhatzhanova*

This paper discusses two possible approaches under which nuclear-armed states could become party to the Convention on the Prohibition of Nuclear Weapons (CPNW):

- 1) destruction of a State's nuclear arsenal followed by accession to the CPNW ("destruction before accession"), and
- 2) destruction of a nuclear arsenal by a State Party to the Convention following, or as part of, its accession to the CPNW ("accession before destruction").

The current draft CPNW seeks to include both pathways. "Accession before destruction" is more fraught with uncertainty. The "destruction before accession" approach provides for more straightforward drafting, with smaller potential for loopholes and future negotiation challenges.

## Introduction

An international legally binding instrument prohibiting nuclear weapons ideally would also provide for their elimination. In this regard, a long-standing vision and goal of many States and civil society organizations has been a comprehensive nuclear weapons convention. Much like the Chemical Weapons Convention (CWC), a nuclear weapons convention was envisioned to not only prohibit the possession of nuclear weapons but also contain provisions for the dismantlement of arsenals, including timelines and a verification regime.<sup>1</sup> However, negotiation of a detailed disarmament document requires the participation of nuclear-armed states, most of which are either opposed to the idea in general or consider such negotiations premature, preferring instead the so-called step-by-step approach to nuclear disarmament. Furthermore, many technical solutions for nuclear disarmament verification, particularly the verification of nuclear warhead dismantlement, are currently not available, although in recent years several States have been working on this issue individually or in collaboration.<sup>2</sup> Since 2010, in light of the growing focus on the humanitarian impact of nuclear weapons and continued lack of political will among the nuclear-weapon States (NWS) to engage in disarmament negotiations, the debate has shifted from a comprehensive instrument to a normative prohibition treaty that can be negotiated without the participation of nuclear-weapons possessors.

While the negotiations on a legally binding instrument to prohibit nuclear weapons, pursuant to United Nations General Assembly resolution 71/258, are taking place without the NWS and against their active opposition, the question of how the new treaty should deal with the potential future accession of the nuclear-armed states is far from theoretical. While the likelihood of any of the current nuclear-weapons possessors joining the prohibition treaty in the foreseeable future is small, it is important to make sure that the text of the new instrument does not foreclose that possibility altogether.

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<sup>1</sup> For the text of the Model Nuclear Weapons Convention, drafted by civil society organizations and submitted to the Secretary-General by Costa Rica and Malaysia, see [www.inesap.org/publications/nuclear-weapons-convention](http://www.inesap.org/publications/nuclear-weapons-convention).

<sup>2</sup> Examples of disarmament verification initiatives include the United Kingdom–Norway Initiative, <http://ukni.info/>; United States–United Kingdom Technical Cooperation for Arms Control, [https://nnsa.energy.gov/sites/default/files/Joint\\_USUK\\_Report\\_FINAL.PDF](https://nnsa.energy.gov/sites/default/files/Joint_USUK_Report_FINAL.PDF); and International Partnership for Nuclear Disarmament Verification, [www.nti.org/about/projects/international-partnership-nuclear-disarmament-verification/](http://www.nti.org/about/projects/international-partnership-nuclear-disarmament-verification/).

Moreover, the negotiating parties are bound to indicate some kind of a path toward the complete elimination of nuclear weapons by their mandate.<sup>3</sup> As noted in *A Prohibition on Nuclear Weapons: A Guide to the Issues*: “the issue of dealing with existing stockpiles arises if and when states with nuclear weapons wish to join [the prohibition treaty].”<sup>4</sup> Provisions for the accession of nuclear-armed States should therefore be formulated so as to make sure there are no loopholes allowing such States to accede but still retain their arsenals for a prolonged period of time. At the same time, these provisions should not be so prescriptive on issues such as stockpile elimination timelines and verification as to become completely unacceptable to the nuclear-weapons possessors, especially in light of their lack of input during the negotiation process. Careful drafting in this regard could be crucial for the long-term prospect of the treaty’s universality, though excellently crafted provisions in and of themselves will certainly not guarantee the eventual accession of the nuclear-armed States.

The key questions, the answers to which shape the nuclear-armed States’ accession provisions, are:

- should a State acceding to the CPNW demonstrate immediately its compliance with the core prohibitions, particularly on possession and stockpiling of nuclear weapons? or
- can a State be allowed to join while still in possession of nuclear weapons and carry out the destruction of its arsenal while being considered a compliant party to the prohibition treaty?

*A Prohibition on Nuclear Weapons: A Guide to the Issues* describes the resulting two broad approaches as “destruction before accession” and “accession before destruction”.<sup>5</sup>

The current draft of the CPNW, circulated by the President of the negotiations on 22 May 2017, attempts to accommodate both pathways by which the nuclear-armed States could accede to the Convention.<sup>6</sup> However, the destruction-before-accession approach provides for much more straightforward drafting, with smaller potential for loopholes and future negotiation challenges. In designing the verification provisions for the destruction-before-accession option, the negotiators can readily draw on past experience and existing authorities and tools at the disposal of the International Atomic Energy Agency (IAEA). There is significantly more uncertainty associated with the accession-before-destruction option, as the negotiation of any specifics regarding elimination and verification would have to be postponed until a nuclear-armed State accedes (or expresses a desire to accede) to the CPNW. The negotiators would also need to reconcile the contradiction between the prohibition on possession and allowing the accession of a State still possessing nuclear weapons.

## **Declarations (article 2 of the draft CPNW)**

Before considering the specifics and relative benefits of the two approaches to accession, it is necessary to address the issue of state declarations on their nuclear weapon status and history. These declarations allow the CPNW to forego using the definition of an NWS in the Nuclear Non-Proliferation Treaty (NPT), as such usage would necessitate a special reference to the nuclear-weapons possessors outside the treaty and potentially make it difficult for those states to join. A state declaration of current or past possession of nuclear weapons would then trigger the

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<sup>3</sup> General Assembly, “Taking forward Multilateral Nuclear Disarmament Negotiations”, UN document A/RES/71/278, 23 December 2016, [www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/71/258](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/258).

<sup>4</sup> “A Prohibition on Nuclear Weapons: A Guide to the Issues”, ILPI/UNIDIR, February 2016, [www.unidir.org/files/publications/pdfs/a-prohibition-on-nuclear-weapons-a-guide-to-the-issues-en-647.pdf](http://www.unidir.org/files/publications/pdfs/a-prohibition-on-nuclear-weapons-a-guide-to-the-issues-en-647.pdf).

<sup>5</sup> *Ibid.*, p. 39.

<sup>6</sup> Draft Convention on the Prohibition of Nuclear Weapons, document A/CONF.229/2017/CRP.1, 22 May 2017, <https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/05/A-CONF.229-CRP.1.pdf>.

application of provisions on their elimination or the verification of previously completed elimination.

Article 2 of the draft CPNW requires each State Party to declare “whether it has manufactured, possessed or otherwise acquired nuclear weapons or other nuclear explosive devices after 5 December 2001.” Two questions arise with regard to this provision: one concerning the choice of the date, and the other concerning the content of the declarations. As the President of the negotiations explained in her remarks introducing the draft CPNW, a cut-off date was introduced “to avoid subjecting any State to a duplicative verification exercise”—that is, to relieve South Africa, Belarus, Kazakhstan, and Ukraine, whose denuclearization had been previously verified, of the declaration requirement.<sup>7</sup> The specific date, 5 December 2001, was reportedly chosen as it was the day of implementation of the Lisbon Protocol, pursuant to which Belarus, Kazakhstan, and Ukraine joined the Strategic Arms Reduction Treaty (START I) and committed to return to the Russian Federation the nuclear weapons they inherited after the break-up of the Soviet Union.<sup>8</sup> While 5 December 2001 was the deadline for the implementation of START I limits, including both the United States–Russian reductions and removal of weapons from the other three republics, the Lisbon Protocol was in fact implemented by the end of 1996.<sup>9</sup>

States may, however, choose to use an alternative date tied to the negotiation of the CPNW or to forego a declaration cut-off date altogether. In the former case, article 2 could require each party to declare if it possessed any nuclear weapons as of 27 March 2017 (when the present negotiations began), or manufactured or otherwise acquired them thereafter.<sup>10</sup> The no-date option would mean that South Africa, Belarus, Kazakhstan, and Ukraine would have to declare past possession and provide effective assurances of denuclearization. Verification procedures for cases of stockpile destruction prior to joining the CPNW will be defined in what is currently article 4 of the draft Convention. However, it would make sense for States to agree to accept past assurances regarding the denuclearized status of these four countries. In addition, South Africa, Kazakhstan, and Ukraine have Additional Protocols in force, and for all of these States the IAEA has drawn a “broader conclusion” that all declared nuclear material remained in peaceful uses and there were no undeclared nuclear material and activities—a conclusion that the IAEA has to reaffirm every year.<sup>11</sup> Overall, though, tying the date of possession to the negotiation of the CPNW appears more straightforward.

On the subject of the content of state declarations, the question is what information should be included therein. The current draft CPNW requires only the declaration of the *fact* of possession (manufacture, acquisition) and, where applicable, the dismantlement of nuclear weapons. Given the importance attached to transparency in nuclear disarmament forums, it seems logical for the CPNW to require the provision of further information on the actual stockpiles, past or present. On the other hand, detailed declarations may not be necessary if the CPNW allows only for a destruction-before-accession option for nuclear-weapons possessors and if those possessing States

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<sup>7</sup> Remarks by the President during the presentation of draft Convention on the Prohibition of Nuclear Weapons, Geneva, 22 May 2017, [https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/05/Letter-from-the-Chair\\_May-24-2017.pdf](https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/05/Letter-from-the-Chair_May-24-2017.pdf).

<sup>8</sup> For the text of the Lisbon Protocol and accompanying letters from the Presidents of Belarus, Kazakhstan and Ukraine, see <https://fas.org/nuke/control/start1/text/lisbon.htm>.

<sup>9</sup> “The Lisbon Protocol at a Glance”, Arms Control Association, March 2014, [www.armscontrol.org/node/3289](http://www.armscontrol.org/node/3289).

<sup>10</sup> Alternatively, the negotiating States could use the date that the negotiations on the CPNW conclude or, similarly to the NPT, use 1 January 2017.

<sup>11</sup> Safeguards Statement for 2015, IAEA, [www.iaea.org/sites/default/files/16/08/statement\\_sir\\_2015.pdf](http://www.iaea.org/sites/default/files/16/08/statement_sir_2015.pdf). For explanation of the broader conclusion, see “Drawing Safeguards Conclusions”, IAEA, [www.iaea.org/topics/drawing-safeguards-conclusions](http://www.iaea.org/topics/drawing-safeguards-conclusions).

are obligated to provide the IAEA with full access and information needed to verify denuclearization (see discussion on article 4 below).

Various proposals on reporting by the NWS made in the context of the NPT review process could serve as a guide for formulating the declaration requirements. Some of the categories to consider include current and historical data on the size of nuclear weapon stockpiles and stocks of fissile material produced for weapons purposes. Some definitional issues could arise in formulating the reporting requirements, such as whether “nuclear weapon stockpile” should be confined to warheads or should include delivery vehicles as well (in which case States should also keep in mind that the IAEA would not be in a position to verify the destruction of delivery vehicles). Further complicating reporting is the fact that different nuclear-armed States might be uncertain about their exact inventories of military fissile material.<sup>12</sup> Given time constraints—if the CPNW is to be concluded by 7 July 2017—the negotiators may wish to agree that specific content requirements for the declarations will be developed and adopted by a Meeting of States Parties or a Review Conference or another decision-making body created by the CPNW.

The rest of this paper will discuss the two accession approaches in greater detail and comment, as appropriate, on the relevant provisions in the draft CPNW.

#### **“Destruction before accession” or “South Africa Plus” (article 4 of the draft CPNW)**

Under this approach, nuclear-weapons possessors would be expected to complete the elimination of their arsenals prior to acceding to the CPNW and, once party to it, to allow for the verification of their denuclearized status. The comparatively simple destruction-before-accession approach allows for a fairly simple accession formula and avoids the need to negotiate the details of nuclear weapons elimination, including the timelines and complex verification provisions. This approach is conducive to nuclear-weapons possessors joining the CPNW individually, upon unilaterally dismantling their respective nuclear arsenals. It also would not preclude the nuclear-armed States from negotiating (with or without the non-nuclear-weapon States) a separate, verifiable treaty on the elimination of nuclear weapons and then joining the CPNW once that treaty is implemented.

Article 4 of the draft CPNW currently represents the destruction-before-accession option. The approach, as indicated by the President of the negotiations in her remarks on 22 May 2017,<sup>13</sup> is inspired by the example of South Africa (to date the only state that had produced nuclear weapons indigenously and then dismantled them prior to joining the NPT). Upon declaring in March 1993 the past production and subsequent dismantlement of nuclear weapons, South Africa cooperated with the IAEA so that the Agency could verify that all nuclear material from the weapons programme had been returned to peaceful uses and that related infrastructure had been dismantled or converted to peaceful uses.<sup>14</sup> By September 1993, the IAEA had completed the verification of the completeness of South Africa’s nuclear inventory and the dismantlement of the nuclear weapons programme.

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<sup>12</sup> See, for example, P. Podvig, “Consolidation of Fissile Material in the Russian Nuclear Complex”, Proceedings of the 49th Annual Meeting of the Institute of Nuclear Materials Management, 13–17 July 2008, [http://russianforces.org/podvig/2008/07/consolidation\\_of\\_fissile\\_mater\\_1.shtml](http://russianforces.org/podvig/2008/07/consolidation_of_fissile_mater_1.shtml).

<sup>13</sup> Remarks by the President during the presentation of draft Convention on the Prohibition of Nuclear Weapons, Geneva, 22 May 2017, [https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/05/Letter-from-the-Chair\\_May-24-2017.pdf](https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/05/Letter-from-the-Chair_May-24-2017.pdf).

<sup>14</sup> For the full list of objectives of the IAEA’s verification activities in South Africa, see “The Denuclearization of Africa”, Report by the Director General, document GC(XXXVII)/1075, attachment 1, IAEA, 9 September 1993, [www.iaea.org/About/Policy/GC/GC37/GC37Documents/English/gc37-1075\\_en.pdf](http://www.iaea.org/About/Policy/GC/GC37/GC37Documents/English/gc37-1075_en.pdf).

Under article 4 of the draft CPNW, a State Party that had dismantled its nuclear weapons prior to accession undertakes to conclude an agreement with the IAEA “for the purpose of verification of the completeness of its inventory of nuclear material and nuclear installations”. Paragraph 3 of the same article further specifies:

*For the purpose of performing the verification required by this article, the [IAEA] shall be provided with the full access to any location or facility associated with a nuclear weapon programme and shall have the right to request access on a case-by-case basis to other locations and facilities that the Agency may wish to visit.*

While the drafters have drawn on South Africa’s experience, the language in the current draft is too restrictive for the stated purposes of verification of completeness of a denuclearized State’s nuclear inventory. The language in paragraph 3 comes from paragraph 32 of the IAEA Director General’s report “The Denuclearization of Africa”.<sup>15</sup> However, in the report this sentence refers to the IAEA’s plans to take up South Africa’s offer to provide full access to nuclear-weapons-programme-related facilities and, on a case-by-case basis, to other facilities *in the future*. That is, this language applied *after* the IAEA had completed the verification of correctness and completeness of the nuclear inventory, and concluded that all sensitive components of the nuclear weapons programme had been “rendered useless” or converted to peaceful or non-nuclear applications.<sup>16</sup> Such access then was supposed to be in addition to South Africa’s obligations under its safeguards agreement.

As John Carlson has pointed out, article 4 as currently drafted seems to suggest that regular safeguards required under article 3 (INFCIRC/153 (corrected), according to the annex) would apply to the State in question only after article 4 is implemented.<sup>17</sup> By specifying locations and facilities “associated with a nuclear weapon programme”, article 4 appears to exempt other facilities from inspections. However, the IAEA would not be able to draw conclusions required by article 4 without “undertaking verification at locations and facilities not declared to be associated with the nuclear weapon program”.<sup>18</sup> Therefore, the article should simply state that the IAEA should be provided with all the information and access it needs to verify the correctness and completeness of the State’s inventory of nuclear material and installations. It is worth noting that the IAEA undertook the verification of South Africa’s denuclearization in 1993, before the major strengthening of the Agency’s safeguards system. To be truly a “South Africa Plus”, the approach under article 4 should allow for the full use of the tools developed in the meantime, including those under the Additional Protocol.<sup>19</sup>

Another issue of concern is safeguards obligations of former nuclear-armed States after the IAEA completes the verification of their denuclearization. Though not clearly defined, the current draft CPNW suggests that after that initial verification is complete, a State Party is subject only to the article 3 and annex requirement to accept comprehensive safeguards pursuant to INFCIRC/153 (corrected). According to the IAEA’s annual safeguards statements, for States with INFCIRC/153 in force *alone*, the Agency is able to conclude only that *declared* nuclear material remained in peaceful activities. For these States, the IAEA does not draw conclusions about the absence of *undeclared* materials and facilities as it does for States with *both* the comprehensive safeguards and Additional Protocol in force.<sup>20</sup> It would be surprising for parties to the CPNW to agree that former nuclear possessors, given their capabilities and expertise, should be subject to a lower verification standard.

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<sup>15</sup> *Ibid.*, p. 11.

<sup>16</sup> *Ibid.*

<sup>17</sup> J. Carlson, “Nuclear Weapon Ban Convention—Overview of First Draft”, APLN Nuclear Threats Monitor, 26 May 2017, [www.a-pln.org/blog/blog\\_view/Nuclear\\_weapon\\_ban\\_convention\\_%E2%80%9393\\_overview\\_of\\_first\\_draft](http://www.a-pln.org/blog/blog_view/Nuclear_weapon_ban_convention_%E2%80%9393_overview_of_first_draft).

<sup>18</sup> *Ibid.*

<sup>19</sup> IAEA, document INFCIRC/540 (Corrected), [www.iaea.org/sites/default/files/infirc540c.pdf](http://www.iaea.org/sites/default/files/infirc540c.pdf).

<sup>20</sup> Safeguards Statement for 2015, IAEA, [www.iaea.org/sites/default/files/16/08/statement\\_sir\\_2015.pdf](http://www.iaea.org/sites/default/files/16/08/statement_sir_2015.pdf).

At the same time, it is hard to expect (former) nuclear-armed States to join a treaty where they would be subject in perpetuity to higher verification requirements than all the other parties. To have *all* States Parties accept the highest verification standard available to the IAEA appears to be an equitable solution in this regard.

### **“Accession before destruction” (article 5 of the draft CPNW)**

As the title suggests, the “accession before destruction” option would allow nuclear-armed States to join the Convention first and subsequently eliminate their stockpiles. Both the BTWC and the CWC follow this approach. The BWC has no verification provisions, while the CWC contains an extensive verification annex and, in this regard, is the preferred model for future nuclear disarmament.

This approach would work best if, similarly to the CWC, the CPNW were to include an obligation to eliminate existing nuclear arsenals along with clear provisions on dismantlement timelines and verification. However, as discussed earlier, without the participation of nuclear-armed States, the negotiation of such provisions will be unavailing. Nevertheless, during the first week of negotiations, many States suggested that the “accession before destruction” option be somehow included in the CPNW. A compromise approach then is to allow the States Parties an option of negotiating the necessary disarmament details as part of an additional protocol at a later date, when a nuclear-armed State joins (or expresses an intent to join). While at first glance the option is attractive for its flexibility, it raises a number of questions, such as how the future protocol would be negotiated and by whom, what would trigger these negotiations, and whether they should be completed within a specified timeframe.

Article 5 of the draft CPNW was designed to accommodate the accession-before-destruction option with maximum flexibility, but a number of issues need clarification. The title of the article, “Measures for Situations Not Covered by Article 4”, seems to suggest that it would apply when a State declares current possession of nuclear weapons and, presumably, it would stipulate what action States Parties should or could take in response to such declaration. The current formulation of the article, however, is much broader than that:

*Proposals for further effective measures relating to nuclear disarmament, including provisions for the verified and irreversible elimination of any remaining nuclear weapon programmes under strict and effective international control, which may take the form of additional protocols to this Convention, may be considered at the Meetings of States Parties or Review Conferences.*

It follows from the text that the Meetings of States Parties (MSP) or Review Conferences might consider a wide array of issues, including, for example, negotiation of a fissile material treaty or agreements on partial nuclear weapons reductions. It is also not clear what would trigger such consideration. To be more specific, article 5 could state that in cases where a State Party declares possession or acquisition of nuclear weapons and article 4 does not apply, the MSP or Review Conference shall take up the issue of verifiable elimination of that State’s nuclear arsenal.

If the negotiators take this route, they will also need to resolve the contradiction between the “accession before destruction” approach and the ban on possession. Given the prohibition on possession under article 1 of the draft CPNW, a State that accedes while it still has nuclear weapons would immediately be in violation. The CPNW negotiators could draw on the CWC example and substitute the prohibition on possession with the prohibition on retention of nuclear weapons, and include an obligation to eliminate existing arsenals, which the current draft does not have. Otherwise, States will have to include a special provision or otherwise reach an understanding that

a party possessing nuclear weapons would not be considered in violation so long as it is negotiating in good faith and subsequently implementing the stockpile dismantlement protocol. The latter approach seems legally suspect, however, and risks creating a situation in which a State Party possessing nuclear weapons remains “in compliance” for an extended period while engaging in protracted negotiations on dismantlement.

A variant of this option could be to make the accession of nuclear-armed States conditional upon the negotiation of the protocol on the elimination of nuclear weapons. To initiate such negotiations, an interested nuclear-armed State (or several) would need to approach, for example, the United Nations Secretary-General or the CPNW secretariat or Executive Council, if the Convention establishes them, which would then inform the States Parties. The MSP or the Review Conference could then take up the issue.

For any of the options described in this section, the CPNW should provide more guidance on how the negotiations of the dismantlement and verification protocol(s) are to be undertaken. Article 5 currently stipulates that, “The meeting or review conference may agree upon additional protocols which shall be adopted and annexed to the Convention in accordance with its provisions.” It does not appear feasible for MSPs in their entirety to engage in negotiations of such protocols, so article 5 could state that an MSP or Review Conference may establish a subsidiary body to undertake the negotiations of dismantlement protocols. Alternatively, if the CPNW were to provide for the creation of an Executive Council, this body could be charged with engaging in such negotiations. Another issue to consider is prescribing a timeframe within which the protocols should be concluded. While it is hard to say at this stage how long the negotiations should take, the concept of a timeframe could still be built into the CPNW.

States should also keep in mind that the prospective dismantlement protocol would not be a short addition to the CPNW but, more likely, a complex instrument tantamount to an entire treaty. It would need to include, *inter alia*, definitions of various elements of nuclear weapon stockpiles and programmes, and provisions on scope—for example, whether delivery vehicles and weapons-usable fissile material stocks are to be eliminated along with warheads. Verification of the process of nuclear weapon dismantlement would require the establishment of a dedicated implementing organization, provisions for which would also need to be in the additional protocol.

It is conceivable that nuclear-armed States would negotiate a separate treaty on the elimination of nuclear weapons, with extensive verification provisions. The CPNW could stipulate that verification of stockpiles dismantlement pursuant to article 5/additional protocol should not be unnecessarily duplicative of verification under other bilateral or multilateral agreements on the elimination of nuclear weapons. The CWC has this kind of provision in article 4.13.<sup>21</sup> An unlikely, but potentially very problematic scenario is one in which a nuclear-armed State accedes to the CPNW and negotiates a dismantlement protocol with other States Parties. Can States Parties usefully agree on definitions and verification with only one State? Would they have the requisite expertise to engage in such negotiations effectively? Then, when other nuclear-armed States, with significantly different nuclear weapons programmes, wish to join the CPNW, would they be expected to accept and implement the same protocol, or would States Parties have to negotiate different provisions for them? At this time, it is impossible to answer definitively the questions raised above. However, these and other issues add further layers of uncertainty to the “accession before destruction” option.

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<sup>21</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, article 4.13, [www.opcw.org/chemical-weapons-convention/articles/article-iv-chemical-weapons/](http://www.opcw.org/chemical-weapons-convention/articles/article-iv-chemical-weapons/).

## **Conclusion**

The absence of nuclear-armed States from the negotiations of the CPNW significantly complicates the drafting of provisions on their eventual accession to this instrument. The central question is whether nuclear-armed States should be required to destroy their respective nuclear weapons stockpiles before joining the CPNW or upon accession. In principle, States can include either the “destruction before accession” or “accession before destruction” option in the CPNW, or even both.

However, the former allows for more straightforward provisions and can rely on the verification authorities and tools already available to the IAEA. The “accession before destruction” option is fraught with uncertainty, as the negotiation of stockpile destruction provisions has to be postponed until one or more nuclear-armed States accede to the Convention.

At this stage, the negotiators need to consider how to reconcile possible contradictions between this approach and the prohibition on nuclear weapons possession, and how to provide guidance for the future consideration of stockpile dismantlement provisions without creating loopholes and leaving too many questions unanswered. In light of time pressures in particular, States would ultimately need to decide if they want to concentrate on creating a clear pathway for the draft instrument under consideration to morph into a comprehensive nuclear weapons convention in the future, or if they want a simpler accession formula and thus focus on other provisions to craft a strong prohibition treaty.



## **ABBREVIATIONS**

<b>APMBC</b>	Anti-Personnel Mine Ban Convention
<b>ATT</b>	Arms Trade Treaty
<b>BTWC</b>	Biological and Toxin Weapons Convention
<b>CARICOM</b>	Caribbean Community
<b>CCM</b>	Convention on Cluster Munitions
<b>CPNW</b>	draft Convention on the Prohibition of Nuclear Weapons
<b>CRPD</b>	Convention on the Rights of Persons with Disabilities
<b>CTBT</b>	Comprehensive Nuclear-Test-Ban Treaty
<b>CTBTO</b>	Comprehensive Nuclear-Test-Ban Treaty Organization
<b>CWC</b>	Chemical Weapons Convention
<b>IAEA</b>	International Atomic Energy Agency
<b>ICJ</b>	International Court of Justice
<b>ICRC</b>	International Committee of the Red Cross
<b>IHL</b>	international humanitarian law
<b>ILPI</b>	International Law and Policy Institute
<b>MSP</b>	Meeting of States Parties
<b>NNWS</b>	non-nuclear-weapon State
<b>NPT</b>	Nuclear Non-Proliferation Treaty
<b>NTC</b>	Nuclear Terrorism Convention
<b>NWFZ</b>	Nuclear-Weapon-Free Zone
<b>NWS</b>	nuclear-weapon State
<b>ODA</b>	United Nations Office for Disarmament Affairs
<b>OPCW</b>	Organisation for the Prohibition of Chemical Weapons
<b>VCLT</b>	Vienna Convention on the Law of Treaties
<b>WILPF</b>	Women's International League for Peace and Freedom



**UNIDIR**

## **Negotiation of a Nuclear Weapons Prohibition Treaty: Nuts and Bolts of the Ban**

In December 2016, the General Assembly adopted resolution A/RES/71/258 on “taking forward multilateral nuclear disarmament negotiations”. The resolution, which passed with a large majority, decided to convene a United Nations conference in 2017 to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination. Negotiations took place from 27 to 31 March and will continue from 15 June to 7 July in New York.

The two papers in this publication were prepared in advance of the June–July 2017 session. Building upon the 2016 ILPI/UNIDIR *Guide to the Issues*, the papers aim to constitute a practical resource for practitioners involved in the negotiations. They identify a number of the specific issues that will have to be addressed in any agreement to prohibit nuclear weapons. The independent analysis provided by this project is intended to sensitize States to potential “solution pathways” in those areas.