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Article 1 – Preparation and Threat

We strongly support the inclusion of a prohibition on engagement in military preparations for use of nuclear weapons, for reasons well explained by the International Committee of the Red Cross this morning. Given that the prohibition is in the Chemical Weapons Convention, the pertinent question here is: why not include the prohibition in the nuclear ban treaty? And there is no reason not to include it.

Regarding a prohibition of the threatened use of nuclear weapons, there seems a trend in favor of including it. Nonetheless, in view of its importance, let me make a few comments.

Some states have maintained that the threat of use of nuclear weapons is barred by the UN Charter and there is accordingly no reason to specify the prohibition.

It is true that threat of use of nuclear weapons is contrary to the scheme and spirit of the UN Charter, and in particular to the Article 2(4) prohibition of a threat of force contrary to the purposes of the United Nations.

But from an orthodox point of view, threat of use is not expressly covered by the Charter except when such a threat is aggressive, that is when it is directed against the territorial integrity or political independence of a state in violation of Article 2(4).

The main question however is whether the threat of use of nuclear weapons in self-defense is permissible. That is what was argued before the International Court of Justice for the most part. The UN Charter says nothing explicitly on this point. The ICJ filled in the gaps, saying that a threat or use of force in self-defense must meet the general requirements of necessity and proportionality, and furthermore that a threat of force is illegal when the use of force is contrary to international humanitarian law.

Thus including a prohibition of threatened use of nuclear weapons would provide desirable clarity regarding existing law.

So what are the underlying objections to inclusion of a prohibition of threat of nuclear weapons?

One is that the term is used politically or ideologically. That may be so in some circumstances, as is true even more so of other terms like aggression or genocide. Nonetheless threat is still a legal term, like the others I mentioned.

Another objection is that its scope of reference is not altogether clear. Does it include general doctrines of nuclear deterrence? IALANA says yes, but other commentators say no and the International Court of Justice was not entirely clear on the matter. Well there are other terms in the nuclear ban treaty whose scope of reference can be disputed; that does not mean they are not put in. If this is truly an obstacle, then drafting can solve the problem. For example, there could be a prohibition of threat of use of nuclear weapons, including security doctrines providing for use of nuclear weapons.

Another concern seems to be that inclusion of a prohibition of threat of nuclear weapons would make it harder for allies of nuclear-armed states to join the treaty, even if they were prepared otherwise to renounce any participation in preparation for use of nuclear weapons. That is a matter of political judgment. From our point of view, this is a treaty for the whole world – including the world's most powerful states and their publics. And it's important to have a powerful codification of norms to delegitimize nuclear deterrence and advance the abolition of nuclear weapons.