



# BANNING NUCLEAR WEAPONS

## PROHIBITIONS FOR A NUCLEAR WEAPON BAN TREATY

WOMEN'S INTERNATIONAL LEAGUE FOR  
**PEACE & FREEDOM**





# Introduction

Renewed investigation of the humanitarian impacts of nuclear weapons has provided stark and irrefutable evidence that nuclear weapons cause death and displacement on a catastrophic scale, with profound and potentially irreversible damage to health and the environment, to socioeconomic development, and to the social order. It has been made clear that no state or international body could adequately address the immediate humanitarian emergency or long-term consequences caused by nuclear weapon detonations.

There is also a consensus amongst non-nuclear-armed or -supportive states that in light of nuclear weapons' indiscriminate nature, inherent immorality, and potential to annihilate humanity and the planet as a whole, they have no role in providing security to populations anywhere. Policies and practices of nuclear "deterrence,"

and any activities that sustain those policies and practices, are illegitimate and contrary to our collective security and survival.

These understandings have led the vast majority of governments to support the negotiation of a legally binding treaty to prohibit nuclear weapons, leading to their elimination. An international instrument that outlaws nuclear weapons based on their unacceptable consequences would put nuclear weapons on the same footing as the other weapons of mass destruction, which are subject to prohibition through specific treaties. Such a treaty has the transformative potential to codify the illegality of nuclear weapons, stigmatise and prevent their possession as well as nuclear "deterrence" practices, and help facilitate nuclear disarmament. This paper outlines the core prohibitions necessary for such a treaty to be effective in meeting these objectives.



Mural by Tatsuya Tomizawa, made with thousands of hand-folded paper cranes. Melbourne, 2015. © Tim Wright/ICAN

# Prohibitions

## Possession and stockpiling

The most fundamental element of the prohibition treaty is that no state can join the treaty and possess nuclear weapons. Thus the treaty must prohibit the possession and stockpiling of nuclear weapons in order to prevent any state from joining the treaty and retaining any number of nuclear weapons. This also requires an obligation for stockpile destruction. The treaty should provide for an instance in which states eliminate their nuclear arsenals and join the treaty, with the correctness and completeness of the elimination being verified. It should also provide for state possessing nuclear weapons to negotiate a protocol or other agreement with the ban treaty states parties for elimination of their nuclear weapon programmes, with agreed timeframes and in accordance with agreed verification arrangements and in observance of environmental norms.<sup>1</sup> While implementing these protocols, the states engaged in stockpile destruction would be subject to the general obligations of the treaty, with an understanding that certain prohibitions (e.g. stockpiling) would only be fulfilled with the verified completion of their destruction programmes.

## Deployment

A deployed nuclear weapon is one that is on a missile, bomber, or submarine, or stationed abroad as part a “forward-deployment” operation. The NPT does not prohibit the deployment of nuclear weapons. Its nuclear-armed states parties maintain active stockpiles of nuclear weapons at varying levels of alert. The US maintains active stockpiles of nuclear weapons on the territories of five other states. Nuclear-armed states have also transited nuclear weapons through NPT states parties’ territories or waters. The deployment of nuclear weapons should be prohibited because it implies capability and willingness of use. This would include the obligation of states parties to prevent deployment of nuclear weapons on or through their territories or jurisdictions of control.

## Use and threat of use

The International Court of Justice (ICJ) advisory opinion concluded that the use or threat of use of nuclear weapons is generally contrary to international law, but was unable to decide whether this would be the case in extreme circumstances in which the survival of a state is at

1. The Chemical Weapons Convention specifies that states parties must “undertake to destroy chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control,” within a specified timeframe and subject to verification.

stake. Prohibiting the use of nuclear weapons would reaffirm the international customary understanding that no use of nuclear weapons is consistent with international law. The treaty should thus prohibit states parties from engaging in, encouraging, or authorizing, directly or indirectly, or in any way participating in the use of any nuclear weapon.

The International Court of Justice (ICJ) determined that “if an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law.” However, banning threat of use could be useful to help clarify and reinforce the law and to prevent specific threats of use of nuclear weapons from being made on states parties’ behalf.<sup>2</sup> Prohibiting threat of use could arguably also contribute to stigmatising the practice of nuclear “deterrence”. There are differing opinions on whether deterrence doctrines constitute a permanent threat of use, thought it should be noted that in their submissions to the ICJ, some states, “which

assert the legality of the threat and use of nuclear weapons in certain circumstances, invoked the doctrine and practice of deterrence in support of their argument.”<sup>3</sup> Regardless, in the context of the ban treaty, states parties “could undertake never to threaten use of nuclear weapons, including through security doctrines providing for use of nuclear weapons.”<sup>4</sup>

Alternatively, treaty negotiators may determine that a prohibition on the threat of use is included in a prohibition on use and/or in a prohibition on assistance, encouragement, or inducement with prohibited acts. If this is the case, those states need to make this clear in the negotiating record. The prohibition against threat use, threat of use, and possession of nuclear weapons could also be reinforced in the preamble with language drawing from the UN General Assembly resolution on “Ethical imperatives for a nuclear-weapon-free world” stating that nuclear weapons serve no legitimate purpose given their indiscriminate nature, inherent immorality, and potential to annihilate humanity.

2. Some have argued that the UN Charter’s call on states to “refrain from the threat or use of force against the territorial integrity or political independence of any state” is sufficient. However, the threat or use of nuclear weapons goes well beyond territorial integrity or political independence. Furthermore, a treaty-based prohibition in this regard could help to counter the apparent normalisation of threats and force in international relations. Also see Rebecca Johnson, “NPT and UN Nuclear Ban: Friends Not Rivals,” Acronym Institute for Disarmament Diplomacy, May 2017.

3. See <http://lcnp.org/wcourt/opinion.htm>.

4. See IALANA’s working paper on the prohibitions and preamble of the draft treaty.



## Planning and preparations to use

In order to most effectively challenge nuclear “deterrence” concepts, doctrines, and policies, the ban treaty should prohibit the actions that facilitate those practices—foremost of which is the planning and preparation to use nuclear weapons. As with threat of use, such a prohibition could arguably be included within a broader prohibition on providing assistance with prohibited acts, but it would be useful for clarity to explicitly prohibit both planning and preparations to use nuclear weapons.

Existing nuclear alliances vary in terms of the level of cooperation and coordination in planning and preparation activities.<sup>5</sup> Any activities related to planning or preparing to the use of nuclear weapons—such as planning operations (strike plans, training, exercises), policy (declaratory policy, strategy), and infrastructure (installations, functions—would not be compatible with states parties’ obligations under the ban treaty. The US government has explicitly acknowledged the impacts of a nuclear ban treaty on “extended nuclear deterrence” and “joint defence operations”. In a memo distributed to North Atlantic Treaty Organisation (NATO) allies in October 2016, the US government noted that

many potential elements of a future treaty, in particular those related to nuclear war planning; targeting; use or threat of use; training personnel for use; assisting, encouraging or inducing prohibited actions; and other elements of a possible draft treaty, would “make it impossible” for the US or other nuclear-armed states to “defend” their allies with nuclear weapons. The memo notes that such prohibitions would “destroy the basis for US nuclear extended deterrence”.<sup>6</sup>

While joining the ban treaty would not require any state to exit any particular military alliance, a prohibition on the planning and preparation for use *would* require them to ensure that their participation in any formal alliance or other political relationship is compatible with their commitments and policies under the ban treaty. This may not be as difficult politically as it seems. No mutual defence policy requires its parties to retain a nuclear posture, nor do they require the use of nuclear weapons in any circumstance. Furthermore, states in alliance or bilateral relationships with nuclear weapon possessors do not have to necessarily end those relationships, only the nuclearised elements of them, as has been done in specific cases already.

5. For example, the bilateral relationships between the United States and Australia, Japan, and Republic of Korea include ministerial consultations that provide political guidance for cooperation on matters related to extended deterrence in all its aspects and publicly signal the resolve of the parties to use force in the exercise of collective self-defence. Within NATO, policy planning relating to extended nuclear deterrence takes place at multiple levels, including in the Strategic Concepts adopted by state leaders and in the Nuclear Planning Group. Some states are involved in forward deployment or nuclear stationing relationships with nuclear-armed states. Training or targeting exercises, port visits, overflights, declarations and doctrines, etc. are all part of the planning or preparation for use of nuclear weapons that constitute these arrangements.

6. “United States Non-Paper: ‘Defense Impacts of Potential United Nations General Assembly Nuclear Weapons Ban Treaty’,” 17 October 2016, [http://www.icanw.org/wp-content/uploads/2016/10/NATO\\_OCT2016.pdf](http://www.icanw.org/wp-content/uploads/2016/10/NATO_OCT2016.pdf).

## Transit

The deployment or preparation for use of nuclear weapons may entail the transit of such weapons through others' airspace and waters. Ending the possibility of nuclear forces, including dual-capable aircraft, to be temporarily present in or to transit through national territory and airspace could curtail some avenues in which nuclear-armed states are able to engage in nuclear brinkmanship. It could also end a means by which non-nuclear-armed states can assist nuclear weapon programmes by facilitating training activities of nuclear-capable military units. Thus prohibiting transit of nuclear weapons may be one

of the few ways in which non-nuclear-armed states can most effectively impact operational practice related to the unfettered global exercise of "extended nuclear deterrence".

In this vein, the memo to NATO allies cited above specifies that a number of the treaty's proposed prohibitions related to transit, port visits, overflights, deployment, and stationing "could make it impossible to undertake ... nuclear-related transit through territorial airspace or seas." It also admits that because the United States "neither confirms nor denies the presence or absence of nuclear weapons on U.S. naval ships," such prohibitions "could make it impossible for these



Trident nuclear submarine

ships to conduct port calls in signatory countries.”<sup>7</sup> Some countries did this during the Cold War, which actually helped facilitate the elimination of nuclear weapons from many warships and was eventually part of what pushed France, Russia, and the United States to offload naval nuclear weapons.

There are also key national security and public safety arguments for prohibiting the transit of nuclear weapons. If a transit or visitation occurs during a period of hostilities between nuclear-armed states, allowing transits could result in non-nuclear-armed states being targeted with nuclear weapons.<sup>8</sup> Furthermore, any accident involving transiting nuclear weapons could have sudden and devastating consequences for local populations, especially given the lack of transparency with respect to these movements and the policy of nuclear-armed states not to disclose the presence of nuclear weapons on their ships and aircraft.

The ban treaty should thus prohibit the transit of nuclear weapons through the territories of state parties, and obligate states parties to prevent the transit of nuclear weapons through their territories. This understanding of transit should

include the transit of nuclear weapons through airspace and territorial waters, visits to ports by foreign ships carrying nuclear weapons or visits to airfields by foreign aircraft carrying nuclear weapons.<sup>9</sup>

As with planning and preparations to use nuclear weapons, such a prohibition could possibly be included within a broader prohibition on providing assistance with prohibited acts. However, this would require an understanding of assistance that includes the absence of an act. That is, it would have to determine that by not preventing a nuclear-armed submarine or aircraft to enter a state party’s territory, that state party is assisting in the deployment, preparation for use, use, or possession of nuclear weapons. It would be useful for legal clarity to explicitly prohibit transit.

## Acquiring, receiving, transferring, control

The NPT prohibits the acquisition of nuclear weapons by non-nuclear-armed states. All of the nuclear weapon free zone (NWFZ) treaties prohibit the acquisition of and control over nuclear weapons by states parties. This standard must be extended globally. However, at least five states

7. Ibid.

8. The negative security assurances contained in the NWFZ treaty protocols may offer no legal protection in such a circumstance, especially if the local country is in an alliance with the state that is transiting nuclear weapons through its territory.

9. There is precedent in national legislation for the prohibition of transit, as well as porting, of nuclear weapons. The 1987 New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act prohibits emplacement or transport of nuclear weapons within New Zealand. The Philippine constitutional amendment from 1987 adopts a policy of “freedom from nuclear weapons in its territory.” This amendment means that “the government may not store or allow anyone to store nuclear weapons inside the national territory, and nuclear-armed aircraft and vessels may not be allowed to enter.” Austria’s 1999 constitutional law prohibits amongst other things the transport of nuclear weapons.





designated as non-nuclear weapon states under the NPT are in a relationship to potentially receive control over US nuclear weapons in a time of war. This would not be permissible under a ban treaty.

## Stationing and installing

Both stationing and installation of nuclear weapons should be prohibited by the treaty. The first suggests a mobile system such as a submarine, which can be moved into a predetermined position, while the latter suggests a fixed position on land. The ban treaty would compel the end of any bilateral or alliance-based arrangement involving the stationing or installation of nuclear weapons.

## Design, development, manufacturing, production

A comprehensive prohibition of all development-related activities would align the ban treaty to the

highest standards contained within the NWFZ treaties.<sup>10</sup> This could refer to “design, development, manufacturing, and production”. Design and research are arguably part of development, however, it may be possible to “design” nuclear weapons without entering into the development or production phases.

Design includes research and the creation of concepts while development includes the execution or engineering of those designs. In addition, former nuclear-armed states may try to retain nuclear weapon design capabilities intact to assist in potential future reconstitution on their arsenals, which this treaty should seek to maximally inhibit to the extent possible. If negotiating states want development to include design, they should make that explicit in the negotiating record. Or they could add the word design to the list of prohibited activities.

10. All NWFZ treaties prohibit the production of nuclear weapons. Three explicitly prohibit the development of nuclear weapons. The Pelindaba Treaty prohibits research.

## Testing

Nuclear testing in several parts of the world has demonstrated the enduring impact of serious and persisting health and environmental impacts that cannot be undone and have yet to be adequately addressed. There have been well over 2000 nuclear explosions at more than 60 locations

around the world since 1945, conducted by nine countries. Most of these tests were done in Kazakhstan, the Nevada desert in the United States, and in the Pacific. Other test sites included locations in Algeria, Australia, China, DPRK, India, Pakistan, and other parts of the former Soviet Union. Today, these sites continue to face persistent radioactive contamination.

### Case study: the Pacific

From the beginning of the nuclear age, Pacific islands have been used for the development and proliferation of nuclear weapons. The plane Enola Gay left the Micronesian island of Tinian to carry the atomic bomb to Hiroshima in August 1945. The following year, the United States began testing nuclear weapons in the Marshall Islands. Over the next five decades, more than 315 nuclear test explosions were conducted across the region by France, Britain and the United States.

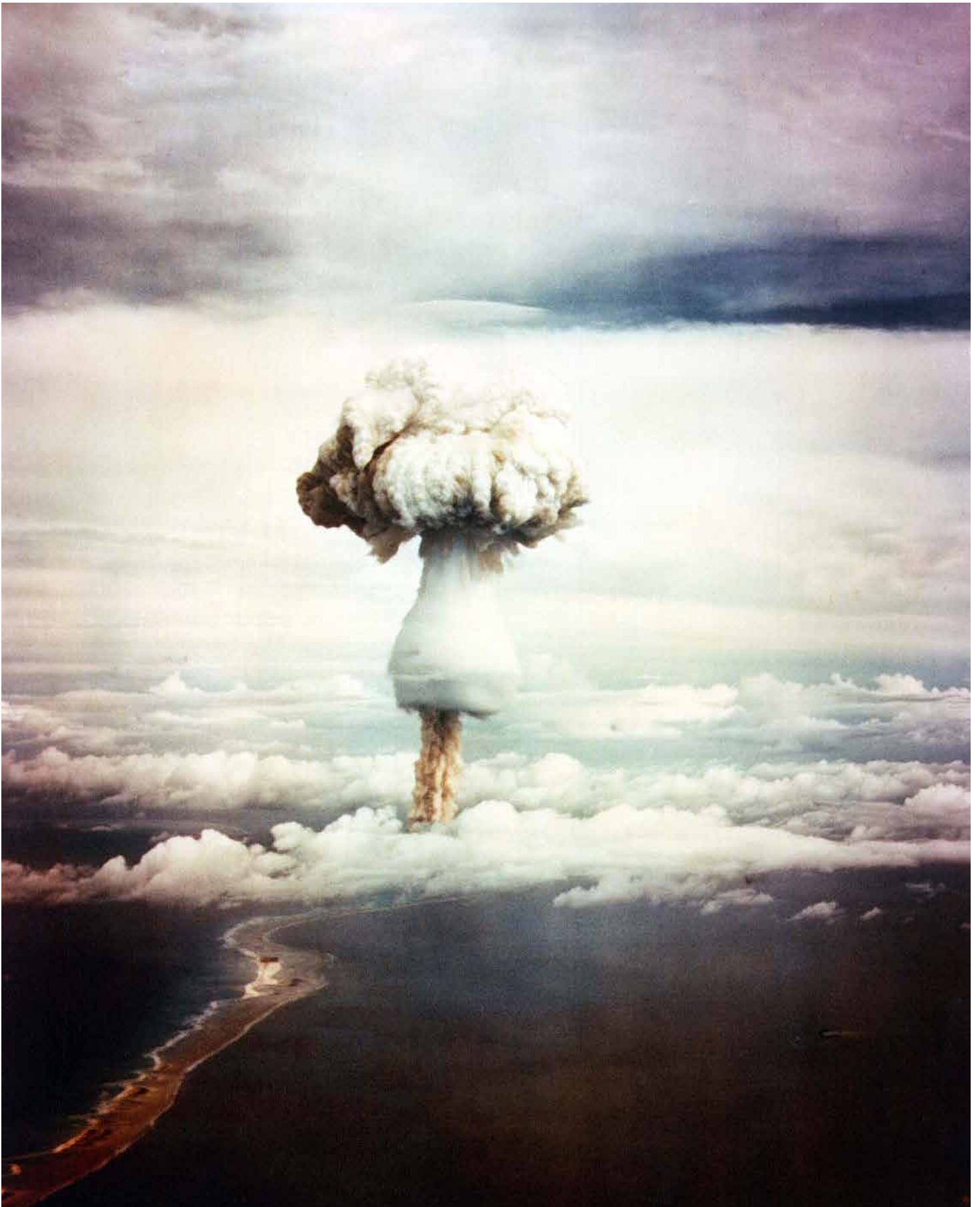
Seeking “empty” spaces, the Western powers chose to conduct Cold War programs of nuclear testing in the deserts of central Australia or the isolated atolls of the central and south Pacific. Missile testing ranges in the Pacific still provide the infrastructure for the development of the intercontinental ballistic missiles that are a key component of nuclear warfare preparations.

During and after US, British and French nuclear testing in the Pacific, radioactive fallout was dispersed in the Pacific region and globally, adding to global radiation risk and cancer burden. Hazards were greatest for the military and civilian personnel who staffed the test sites, as well as villagers living on nearby and downwind islands.

Years later, many of these nuclear survivors are suffering health problems related to their exposure to radiation from the nuclear test explosions. In all cases where adequate health studies of participants in atmospheric nuclear tests have been undertaken, adverse health consequences have been demonstrated, even many decades later. Downwind communities in the Marshall Islands bore the brunt of acute radiation sickness and direct organ radiation damage related to high radiation exposure, as well as long-term cancer risks including increased rates of thyroid cancer. As well as direct exposure to radioactive fallout, they confront long-term contaminated environments and food sources.

They also face ongoing psychological stress and anxiety and concern for subsequent generations. Some in Micronesia and Polynesia have also been subjected to the profound health impacts of dislocation and displacement. Environmental studies have documented serious levels of continuing radioactive contamination at nuclear test sites.

*This text is reprinted with permission from Nic Maclellan, “Banning nuclear weapons: a Pacific Islands perspective,” published by ICAN Australia in 2014.*



A nuclear device fired from a tower at Enewetak Atoll in the Marshall Islands in 1951 © US Government

Many communities are living with the health and environmental impacts of this testing. The tests have irradiated downwind and downstream communities, increasing the risk that their people will one day develop cancers and other chronic diseases as a result. In many cases, those residing near test sites have been permanently displaced from their homes. Indigenous communities have borne the brunt of this deadly experimentation. At all of the testing sites around the world, indigenous communities have suffered profound physical, psychological, social, and cultural impacts that have disconnected many people from their traditional way of life.<sup>11</sup>

Nuclear testing is prohibited in various ways in other instruments. All nuclear weapon free zone (NWFZ) treaties prohibit testing by states parties. Additional protocols to the Pelindaba and Rarotonga treaties prohibit nuclear testing by NPT nuclear-armed states within the NWFZs, where ratified. The Partial Test Ban Treaty of 1963 prohibits nuclear weapon tests in the atmosphere, underwater, and in outer space. The Comprehensive Nuclear Test-Ban-Treaty (CTBT) prohibits testing of nuclear weapons by explosive means in all environments. Testing by other means, such as subcritical testing, computer modeling, or hydrodynamic trials are not banned

under that treaty.<sup>12</sup> The CTBT has not yet entered into force, though it was adopted in 1996.<sup>13</sup>

This patchwork of prohibitions against testing needs to be supplemented by an explicit prohibition on testing in the nuclear weapon ban treaty. This would serve to reinforce and strengthen the norm against nuclear weapon testing and encourage states to uphold their current moratoriums against testing and/or to inspire new such moratoriums. Banning nuclear weapon testing explicitly in the prohibition treaty will also help to strengthen efforts to maintain funding and legal authority for the CTBT Organisation's verification regime, which consists of over 300 monitoring facilities around the world that are already in operation.

If the ban treaty reiterates the prohibition of nuclear testing by explosive weapons, additional verification measures would not be necessary to determine compliance. Furthermore, its inclusion in the ban treaty could help encourage states that have not yet ratified the CTBT to do so. Data from the global monitoring centres are processed in Vienna and analysis is transmitted to CTBT states parties. As the ban treaty builds upon and deepens global norms against the existence and maintenance of nuclear weapons, accepting and

11. For details please see the working paper prepared for the ban treaty conference by Mines Action Canada in consultation with ICAN Australia, "The disproportionate impact of nuclear weapons detonations on indigenous communities," (June 2017).

12. The need explicitly to ban such activities given their significance for the development of nuclear weapons can be inferred for instance from the IAEA report on Iran's activities judged to have "been relevant to the development of a nuclear explosive device;" see "Final Assessment on Past and Present Outstanding Issues regarding Iran's Nuclear Programme," IAEA, GOV/2015/68, 2 December 2015.

13. See Eloise Watson, *The CTBT: obstacles to entry into force*, Reaching Critical Will of the Women's International League for Peace and Freedom, September 2012.

complying with the ban on testing will be an important element of demonstrating renunciation of nuclear weapons.

Omitting testing from the prohibited activities in the nuclear weapon ban treaty would only serve to exacerbate the CTBT's current problems, including its lack of entry into force. It could leave a crucial gap in the treaty's core prohibitions that will be instrumental in preventing future development of or reconstitution of nuclear arsenals.



Australian nuclear weapon test sites © Dimity Hawkins

## Gender and nuclear testing

The effects of nuclear weapon testing and use are gendered. Women face unique devastation from the effects of nuclear weapons, especially from nuclear radioactivity. In particular, high rates of stillbirths, miscarriages, congenital birth defects, and reproductive problems (such as changes in menstrual cycles and the subsequent inability to conceive) have been recorded. A possible link between breast cancer in younger women and women who were lactating at the time of exposure to nuclear radiation has also been found to exist. Women who have survived nuclear weapon tests or use also face unique social challenges related to how they are treated in societies and communities.

In 2012 the UN Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes visited the Marshall Islands to assess the impact on human rights of the nuclear testing conducted in there by the United States from 1946 to 1958. He found that the full effects of radiation on Marshallese women might have been underestimated. Among other things, the bathing and eating habits of women potentially played a role in their higher rates of contamination. The Special Rapporteur found that women often bathed in contaminated water, which may have been overlooked as a possible means of exposure, as was the fact that women eat different parts of fish than men, such as bones and organ meat, in which certain radioactive isotopes tend to accumulate. The Special Rapporteur also notes, "Apparently, women were more exposed to radiation levels in coconut and other foods owing to their role in processing foods and weaving fiber to make sitting and sleeping mats, and handling materials used in housing construction, water collection, hygiene and food preparation, as well as in handicrafts."

Recognising the gendered impacts of nuclear weapon detonations is important for ensuring that victims and survivors are afforded appropriate assistance. It is also vital to understanding the myriad of ways in which nuclear weapons affect human health, in order to help motivate their prohibition and elimination.



## Assistance, encouragement, or inducement of any nuclear weapon-related activities, including through financing<sup>14</sup>

“Encouraging” includes motivating or giving support to the development, possession, or use of nuclear weapons; “inducing” includes leading by persuasion or influence, or directly inciting the development, use, or possession. “Assistance” could include activities such as planning or preparation for use of nuclear weapons. It could also include material assistance, including financing.

An explicit prohibition on financing would build upon the understanding that providing financial services to companies or state organisations involved in the production of key components that play a direct role in the development, manufacture, or testing of inhumane weapons constitutes a form of assistance. A prohibition on financing would help provide clarity and guidance towards treaty implementation, which could

include national prohibitions on financial or material support to public and private enterprises involved in any of the activities prohibited by the treaty. It would help states parties to prevent direct or indirect investments in entities materially involved in nuclear weapon programmes, and to prevent such investment by companies or other entities within their jurisdiction.<sup>15</sup>

This could reduce the incentives for private companies to accept any work related to nuclear weapons. It could also compel public funds controlled by the state, the financial industry, and foundations from supporting any entity involved in nuclear weapons activities.<sup>16</sup> In this regard, this treaty could raise the political and economic costs of maintaining nuclear weapons. It could also help remove the influence of private interests from any decision-making processes related to nuclear weapons production and disarmament. It could also increase the societal stigmatisation of nuclear weapons, including through public divestment programmes.

14. Such a prohibition can be designed in such a way that it does not limit investment in activities deemed necessary to meet other obligations under the treaty, such as disarmament and securing weapons and related facilities and materials, while meeting stockpile elimination obligations.

15. There is already an obligation not to “support” and to not “participate... as an accomplice, assist or finance” any “attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery” by non-state actors, under UN Security Council resolution 1540. A ban treaty could adopt this language and expand it to cover any such activities undertaken by states as well as non-state actors. Also useful is that the Norwegian Government Pension Fund adopted ethical guidelines in 2004, which exclude investment in companies that “develop and produce key components to nuclear weapons”. This is particularly significant because nuclear weapons are treated by the Fund as “weapons that violate fundamental humanitarian principles” in the same way as other weapons prohibited under international law, including landmines and cluster munitions.

16. There is already evidence of financial institutions shunning producers of nuclear weapons. In Norway for example the sovereign wealth fund rejects investment in nuclear weapon producing companies. See Don’t Bank on the Bomb, PAX, 2016. These practices of avoiding investment would be likely to increase once a treaty prohibition has been put in place at the national level.

# Conclusion

This document has outlined Reaching Critical Will's view of the key prohibitions for a treaty banning nuclear weapons. An international agreement to prohibit nuclear weapons is the best opportunity we have to stigmatise these remaining weapons of mass destruction, codify their illegality and illegitimacy into international law, and help set standards and rules to help facilitate their elimination. Such a treaty is urgently needed and long overdue. 2017 is the year for banning nuclear weapons!





## Reaching Critical Will

Reaching Critical Will is the disarmament programme of the Women's International League for Peace and Freedom (WILPF), the oldest women's peace organisation in the world.

WILPF is a member of the International Steering Group of the International Campaign to Abolish Nuclear Weapons (ICAN).

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