



NUCLEAR BAN DAILY



Reaching Critical Will

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Nuclear Ban Daily is produced by Reaching Critical Will, the disarmament programme of the Women's International League for Peace and Freedom (WILPF) during meetings related to the UN conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading to their elimination, taking place 15 June-7 July 2017. The views expressed in this publication are not necessarily those of WILPF.

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DEALING WITH DISARMAMENT IN THE PROHIBITION TREATY

Ray Acheson | *Reaching Critical Will, Women's International League for Peace and Freedom*

Wednesday's sessions were off-the-record, so we will not be reporting on those discussions. Instead, we offer some thoughts about the challenges being faced on articles 2–5 of the draft treaty. These articles deal with nuclear-armed states and the elimination of their weapons and weapon programmes. They also address safeguards against the reconstitution of these weapons and against possible proliferation by non-nuclear-armed states parties.

There are many pathways to a nuclear weapon free world, as explored by the International Panel on Fissile Materials in a 2009 report on this subject. The paths—and their end result—are distinguished by how transparent they are, and how irreversible they are. Nuclear ban negotiators need to decide what this treaty can do to best facilitate the achievement of the total elimination of nuclear weapon programmes in all their aspects, keeping in mind these principles of transparency and irreversibility.

As we wrote yesterday, there are significant problems with the current draft provisions dealing with these issues. As drafted, states parties can join the treaty with nuclear weapons and programmes intact, needing only to agree to “destroy as soon as possible” their nuclear weapons and to submit a plan to eliminate their weapon programmes.

While we want the treaty to be open to all states equally, we do not want to create a situation described by New Zealand during an open plenary meeting on Tuesday whereby states joining with nuclear weapons would be permitted to be in contravention with the treaty's prohibitions on the possession of nuclear weapons. In the current drafting, such states would be free to interpret “as soon as possible” to mean “we can take as long as we want” and to interpret “destroy” their weapons as loosely as they wish.

As currently drafted, the treaty also would permit a state to get rid of its nuclear arsenal before joining. It can eliminate its weapons on its terms, using whatever criteria it sees fit. The draft treaty only requires such a state subsequently to cooperate with the IAEA in regards to accounting for its nuclear material inventory. It has no obligations concerning the rest of its nuclear weapon programme.

One approach to dealing with these challenges is to continue working on articles 2–4 to make sure they are clear, internally consistent, and strong enough to deal with current and future situations. In this case, there must be a clear alignment of the declarations in article 2 with the prohibitions in article 1 and with obligations for the complete elimination of nuclear weapon programmes in article 4. There must also be a clear provision of safeguards that does not lock us into a minimum standard and that ensures safeguards are mandatory for all states parties.

The alternative approach is to not try to deal with parameters for nuclear disarmament in this treaty. Instead, the text could empower meetings of states parties to agree upon time-bound, verifiable, and irreversible plans for the elimination of nuclear weapon programmes in all their aspects with interested nuclear-armed states.

In either case, we need an approach that ensures states parties are in compliance with their obligations under the treaty. Hosting states will need to remove these weapons; armed states will need to destroy their programmes. This treaty can facilitate that, but states must take care not to inadvertently impede such processes or create weak provisions that can be exploited further down the road. •

Thanks to Zia Mian for his contributions to this article.

RECALLING THE HUMANITARIAN AGENDA: THE NEED TO STRENGTHEN POSITIVE OBLIGATIONS

Lan Mei | *Harvard Law School's International Human Rights Clinic*

The President's revised draft text released Monday morning marks initial progress towards a strong nuclear weapon ban treaty, but as many negotiating states have commented, it still leaves room for significant improvement. The new text appears to be caught between two eras: one, the Cold War era, with a focus on international security, and the other, the modern era, with a focus on humanitarian concerns. As negotiating states move forward in the negotiations, they should refocus on the humanitarian purposes to which this treaty is aimed and develop a text that advances the law of humanitarian disarmament.

To achieve these goals, states should strengthen provisions to ensure that victims of nuclear weapons use and testing receive the support and assistance they need and that environmental damage is remediated. In particular, negotiating states should strengthen Article 7 (formerly Article 6) on victim assistance and environmental remediation and Article 8 on international cooperation.

Victim assistance and environmental remediation

Article 7 in the latest text contains no substantive changes and thus leaves the draft treaty's provisions on victim assistance and environmental remediation as weak as before. The article has been appropriately re-titled "Victim Assistance and Environmental Remediation," and former Article 6(3) has been moved to Article 8(3). While these two changes add some coherency to the new text, they do nothing to create strong obligations for victim assistance and environmental remediation.

In Article 7, there are two notable clauses that should be revised to ensure that victims receive the assistance they need and that the environment is remediated. First, Article 7(1) continues to limit the obligation to provide victim assistance to affected states "in a position to do so," meaning there is no absolute obligation of victim assistance. Limiting the obligation to provide assistance to states "in a position to do so" runs counter to the humanitarian spirit of the treaty. The phrase must be eliminated in order to prioritize victims' rights and to ensure their needs will be met.

Second, Article 7(2) provides that affected states have the right to request and receive assistance towards environmental remediation, but still contains no obligation to remediate the environment. Such an obligation must be incorporated within the treaty if the treaty is to make progress towards remediation of the environment following contamination from nuclear weapons testing or use.

International cooperation and assistance

While affected states parties should bear primary responsibility for victim assistance and environmental remediation in their territory, they should not have to bear this burden alone. Article 8, which was also not substantively revised, however, is insufficient to meet this aim. It merely requires states parties to "cooperate" to facilitate the treaty's obligations and notes that states can request and receive assistance. Without establishing a clear and direct obligation to provide assistance, this article will have limited effect. Requiring all states parties to provide assistance to affected states is critical to helping them meet their obligations, particularly on victim assistance and environmental remediation. Article 8 should also be re-titled so it is clear that Article 8 sets forth obligations on "International Cooperation and Assistance."

A strong Article 8 is vital to ensuring that affected states do not have to meet their Article 7 obligations unaided. All states, including user states, should be obliged by this article to provide assistance, whether in the form of technical, material, financial, or other assistance, to affected states in meeting their positive obligations. This framework of responsibility would conform with precedent in humanitarian disarmament law. It would not preclude affected states from seeking accountability and redress from user states through peaceful measures separately from the nuclear weapon ban treaty. Moreover, the proposed revisions to Article 8 could be complemented with a provision strongly encouraging user states in particular to provide international assistance to affected states.

Looking forward

Strengthening Articles 7 and 8 of the next draft text is imperative if the treaty is to ensure victims' rights are respected and the environment protected. The harms caused by nuclear weapons to individuals and to the environment prompted international action first to limit, and now finally, to prohibit these weapons. The horrific consequences of nuclear weapons must not be forgotten, and the humanitarian spirit and goals of the treaty must be borne in mind as states move forward in the negotiations and make specific proposals for improvements. •



ENSURING RESPECT FOR THE NUCLEAR WEAPON BAN TREATY

Matthew Bolton | International Disarmament Institute, Pace University

A crucial purpose of the ban treaty process is to stigmatize nuclear weapons. To do so, it should undermine the policies and practices in nuclear-armed and nuclear-allied states that entrench the persistence of nuclear arsenals. This includes delegitimizing doctrines of nuclear deterrence and accepting the stationing of nuclear weapons on the territories of non-nuclear weapons states. Prohibitions on military preparations and planning, stationing, and financing of nuclear weapons are key elements in this effort, raising the costs—economic, social, political and diplomatic—of the nuclear weapons complex.

However, stigmatizing nuclear weapons will require more than negative prohibitions. It will also require states to take positive actions that cultivate, generate, and disseminate the norms of the treaty, both domestically and globally.

In this round of negotiations, states and civil society have begun to discuss potential provisions to this effect, including regarding universalization, norm promotion, disarmament education and awareness raising, and fostering a culture of peace. Others have suggested language that would require states to condemn violations of the prohibitions by states not party. Such obligations would help do the discursive work of delegitimizing nuclear weapons and nuclear deterrence doctrines.

In building and strengthening this stigmatizing architecture, states should also consider augmenting it with the “respect” tradition in humanitarian law.

Common Article 1 of the Geneva Conventions obligates states “to respect and ensure respect” for international humanitarian law “in all circumstances”. According to custom and state practice this is understood to mean that states must themselves abide by the spirit of the norms established in the treaties (“respect”) and encourage others—both states and non-state actors—to do so too (“ensure respect”). However, according to the International Committee of the Red Cross (ICRC), Common Article 1 is “not a loose pledge but a commitment vested with legal force.”¹ This was confirmed by the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua*.²

A review by ICRC Legal Advisors, for example, notes that the language in Common Article 1 not only requires states to “to avoid encouraging ... violations committed by others, but also to take measures to put an end to on-going violations and to actively prevent their occurrence.”³ The official 2016 ICRC Commentary states that this extends to preventing “violations when there is a foreseeable risk that they will be committed”—this would obligate states to condemn deterrence doctrines which

rely on the “foreseeable risk” of nuclear weapons being used.⁴

The Commentary also notes that states have a duty to ensure respect by all parties to a military alliance. If one NATO member joined, they would thus be required to communicate respect for the prohibition on nuclear weapons to other NATO members.⁵ The ICRC states that the phrase “in all circumstances” extends the duty to ensure respect into both wartime and peacetime and binds to states to comply with humanitarian norms, no matter what other states are doing.⁶ This would further undercut the doctrine of nuclear deterrence, by requiring states to uphold a prohibition on nuclear weapons even when threatened by other states’ nuclear weapons and even when nuclear weapons deployment is claimed to be a peaceful and defensive posture.

Articles 21 of the Convention on Cluster Munitions (CCM) offers a more specified example of what is, in effect, a modified ensuring respect clause. It requires states parties to “encourage States not party” to join the treaty, “with the goal of attracting the adherence of all States” (CCM, Article 21.1). It also requires states parties to notify other states not party of their obligations, “promote the norms it establishes” and “discourage States not party to this Convention from using cluster munitions” (CCM, Article 21.2). While other parts of Article 21 are problematic, these first two paragraphs could serve as a good model for specific language on norm promotion in the nuclear weapon ban treaty. They offer a precedent for including a respect clause in a humanitarian disarmament treaty.

A more detailed version of such a respect clause could, for example, include provisions requiring states parties to communicate the norms to nuclear-armed states, declare that they will not accept nuclear deterrence “protections” from other states, refuse to participate in planning, preparations or joint operations where nuclear weapons are involved and condemn violations of the prohibitions by states not party. Such detail would make clear, in more straightforward language, what would be expected from states to ensure respect for the treaty.

Whether simply expressed or more elaborately specified, an ensuring respect clause could discourage any behavior, not otherwise specified, that would undermine the core prohibitions. This could be placed near the beginning of the treaty, near Article 1 on Prohibitions, or in amendments to Article 6 on National Implementation and/or Article 13 on Universality. If states



Ensuring respect, continued

opt for a more general phrasing, they could read into the negotiating record that they understand it to mean that deterrence doctrines are contrary to the object and purposes of the treaty and should be addressed in national legislation and policy. •

Notes

1. ICRC. (2016) "Commentary of 2016: Article 1: Respect for the Convention." Para. 170. <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AFA66200C1257F7D00367DBD#_Toc452378933>.
2. ICJ. (1986) *Military and Paramilitary Activities in and against Nicaragua* case. Merits, Judgment. Para. 220. <<http://www.icj-cij.org/docket/?sum=367&p1=3&p2=3&case=70&p3=5>>.
3. Knut Dormann & Jose Serralvo. (2014) "Common

Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations." *International Review of the Red Cross*. 96(895/896). p. 707.

4. ICRC. (2016) "Commentary of 2016: Article 1: Respect for the Convention." Para. 164. <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AFA66200C1257F7D00367DBD#_Toc452378933>.
5. ICRC. (2016) "Commentary." Para. 133 & 153.
6. ICRC. (2016) "Commentary." Paras. 184-191.

CALENDAR OF EVENTS: THURSDAY, 29 JUNE 2017

When	What	Where	Who
08:00	Morning Inter-Faith Vigil	Isaiah Wall	Humanitarian Disarmament Interfaith Working Group
09:00-09:50	ICAN campaigners meeting	CR B	ICAN
10:00-10:30	Plenary meeting	CR 1	
10:00-12:00	The Ban and the 2018 UN High Level Conference	CR 1	PNND, Unfold Zero, Basel Peace Office
13:15-14:30	Implications of implementation: forbidding financing of prohibited acts	CR B	PAX
15:00-16:30	Role playing: Answering all arguments	CR 1	Veterans for Peace
18:15	Film Screening and Discussion: <i>The Nuns, the Priests and the Bomb</i>	CR B	Pax Christi International, NGO Committee on Disarmament, Peace and Security, The Committee of Religious NGOs, Maryknoll Office of Global Concerns, Roundtable Association of Catholic Diocesan Social Action Directors