



# NUCLEAR BAN DAILY



Reaching Critical Will

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## WE'VE GOT A TREATY BANNING NUCLEAR WEAPONS

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

There are many ways to ban nuclear weapons. The draft text that the President of the conference released on Monday evening is one of them. And it's a good one. It is a categorical prohibition of nuclear weapons that also provides a framework for their elimination. To paraphrase the former leading US arms control negotiator Paul Warnke about nuclear treaties: "I could have written a much, much better agreement.... But of course, I could not have negotiated such an agreement."

The treaty that delegations here in New York have negotiated may not satisfy all visions or interpretations of the "best" way to ban nuclear weapons, but it does constitute a progressive, sound, legally-binding effective prohibition of these genocidal, suicidal weapons of mass destruction.

### A review of the text

#### *Framing and prohibitions*

The **preamble** remains almost entirely unchanged from the last version published on 27 June. It's a long preamble, but a good one. There are strong reflections of the cata-

strophic humanitarian impacts of nuclear weapons, including gendered impacts and disproportionate impacts on indigenous communities. It means there is strong reflection of the ethical and legal imperatives for the prohibition and elimination of nuclear weapons. There is a reference to the need to support and strengthen the effective participation of women in nuclear disarmament as well as to promote peace and disarmament education and raise awareness about the risks and consequences of nuclear weapons for current and future generations.

The one thing that is still missing, in preambular paragraph 8, is a reaffirmation that states must comply at all times with international environmental law. Nuclear weapons, whether through production, use, or testing, have a far greater potential to harm the environment than other forms of banned weapons. The principles of international environmental law are relevant to the treaty's objectives of preventing humanitarian and environmental catastrophe; an explicit reference to those principles would reflect current legal thinking on the law

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*International Campaign to Abolish Nuclear Weapons, New York, 20 June 2017. Photo © Clare Conboy*

## Editorial, continued

applicable to the environmental impact of conflicts and military activities.

Unfortunately the paragraph reaffirming the Non-Proliferation Treaty's "inalienable right" to nuclear energy for "peaceful purposes" is still there. It's an unnecessary, legally unsound, and frankly offensive paragraph, but at least it does not detract from the categorical banning of nuclear weapons that this treaty provides.

The only change in the prohibitions of **article 1** from the last version produced on 30 June is that the prohibition on using or threatening to use nuclear weapons has been expanded to also include "other nuclear explosive devices" to be consistent with the rest of the prohibitions here. Testing is still in the treaty; preparations to use, transit, and financing are still not there. If this is to be the final text, states need to articulate that their understanding of "assistance, encouragement, and inducement" includes preparations to use, transit, and financing of nuclear weapons.

The treaty would have also benefited from prohibitions on nuclear weapon-usable materials and on nuclear-weapon certified and nuclear-capable delivery systems. These can be accommodated, however, if states make clear that these are part of nuclear weapon "programmes" and as such must be eliminated through the process set out in article 4.

### *Dealing with nuclear weapons and programmes*

**Article 3** on safeguards has only one change from the 30 June version, adding an explicit reference to INFCIRC/153 corrected as the required comprehensive safeguards agreement. Otherwise the article remains unchanged.

The only change in **article 2** on declarations from the 30 June version is to add language to the declarations for states that possess or station nuclear weapons at the

time they join the treaty that makes it clear that are not to be considered in non-compliance with those particular prohibitions.

This "notwithstanding" language, which permits state to join in spite of being in technical violation of particular prohibitions, poses a potential risk. However, given that it seems states parties want this to be an option, then at least they have made their best effort to guard against the ability of any state to join with nuclear weapons and retain them—or nuclear weapon programmes and facilities—indefinitely. It must also be noted that the notwithstanding reference to article 1(a) only refers to possession and stockpiling, and not the rest of the prohibited activities in that article.

In this regard, the new **article 4** has some positive changes. Article 4(1), which covers a situation in which a currently nuclear-armed state joins the treaty after eliminating its nuclear weapon programme, now provides for verification of that elimination. Previously it only required the state to conclude an agreement with the International Atomic Energy Agency (IAEA) in regards to non-diversion of declared nuclear materials and absence of undeclared nuclear materials or activities. Now it is also required to "cooperate with the competent international authority designated pursuant to paragraph 6 of this Article for the purpose of verifying the irreversible elimination of its nuclear weapons programme."

A nuclear weapon programme, however, is still undefined here. It should be interpreted to include material in weapons, material reserved for weapons, and material recovered from weapons, as well as delivery systems that a state has certified for nuclear weapon use and those delivery systems that are clearly nuclear-capable. These materials and delivery systems were produced as part of weapon programmes or to support such programmes and should be treated as such.

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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
10:00-13:00	Plenary	CR 1	
13:15-14:30	How to use the Ban Treaty to build a momentum toward the elimination of nuclear weapons	CR B (or 1)	International Peace Bureau



## Editorial, continued

The parameters of his “international authority” in paragraph 6, which also has responsibilities for verification of elimination in states that choose the join-and-destroy approach, have been significantly expanded upon in the latest text. It can now be more than one authority and it/they will be involved in the negotiation of a verification plan with the concerned state. This updated paragraph also makes clear that if such an authority has not been designated by the time a join-and-destroy or destroy-and-option is utilised, the UN Secretary-General will convene an extraordinary meeting of states parties (MSP) to take any decisions that may be required.

As before, Article 4(2) and (3) deal with nuclear-armed states joining the treaty before it has eliminated its nuclear weapon programme. A key change is that now states using this option are required to “immediately” remove nuclear weapons or nuclear explosive devices from operational status and destroy them, “as soon as possible but not later than a deadline to be determined by the first Meeting of States Parties.” (Presumably this MSP refers to the first one after the concerned state joins the treaty.) The rest of the paragraph remains unchanged, mandating that the plan for the legally-binding, time-bound plan for the verified and irreversible elimination of nuclear weapon programmes is to be submitted within 60 days of the treaty entering into force for that particular state. The plan isn’t just accepted, though, it will then be negotiated with the paragraph 6 authority and then approved by other states parties.

As with states that have joined the treaty after eliminating their nuclear weapon programmes, join-and-destroy states also have to conclude an IAEA safeguards agreement. Negotiation of this agreement is to commence immediately after the elimination plan above has been completed. To strengthen this, safeguards could begin at the same time as the elimination process.

This is a lot of detail, and is receiving some raised eyebrows from states or other participants that anticipated that a prohibition treaty would provide for a much simpler structure for dealing with nuclear-armed states. However, once the majority of conference participants expressed their determination to allow for a join-and-destroy approach, this level of detail became more or less inevitable. Another option, in which a space is simply carved out in this treaty to negotiate parameters like this later, punts those decisions down the road to a time when nuclear-armed states would be engaged in designing the parameters. The way article

4 is set up now leaves all of the details of the actual elimination plan to be negotiated with the particular nuclear-armed state that is joining the treaty but establishes a firm expectation and a framework for ensuring that these states cannot simply join the treaty and retain their nuclear weapons or eliminate their programmes without oversight and involvement of states parties and international authorities.

There is one other situation that article 4 deals with: states that “host” nuclear weapons on their soil. Article 4(4) allows for states that have any nuclear weapons in their territory that not their weapons “ensure the prompt removal of these weapons”. In the 30 June version, this was to be done “within a timeframe to be proposed by that State Party and approved by” other states parties at the next meeting. Now, this is to be done “as soon as possible but not later than a deadline to be determined by the first Meeting of States Parties”—again, presumably this refers to the first MSP after the concerned state has joined the treaty.

One remaining issue here is that no verification mechanism is specified for how a state can show it has complied with its obligation to remove the weapons it had been hosting. Currently, it only needs declare that it has done so. Since such states have nuclear weapon-related facilities (for instance the dedicated nuclear weapon storage vaults at airbases), a simple fix is to require the designated authority set up under Article 4(6) to verify that these storage facilities have been eliminated or converted.

There are concerns about allowing a “host” state to join while it still has nuclear weapons on its territory, though at least in this scenario it will be bound by the prohibitions of the treaty which means it would not be able to permit or assist in the use of these weapons in the time that it joins the treaty until they are removed. The specification of timeframe for this removal is much stronger in the updated version.

Overall, the challenge of articles 2 and 4 lies with the risks we perceive in the world today. We are promised “good faith” and have become accustomed to bad faith. The nuclear-armed and nuclear-hosting states parties of the NPT have abused the good will of the rest of the treaty’s membership for decades. This generates unease about establishing parameters in this treaty for such states to join while still retaining their weapons and programmes.

However, the objective of this approach is to lock nuclear-armed or nuclear-host states into the other prohibitions and into time-bound, irreversible, verifiable

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## Editorial, continued

elimination or removal of the weapons and weapon programmes in cooperation with other states parties and a designated international authority. This is a valid pathway to achieving the elimination of nuclear weapons and programmes and the establishment and maintenance of a nuclear weapon free world. In the pursuit of such a world, we will have to build trust with and confidence in states that have previously let us down for so long and in so many ways. This will not be an easy thing to do, but staking out carefully guarded space for it in this treaty may be a good start.

### *Implementation and assistance*

Article 5 on national implementation and article 6 on victim assistance and environmental remediation have remained unchanged from the 30 June text. The assistance and remediation provisions are still limited only to the use and testing of nuclear weapons but should also include production of nuclear weapons. The impacts of production—from uranium mining to weapon production to waste storage—have grave and generational impacts on people, including workers and local populations, and on the environment.

The final paragraph of article 7 on international cooperation and assistance has been removed. In the 30 June draft, this paragraph explained that a state party that has used or tested nuclear weapons shall have either a “primary” or a “fundamental” responsibility to provide adequate assistance to either affected states or states parties. On Monday, participants in those discussions reportedly resolved these choices and submitted text to the President on that basis, but the paragraph is not contained within this new draft.

### *Meetings of states parties*

Article 8 contains minor revisions from the 30 June version. The remaining issue that could be improved here is the question of regularity of these meetings. Annual meetings would help civil society and states keep up the pressure for ratifications as well as review implementation and spread awareness of the treaty.

### *Withdrawal*

After much discussion on Monday, the provisions for withdrawal still need serious work. In order to remain consistent with the humanitarian objectives of this treaty, and other humanitarian disarmament law, the reference to “extraordinary events [that] have jeopardized the supreme interests” of a state must be removed.

No multilateral disarmament treaty concluded in the last 24 years has included this formulation. The withdrawal clauses for the humanitarian-focused Mine Ban Treaty and Convention on Cluster Munitions do not

include references to extraordinary events and supreme interests. This formulation also does not appear in older humanitarian-focused treaties, such as the Geneva Conventions, or in human rights treaties that contain withdrawal provisions.

Its inclusion in the ban treaty would run counter to the principles and goals of the treaty as set forth in the draft preamble. It would send the message that “supreme interests” trump the treaty. A bare withdrawal clause would avoid sending this message and just recognize that states can withdraw from the treaty. This would not represent a weakening of the provision.

This article also needs include a means for mounting a collective response by states parties and the General Assembly to a withdrawal. At the very least it should be stated that any withdrawal from the ban treaty shall be treated as constituting a threat to international peace and security and shall lead to an emergency meeting of the states parties and if required the General Assembly to address the matter.

### *Relationship with other agreements*

Article 18 has changed slightly, removing a reference to “future” international agreements. This is fine and the language in this paragraph must be retained as is, or deleted entirely. Other options, such as including references to specific treaties or trying to subordinate the ban treaty to other instruments, are not acceptable.

## **Banning nuclear weapons and facilitating disarmament**

This treaty may not be perfect, but no treaty is. It is an instrument that achieves what we set out to do: create international law without the nuclear-armed or nuclear-supportive states that will fundamentally challenge their ability and interest in maintaining these weapons of mass destruction. If adopted on Friday, it will mount an effective legal, political, economic, and social challenge to the concept, policies, and practices of nuclear “deterrence” and to the existence of nuclear weapons themselves.

As noted above there are some changes that could make this treaty even stronger than it is now. But even in its current form, this is a treaty worthy of adoption. It’s up to states now to take this final step. The external pressure to not adopt this treaty is surely cranked up to eleven, but as the President of the conference said on Monday evening, we must “work hard to have some good news to the world on Friday.” •

*Thanks to Bonnie Docherty, Zia Mian, Doug Weir, and Tim Wright for their contributions to this article.*



## NEWS IN BRIEF

Allison Pytlak | *Reaching Critical Will of the Women's International League for Peace and Freedom*

The following provides an overview of the open plenary meeting on Monday, 3 July.

- Conference president Ambassador Whyte stated that the past few days of parallel negotiations in working groups have shown that there are now many more points of convergence than differences. She said the new draft text reflects the moral imperative of prohibiting nuclear weapons and asked states to work hard to adopt a treaty by Friday.
- She made a special thank you to Helena Nolan of Ireland, who had facilitated the informal working group on articles 2-5. The president said that the work to draft these paragraphs has been a realistic process that can facilitate the adherence of nuclear-armed states to the treaty in future. Ambassador Whyte noted the importance of the treaty being flexible enough to adapt to future changes so that nuclear-armed states have the flexibility to adapt the principles of this treaty to their unique needs.
- Algeria raised a procedural question, noting that paragraph 13 of the resolution that established the negotiating conference calls for this conference to submit a report to the General Assembly and decide a way forward. Algeria felt that this implies that a decision to adopt a treaty would happen following the report to the General Assembly and not the same day. It said that it's not clear that 7 July is meant to be the end of the negotiations.
- The president responded to say that paragraph 12 of the same resolution calls on states participating in the conference to "make every possible effort" to

conclude a legally binding instrument to prohibit nuclear weapons. The programme of work for the conference has been designed with this objective in mind.

- South Africa explained that this paragraph was meant as a "safeguard" in case it was not possible to finish the work on time, a point that was reinforced by Austria. South Africa appealed to delegation to endeavor as best they can, mindful of the budgetary implications of convening further negotiations, to conclude the work of the conference by 7 July.
- Cuba said that it believes Algeria's concerns are legitimate but the mandate of the resolution allows the conference to reach an agreement on the treaty and participants should continue working toward that goal.
- Chile supported the appeal of South Africa, and further pointed out that states are working in the framework of the General Assembly and consider this conference to be a subsidiary of it. It noted that states have been discussing this concept of a ban treaty for a long time, and more time should not be necessary.
- Algeria responded to say that it was merely seeking clarification on this point and not objecting to the adoption of the treaty on 7 July.
- The meeting adjourned and the new text was posted online. Plenary will re-convene at 10:00 on Wednesday, 5 July. •



Conference Room 1, United Nations, New York, 3 July 2017. © Ralf Schlesener

## FREQUENTLY ASKED QUESTIONS ON WITHDRAWAL

### Is withdrawal a standard feature of treaties?

Yes. All disarmament treaties contain withdrawal clauses. Most other treaties also contain withdrawal clauses—including, for example, the conventions against torture and genocide. The inclusion of a withdrawal clause should not be seen as weakening, in any way, the norms that the treaty promotes.

### How are withdrawal clauses typically framed?

Disarmament treaties such as the Mine Ban Treaty and Convention on Cluster Munitions have simple withdrawal clauses requiring a state to give “a full explanation of the reasons motivating withdrawal”.

However, a number of older disarmament treaties—particularly those that do not have a strong humanitarian focus—stipulate that withdrawal is possible only if the withdrawing state *decides* that “extraordinary events ... have jeopardized the supreme interests of its country”.

### Should “supreme interests” language be used in the ban treaty?

No. This formulation is inappropriate for the ban treaty, as it assumes a security-based perspective that is out of line with the humanitarian focus of this treaty. Its inclusion would represent a step backwards for humanitarian disarmament law.

The “supreme interests” language runs counter to the principles and goals of the treaty as set forth in the draft preamble. It sends the message that these interests trump the treaty. A simple withdrawal clause would avoid sending this message and just recognize that states can withdraw from the treaty.

It is important to note also that the “supreme interests” test is largely subjective. A state may essentially decide for itself whether extraordinary events have jeopardized the supreme interests of its country. If it is determined to withdraw, this formulation will pose no significant barrier.

### Would the absence of “supreme interests” language weaken the clause?

No. In fact, it would greatly strengthen the clause—and the treaty as a whole—by avoiding the suggestion that there might be legitimate security-based reasons to acquire and use nuclear weapons. The treaty must be clear that there can be no justification whatsoever for these abhorrent weapons.

For good reason, “supreme interests” language is not included, for example, in the conventions against torture and genocide—both of which contain simple withdrawal clauses. The absence of this language does not in any way weaken those treaties and the norms they promote.

### What language should be used instead?

The treaty should use a simple formulation such as the following: “Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty. It shall give notice of such withdrawal to the Depositary. Such notice shall include a full explanation of the reasons motivating withdrawal.”

### How can the withdrawal provision be strengthened further?

One idea is to stipulate that notice of withdrawal shall automatically trigger an extraordinary meeting of states parties. This would give the parties a chance to discuss and seek to resolve the concerns of the withdrawing state—or at least to condemn its decision. Another possibility is to increase the notice period.

### Should a state party be able to withdraw during an armed conflict?

No. It is important to retain the caveat in the draft withdrawal clause preventing a state party from withdrawing from the treaty if it is engaged in an armed conflict. Similar caveats can be found in the Mine Ban Treaty and Convention on Cluster Munitions.



ICAN demonstration, New York, 28 June 2017. Photo © Ralf Schlesener