



NUCLEAR BAN DAILY



Reaching Critical Will

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IN THIS ISSUE

- 1 | The ban and other law
- 2 | Calendar of events
- 3 | News in brief

THE BAN AND OTHER LAW

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

On Tuesday morning, the conference wrapped up its read through of the President's draft treaty text. In the afternoon, states engaged in an informal, off-the-record discussion. We are not reporting on that session but welcome the decision to permit civil society to observe.

In terms of the draft text, one of the issues discussed on Tuesday morning was the relationship between this treaty and the Non-Proliferation Treaty (NPT), which is currently described in article 19. Since the process to ban nuclear weapons began its supporters have had to defend against accusations of undermining or even destroying the NPT. Such accusations are not based on any real risk or challenge to the NPT regime. The ban treaty is an attempt by most NPT states parties to help fulfill their article VI

obligations under the NPT to pursue in good faith effective measures for nuclear disarmament.

The current wording in the draft treaty is problematic. It currently states that this treaty "does not affect the rights and obligations" of NPT states parties. Article 30(2) of the Vienna Convention on the Law of Treaties notes 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 the other treaty prevail." Whilst the nuclear weapon ban treaty is complementary to the NPT, the NPT's provisions must not prevail over the ban treaty's. One concern raised by several states during these negotiations is that the nuclear-armed states would try to argue that their (erroneous) assertion that

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Women's March to Ban the Bomb solidarity event in Melbourne, Australia © ICAN Australia

Editorial, continued

they have a “right” to possess nuclear weapons under the NPT would override the ban treaty’s prohibition of these weapons.

One option is to delete article 19, as some states such as Egypt and others suggested. Another is to follow Malaysia’s suggestion to use the formulation from article 26 (1) of the Arms Trade Treaty, which reads, “The implementation of this Treaty shall not prejudice obligations undertaken by States Parties with regard to existing or future international agreements, to which they are parties, where those obligations are consistent with this Treaty.” This formulation seems like it should assuage any concerns that the ban undermines the NPT whilst not subjecting the ban to the NPT’s problematic elements or interpretations.

The NPT is also referred to in the draft preamble, and that should also guard against those who wish to disparage the ban treaty as an attack on that regime. The language in the revised text is awkward, however. A reference simply to the NPT would be sufficient, as the “three pillar” concept is not enshrined in that treaty.

Other aspects of the revised preamble are very welcome. The reference to the disproportionate impact on indigenous peoples from nuclear weapon activities is reflective of the wide support indicated in the room for such language. There is also a new paragraph that recognizes the “equal, full and effective participation

of both women and men is an essential factor for the promotion of and attainment of sustainable peace and security,” and expresses commitment “to support and strengthen effective participation of women in nuclear disarmament.” This is important for building upon commitments made by states in other forums and contexts to promote women’s participation as well as to incorporate gender perspectives into this work. The reference to gendered impacts of nuclear weapons is still limited to ionizing radiation. This should be changed to the “disproportionate impact of nuclear weapons on women and girls,” in recognition that these effects are not just physical but also social, cultural, and economic.

It is good to see human rights law reflected in the revised preamble, though environmental law is missing. The preamble should acknowledge the principles enshrined in international environmental law. Both of these references will help reinforce the positive obligations under development regarding victim assistance and environmental remediation.

This is, after all, the point of the preamble—to send a clear political message about the motivations and philosophical framing of the treaty, and where possible to provide guidance and reinforcement for the implementation of its provisions. In this sense it is crucial that the preamble not become diluted but that it includes the strongest, clearest possible language. The latest draft is a good step in that direction. •

CALENDAR OF EVENTS: THURSDAY, 22 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
10:00-13:00	Plenary	CR 1	
10:00-13:00	Lessons from the Chemical and Biological weapons Conventions	CR B	IPB
13:15-14:30	Scotland: a disarming view of the ban treaty	CR B	Scottish CND
13:15-14:30	Nuts and bolts of the ban	CR 1	UNIDIR
15:00-18:00	Plenary	CR 1	
15:00-18:00	Threat and deterrence	CR B	IALANA



NEWS IN BRIEF

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

The News in Brief may not capture every proposal or position but provides an overview of the discussion.

Final provisions, continued

Article 9

- Brazil said it could not support the suggestion from the Netherlands to include a clause that would subordinate this treaty to the NPT for reasons similar to what Ecuador expressed about article 19. It also cannot support the Swiss proposal to include a provision in article 9 allowing on-going military cooperation with states not party.

Article 11

- Indonesia supported the suggestion made by previous delegations to be more specific in terms of addressing who has the right to propose amendments. It supports suggestions made by previous delegations that amendments should be adopted by a two-thirds majority, but could live with a three-quarters majority.
- Mexico said it must be established that amendments cannot go against the principles and purposes of this treaty. Peru and Guatemala agreed with Malaysia's proposal made Tuesday to not allow amendments that go against the goals or purposes of the treaty.
- Peru supported Cuba's suggested of changing "may" to "shall" in article 11.1.
- Malaysia emphasised that another aspect of its proposal made on Tuesday was to strengthen the procedure by which amendments are made.

Article 12

- Venezuela feels that a sequential focus on the means of dispute settlement is needed and prefers direct negotiation to settle disputes. A move to the ICJ should be based on mutual consent. It suggested deleting the second paragraph.

Article 13

- Indonesia believes this article could be strengthened so as to become more proactive. It supported the logic proposed by Egypt on Tuesday, to replace "attracting" with other words, and proposes "to promote" along with "encourage".
- Thailand said that this article must remain clear.
- Singapore suggested adding a paragraph to the preamble to encourage universalisation, similar to what is in the Convention on Cluster Munitions. Malaysia supported this.
- Thailand noted that there is not a provision clarifying that the instrument will be open for accession.

- Peru believes that the treaty should establish an affirmative obligation to promote the norms that it establishes.
- Malaysia said it is fine with the language in the draft treaty and suggested including universalization as an agenda item at meetings of states parties.

Article 14

- Venezuela suggested adjusting the language to eliminate the last five words.

Article 16

- Singapore said that the amount of ratifications in the draft text (40) is acceptable.
- Guatemala suggested a reduction to 30, but that 40 is reasonable.

Article 17

- Venezuela said this instrument be exempt from reservations under the nature and scope under peace-building.
- Mexico supported the modifications suggested by Cuba.
- Fiji agreed with other states that have said states parties cannot be able to have reservations.
- Peru supported Cuba's proposal that reservations cannot pertain to parts of the treaty, but to the instrument as a whole.
- Guatemala urged to not amend this article.

Article 18

- Indonesia agrees with Liechtenstein to simplify the paragraphs here. It believes that it is the sovereign right of a state to withdraw but pointed out that this should be done in a very proper way because withdrawing from this treaty would constitute a threat to peace and security.
- Venezuela said that it is unnecessary to mention the UN Security Council as the notification body, given the reticence of the P5 to join the treaty negotiations. The UN General Assembly can be trusted for this. Singapore supported this.
- Venezuela supported Egypt's suggestion to add "further withdrawal" to the title.
- Mexico and Singapore supported the suggestion of Liechtenstein to the notification period from three months to 12 months.

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News in brief, continued

Article 19

- Ecuador expressed concern about the reference to the NPT in this article, stating that it could make the ban “subordinate” to the NPT and could make it subject to the ways in which nuclear-armed states have interpreted their “rights” under the NPT. It asked if this article should be eliminated.
- Indonesia sees merit in the suggestion to delete it, but also suggested other ways to address this issue such as through strengthening article 9 on the relationship to other treaties. Another approach would be take a “rights and obligations” perspective, for example stipulating that it is the right of states parties to acquire nuclear technology for peaceful purposes.
- Singapore said it will propose some tweaks to this article.
- Nigeria is aligned with the issues raised by Ecuador about the reference to the NPT. It suggested that one way out would be to make reference to other agreements in this article such as the nuclear weapon free zone (NWFZ) treaties, in no particular order; another path would be to delete the reference, or consider the proposals that Singapore will make.
- Guatemala said if language cannot be identified to solve the issues raised by Ecuador, it would then and others in supporting deletion.

- Venezuela supported Cuba’s suggestion to add a reference to NWFZ treaties.
- Mexico said that this article should not be limited to the NPT and could support the deletion of this article as has been suggested by Ecuador, Indonesia, etc.
- Mexico, Thailand, and Venezuela expressed support for the proposal from Malaysia made on Tuesday to use language from ATT article 26.1.

Positive obligations

- Fiji expressed support for the concerns raised by Marshall Islands on Tuesday.

Decision-making

- Philippines proposed language about decision-making processes, that reinforced making every effort to adopt decisions by consensus and if this is not reached, to move to a two-thirds majority vote of states parties that are present and voting at the time of the decision. It is open to the where this could be placed in the treaty.
- Malaysia said this is an interesting idea although questioned if this is something to specify in the treaty or could be left for the rules of procedure for Meetings of States Parties. •

Threat and Deterrence

Thursday, June 22, 2017, 3:00 – 5:00, Conference Room B

Commander Robert Green, Royal Navy (Ret’d)

Co-Director, Disarmament & Security Centre, New Zealand; author, *Security Without Nuclear Deterrence*; former UK nuclear weapons operator

Professor Janne Nolan

Research Professor, The George Washington University; author of *Guardians of the Nuclear Arsenal: The Politics of Nuclear Strategy* and other books

Dr. John Burroughs

Executive Director, Lawyers Committee on Nuclear Policy; author, *The Legality of Threat or Use of Nuclear Weapons: A Guide to the Historic Opinion of the International Court of Justice*. He will introduce the Lawyers’ Letter on the Abolition of Nuclear Weapons, available at www.ialana.info.

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