

United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination

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Banning nuclear weapons: principles and objectives of a legally binding instrument

Submitted by the Women's International League for Peace and Freedom¹

1. The following is an overview of the principles and objectives that should be reflected in a treaty prohibiting nuclear weapons.
2. **The treaty should express deep concern about the catastrophic humanitarian consequences of any use of nuclear weapons.** The development of new international law on nuclear weapons needs to be based on the catastrophic humanitarian consequences caused by a detonation of a nuclear weapon. These consequences give urgency and necessity to the prohibition and elimination of nuclear weapons. These are weapons of mass destruction—indiscriminate and murderous. They are not tools of “security”. Recognising the humanitarian impact of their use is important for ensuring that the treaty banning them is comprehensive and effective.
3. **In this context, the treaty should recognise the gendered impacts of the development, testing, and use of nuclear weapons.** Women face unique devastation from the effects of the use 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. Women who have survived nuclear weapon tests or use also face unique social challenges related to how they are treated in societies and communities.² 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

¹ This working paper is a shortened version of the first section of a report published by the Women's International League for Peace and Freedom in March 2017. The full version is available at <http://www.reachingcriticalwill.org/images/documents/Publications/banning-nuclear-weapons.pdf>.

² See *Unspeakable suffering: the humanitarian impact of nuclear weapons*, Women's International League for Peace and Freedom, February 2013, available at: <http://www.reachingcriticalwill.org/images/documents/Publications/Unspeakable/Unspeakable.pdf>; Ray Acheson, *Sex, gender, and nuclear weapons*, International Campaign to Abolish Nuclear Weapons, July 2015, available at: <http://www.reachingcriticalwill.org/images/documents/Publications/sex-gender-nuclear-weapons.pdf>; and presentation by Mary Olsen, Nuclear Information and Resource Service, to the Vienna Conference on the Humanitarian Impact of Nuclear Weapons, 8 December 2014, available at: http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/vienna-2014/8Dec_Olson.pdf.

weapons affect human health, in order to help motivate their prohibition and elimination.

4. **The treaty must emphasise that it is inconceivable that any use of nuclear weapons would be compatible with the requirements of international law, including international humanitarian law.** Nuclear weapons are indiscriminate by nature. When used in Hiroshima and Nagasaki, nuclear weapons mostly killed civilians, and did immeasurable damage to civilian infrastructure and economy. Lawyers, judges, and legal scholars have thoroughly examined the legality of using nuclear weapons. In 1996, the International Court of Justice (ICJ) issued an advisory opinion stating that “the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law.”³ It also explained that “states must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.”⁴

5. **The treaty should also declare that any effort to use or threaten to use nuclear weapons is a crime against humanity.** This recognition helps reinforce the illegitimacy of nuclear weapons. In 1961, the UN General Assembly adopted resolution 1653 (XVI), which declares “any state using nuclear and thermonuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind [sic] and civilization.”⁵

6. **It should also recognise that the use or threat of use of nuclear weapons is contrary to laws of humanity or the dictates of public conscience.** Ethics and morality provide an important basis for the prohibition of nuclear weapons. The Chair’s Summary of the Vienna conference on the humanitarian impact of nuclear weapons in December 2014 found that “the catastrophic consequences of a nuclear weapon detonation event and the risks associated with the mere existence of these weapons raise profound ethical and moral questions on a level transcending legal discussions and interpretations.”⁶ This was echoed in the Humanitarian Pledge emerging from this conference, which has so far been endorsed by 127 states.⁷ This pledge sparked the adoption of a UN General Assembly resolution on the “Ethical imperatives for a nuclear-weapon-free world,” which describes the elimination of nuclear weapons as a “global public good of the highest order” and highlights the ethical responsibility of all states toward this goal.⁸

7. Some scholars of ethics and law have argued that the effects of nuclear weapons are of such a brutal nature that they ought to be categorically banned—that public conscience, or morality, requires it.⁹ This concept of the dictates of public conscience appears in the “Martens

³ “Legality of the Threat or Use of Nuclear Weapons,” International Court of Justice, 8 July 1996, available at: <http://icnp.org/wcourt/opinion.htm>.

⁴ Ibid.

⁵ United Nations General Assembly resolution 1649 (XVI), “Declaration on the prohibition of the use of nuclear and thermo-nuclear weapons,” 24 November 1961, <http://nwp.ilpi.org/wp-content/uploads/2011/12/UNGA-Declaration-on-the-Prohibition-of-Use.pdf>.

⁶ “Report and Summary of Findings of the Conference,” Vienna Conference on the Humanitarian Impact of Nuclear Weapons, 8-9 December 2014, available at: <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/vienna-2014/ChairSummary.pdf>.

⁷ See <http://www.icanw.org/pledge> for a list of endorsing states.

⁸ “Ethical imperatives for a nuclear-weapon-free world,” A/RES/71/55, 5 December 2016, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/55.

⁹ See for example the presentation of Nobuo Hayashi, University of Oslo, to the Vienna Conference on the Humanitarian Impact of Nuclear Weapons, 8 December 2014, available at:

Clause,” introduced in 1889 and slightly modified in 1907 in the Hague Conventions, which finds that civilians and combatants “remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”¹⁰ Several submissions to the ICJ when it was considering the legality of the use or threat of use of nuclear weapons made use of the Martens Clause.¹¹

8. **With all this providing motivation, the preamble should register states parties’ determination to eliminate nuclear weapons and their means of delivery.** The total elimination of all nuclear weapons is the key goal of the prohibition of nuclear weapons. In today’s context, when the nuclear-armed states have refused to engage in nuclear disarmament and are instead reinforcing and building up their arsenals, the prohibition of nuclear weapons is an imperative towards achieving that objective. The elimination of nuclear weapons must be forefront in the motivations for the provisions of this treaty. All states that are already party to the NPT are legally bound to achieve nuclear disarmament—which was reaffirmed by the ICJ in its 1996 advisory opinion on the use and threat of use of nuclear weapons. The NPT is also clear that this includes the elimination of delivery systems for nuclear weapons.

9. **The treaty should also express the conviction that all states have an obligation to make every effort to achieve the goal of a world free of nuclear weapons.** The NPT is clear that it is not just the nuclear-armed states that have a responsibility of pursuing and achieving nuclear disarmament. In this regard, all states parties to the NPT—and to the nuclear ban treaty—must not engage in activities that facilitate a nuclear arms race or promote the possession or use of nuclear weapons for any purpose.

10. **The treaty should emphasise the need to establish a clear legal standard to prohibit nuclear weapons in the same way as the other weapons of mass destruction have been prohibited through specific instruments.** Recognising the fact that nuclear weapons are the only weapons of mass destruction not yet subject to a legally binding prohibition helps contextualise a treaty banning nuclear weapons in terms of other WMD treaty law. Biological and chemical weapons have been prohibited and are subject to programmes for their elimination. Nuclear weapons cannot be excused!

11. **The treaty must be sure to reject any role for nuclear weapons in security arrangements.** 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. The ban treaty is a legal codification of the norms and stigma against nuclear weapons; no state party should be able to accept a prohibition on nuclear weapons whilst promoting these weapons as necessary for its security.

12. **The treaty should also recognise the ultimate objective of general and complete disarmament.** Most UN resolutions and major treaties related to disarmament and arms control

http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/vienna-2014/9Dec_Hayashi.pdf; the presentation of Ray Acheson, Women’s International League for Peace and Freedom, to the NPT Review Conference, 8 May 2015, available at: <http://www.reachingcriticalwill.org/images/documents/Publications/sex-gender-nuclear-weapons.pdf>; and Nina Tannenwald, *The Nuclear Taboo: The United States and the Non-Use of Nuclear Weapons Since 1945*, Cambridge: Cambridge University Press, 2008.

¹⁰ Rupert Ticehurst, “The Martens Clause and the Laws of Armed Conflict,” *International Review of the Red Cross*, No. 137, 30 April 1997, available at: <https://www.icrc.org/eng/resources/documents/article/other/57jnhhy.htm>.

¹¹ Ibid.

reflect this goal, including the nuclear Non-Proliferation Treaty (NPT).¹²

13. **The treaty should stress that, in a world where basic human needs have not yet been met, the vast resources allocated to the production, modernisation, and maintenance of nuclear arsenals should instead be redirected to meeting social needs.** Right now trillions of dollars are being spent or committed to developing new nuclear weapons, “modernising” existing ones, and “upgrading” the missiles, bombers, and submarines on which nuclear weapons are deployed. Recognising the waste of money being spent on weapons of terror and mass destruction is important for underscoring the multitude of ways in which these weapons are a global injustice and against the principles and needs of humanity.

14. **The treaty should reaffirm the NPT and the ICJ advisory opinion.** The NPT is currently the only international treaty mandating multilateral negotiations of nuclear disarmament. It is important to contextualise the treaty prohibiting nuclear weapons as part of the initiative to fulfill article VI of the NPT. Therefore, the ban treaty preamble should note that article VI of the NPT stipulates that all states parties undertake “to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”¹³ The preamble should also recall that the ICJ advisory opinion unanimously concluded that states must bring to conclusion multilateral negotiations on nuclear disarmament. As the Court argued, negotiations cannot be an end in itself.¹⁴

15. **The treaty should also reaffirm the treaty’s intention to build upon the norms that exist within the nuclear weapon free zone (NWFZ) treaties to prohibit and promote the elimination of nuclear weapons.** Much of the world is already covered by NWFZs. Those treaties have a variety of provisions that are similar to the provisions that will be contained within the global treaty banning nuclear weapons being negotiated now. It’s important to remind states that they have already done much of the work necessary to formally reject nuclear weapons, and that others have the opportunity to do the same even they are not situated in a region where such a zone has been negotiated yet.¹⁵

16. **The preamble should also emphasise that states parties should strive to promote universality of the treaty.** While it is not necessary for the ban treaty to be universal in order for it to have practical and normative impacts, it is important that all states parties strictly adhere to its provisions and that they work strenuously towards its full implementation and its acceptance in law by as many governments as possible.

17. **The treaty should express determination to ensure the full realisation of the rights of all victims of nuclear weapons, and acknowledge the disproportionate and ongoing impact of the testing and development of nuclear testing on indigenous communities around the world.** The humanitarian justification for the prohibition of nuclear weapons is

¹² For more on general and complete disarmament, please see *Rethinking General and Complete Disarmament in the Twenty-first Century*, UNODA Occasional Papers, No. 28, October 2016, <https://www.un.org/disarmament/publications/occasionalpapers/no-28>.

¹³ Treaty on the Non-Proliferation of Nuclear Weapons, 1968, <http://www.reachingcriticalwill.org/images/documents/Resources/Treaties/NPT.pdf>.

¹⁴ See <http://www.lcn.org/wcourt> for more information.

¹⁵ For a comparative overview of provisions contained within nuclear weapon free zone treaties (and other agreements regulating nuclear weapons), see *Filling the legal gap: the prohibition of nuclear weapons*, Women’s International League for Peace and Freedom and Article 36, April 2015, available at: <http://www.reachingcriticalwill.org/images/documents/Publications/filling-the-legal-gap.pdf>.

rooted in the experience of survivors of nuclear weapon use and testing. Recognition of victim's rights, which are reflected in other humanitarian disarmament treaties, is essential.

18. **The preamble should also articulate the right to protect the world commons for future generations.** The principle of guardianship for future generations reflects the understanding that the threat nuclear weapons pose to all life on earth is not limited to a present threat, but rather that the existence of nuclear weapons poses the risk that future generations will not have a world to inhabit.¹⁶

19. **The treaty should also reflect the rights and obligations of whistleblowers in the context of fulfilling the treaty's objectives.** When it comes to transparency and accountability, ensuring the rights of whistleblowers is essential. Information provided by non-state actors, as a form of "societal verification," might assist in the detecting of undeclared nuclear weapon related activities. The treaty should reflect the need for witness protection and other relevant measures. There is a precedent in the field of human rights, with obligations of the International Criminal Court to protect witnesses.¹⁷

20. **The treaty could also encourage states parties to engage in risk education.** States should be encouraged to educate and raise awareness of their citizens about the risks of radiation and other catastrophic humanitarian consequences of the use and testing of nuclear weapons. This will underscore the humanitarian purpose of the treaty.

21. **The treaty should recognise the efforts to advance nuclear disarmament undertaken by the United Nations, the International Red Cross and Red Crescent Movement, and the International Campaign to Abolish Nuclear Weapons.** Acknowledging that public conscience, awareness, and mobilisation is important to the success of any international law is a good way to remind states that they will be held to account for their commitments, and that their policies and practices are embedded within a context of the rule of law, international cooperation, and public oversight.

¹⁶ See <http://www.sehn.org/future.html>.

¹⁷ For more information and history about societal verification, see *Global Fissile Material Report 2009: A Path to Nuclear Disarmament*, International Panel on Fissile Materials, 2009, pp. 114–123, <http://fissilematerials.org/library/gfmr09.pdf>.