

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

17 March 2017

English only

New York, 27-31 March 2017 and 15 June-7 July 2017

Banning nuclear weapons: prohibitions of a legally binding instrument

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

1. The following is an overview of the prohibitions that should be included in a treaty prohibiting nuclear weapons.
2. **The ban treaty must prohibit the stockpiling of nuclear weapons.** The most fundamental element of the prohibition treaty is perhaps that no state can join the treaty and possess nuclear weapons. The NPT only prohibits the possession of nuclear weapons by non-nuclear-armed states parties. The ban treaty must categorically prohibit the stockpiling of nuclear weapons by all states parties, without discrimination.
3. Any state with nuclear weapons that wants to join the ban the treaty would need to eliminate their nuclear weapons. The Chemical Weapons Convention, for example, 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.”² The ban treaty itself does not need to set out provisions for elimination. It would only need to require that any state joining the treaty eliminate its nuclear weapons. A state could dismantle its nuclear weapons before joining the treaty (as was the case with South Africa’s accession to the NPT). This, however, may unnecessarily delay a state joining the treaty after it has decided to give up its nuclear weapons.
4. Ban treaty states parties could agree that a nuclear-armed state that has decided to eliminate its nuclear arsenals could do so by negotiating a protocol or other agreement with the ban treaty states parties, with agreed timeframes and in accordance with agreed verification

¹ This working paper is a shortened version of the second 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 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, <http://reachingcriticalwill.org/images/documents/Resources/Treaties/CWC.pdf>. The CWC requires that states declare their chemical weapons and “Each State Party shall, immediately after the declaration ... has been submitted, provide access to chemical weapons ... for the purpose of systematic verification” and “Provide its general plan for destruction of chemical weapons that it owns or possesses, or that are located in any place under its jurisdiction or control.” The CWC also requires that “Such destruction shall begin not later than two years after this Convention enters into force for it and shall finish not later than 10 years after entry into force of this Convention. A State Party is not precluded from destroying such chemical weapons at a faster rate.”

arrangements.³ This would allow a voice for ban treaty states parties in the manner in which the elimination takes place—including the requirement that in undertaking stockpile destruction and removal measures, states parties must observe all necessary safety precautions to protect populations and the environment. Or, nuclear-armed states could negotiate amongst themselves provisions for a time-bound, verified programme for elimination, outside of the ban treaty, and could join the treaty after that has been completed.

5. **The treaty should prohibit the deployment of nuclear weapons.** The NPT does not prohibit the deployment of nuclear weapons. This has allowed its nuclear-armed states parties to maintain active stockpiles of nuclear weapons at varying levels of alert. It has also allowed some of their allies to maintain active stockpiles of nuclear weapons on their territories with the capability of taking possession and using these weapons within minutes. The deployment of nuclear weapons must be prohibited because it implies capability and willingness of use. It can be seen as different from “stationing”—which suggests storage, but the weapons may not always be ready for use—and from “stockpiling”—which suggests permanent possession. A deployed nuclear weapon is one that is in operation, on a missile, bomber, or submarine.

6. **The ban treaty should prohibit the use and threat of use of nuclear weapons.** This would be the first global prohibition under international treaty law against the use or threat or use of nuclear weapons. Some of the nuclear weapon free zone (NWFZ) treaties include such a prohibition while their protocols prohibit the NPT nuclear-armed states from using nuclear weapons against countries within the zones. But these latter prohibitions are subject to reservations and conditions by those nuclear-armed states. The ICJ advisory opinion concluded that the use or threat of use of nuclear weapons is generally contrary to international law, but included an exception of extreme circumstances in which the survival of a state is at stake. A binding provision in the ban treaty would reaffirm the international customary understanding that no use of nuclear weapons is consistent with international law.

7. Other treaty law banning specific weapons may not include threat of use, but it is a necessary element in a nuclear weapon ban treaty because the entire concept of nuclear “deterrence” relies on the threat of use—and on preparedness for such use. No state party to the ban treaty should be able to adhere simultaneously to a security policy that includes the threat of use of nuclear weapons. Threat of use is included in the NWFZ treaties. In addition, UN Security Council resolution 984 (1995)⁴ states that “aggression with nuclear weapons or the threat of such aggression ... would endanger international peace and security.”⁵ A prohibition on threat of use within the ban treaty would apply not just to aggression but to all circumstances.

8. **The treaty should also prohibit the engagement in any preparations for the use of nuclear weapons, including planning and training.** Any activities related to the preparation of the use of nuclear weapons—such as training exercises, planning scenarios that envision the use of nuclear weapons, etc.—would not be compatible with states parties’ obligations under the ban treaty. While joining the ban treaty should not require any state to exit any particular

³ This last is model followed by the NPT with respect to the safeguards required by article III, which must be negotiated within a specified number of days of entry into force between the state party and the IAEA.

⁴ This resolution deals with “negative security assurances”—the guarantee from nuclear-armed states that they will not use or threaten to use nuclear weapons against non-nuclear-armed state parties of the NPT. However, it would not be advisable for states to pursue negative security assurances within the context of a ban treaty, since such a provision would signal conditional acceptance of the possession of nuclear weapons by states outside the treaty.

⁵ United Nations Security Council resolution 984, S/RES/984 (1995), 11 April 1995, <http://unscr.com/en/resolutions/doc/984>.

military alliance, this prohibition would compel them to ensure that their participation in any alliance is compatible with their commitments and policies under the ban treaty.⁶ For states in NATO, for example, this would mean leaving the Nuclear Planning Group and opting out of any aspect of the strategic doctrine that involves any use of nuclear weapons either on their behalf or on behalf of any other member of the alliance.⁷ Similarly, relationships of “extended nuclear deterrence,” in which a nuclear-armed state pledges to use nuclear weapons to “protect” an ally, would need to be renounced by ban treaty states parties.

9. **The treaty should prohibit the transfer or acquisition of nuclear weapons.** The NPT prohibits the acquisition of nuclear weapons by non-nuclear-armed states. All of the NWFZ treaties prohibit the acquisition of and control over nuclear weapons by states parties. This standard must be extended globally.

10. **The ban treaty should also prohibit states parties from allowing nuclear weapons to be stationed on a territory under their control.** At least five states designated non-nuclear weapon states under the NPT currently host US nuclear weapons on their soil. The ban treaty would compel the end of any bilateral or alliance-based arrangement involving the hosting of nuclear weapons. In line with the provisions of all of the NWFZ treaties, a ban treaty must prohibit its states parties from receiving, storing, installing, or accepting deployment of nuclear weapons on their territories.

11. **The treaty should prohibit the development of nuclear weapons. This should include specific prohibitions on the research, design, development, manufacturing, and production of nuclear weapons.** All NWFZ treaties prohibit the production of nuclear weapons. Three explicitly prohibit the development of nuclear weapons.⁸ The Pelindaba Treaty prohibits research of nuclear weapons. A global prohibition on development of nuclear weapons should preclude all activities that lead up to the final manufacture of a nuclear weapon. A comprehensive prohibition of all development-related activities would align the ban treaty to the highest standards contained within the NWFZ treaties.⁹

12. **The treaty should prohibit the testing of nuclear weapons.** Testing is categorised separately from development by nuclear-armed states and thus needs to be explicitly prohibited by the nuclear weapon ban treaty.¹⁰ All NWFZ treaties prohibit testing by states parties. Additional protocols to the Pelindaba and Raotonga treaties prohibit nuclear testing by NPT nuclear-armed states within the NWFZs, where ratified. The Comprehensive Nuclear Test-Ban-Treaty (CTBT) prohibits testing of nuclear weapons by explosive means. Testing by other means, such as subcritical testing, computer modeling, or hydrodynamic trials are not yet banned.¹¹ Furthermore, the CTBT has not yet entered into force. The nuclear weapon ban treaty

⁶ Stein-Ivar Lothe Eide, “A ban on nuclear weapons: what’s in it for NATO?” International Law and Policy Institute, Policy Paper No 5, January 2014.

⁷ See for example Susi Snyder, *Dealing with a ban: implications of a nuclear weapons ban treaty on NATO*, PAX, April 2015, <https://nonukes.nl/what-would-banning-nuclear-weapons-mean-for-nato>.

⁸ Bangkok, Pelindaba, and Semipalatinsk

⁹ The word “production” or “development” alone does not necessarily account for various stages of development or some legacy capabilities, such as weapons design.

¹⁰ For example, see National Defense Authorization Act for Fiscal Year 2016, <https://www.congress.gov/bill/114th-congress/senate-bill/1356/text>.

¹¹ 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

should explicitly prohibit testing to reinforce and strengthen the norm created by the CTBT against nuclear weapon testing, to tighten the restrictions against all possible forms of testing, and to encourage states to uphold their current moratoriums against testing and/or to inspire new such moratoriums.

13. **The treaty should prohibit the assistance, encouragement, or inducement of any nuclear weapon-related activities, including specifically through financing.**¹² 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.

14. A prohibition on assistance with prohibited acts should explicitly include a prohibition on any form of financial or material support to public and private enterprises involved in any of the activities prohibited by the treaty. It should prohibit states parties from investing, directly or indirectly, in foreign companies or other foreign entities materially involved in nuclear weapon programmes, and to prohibit such investment by companies or other entities within their jurisdiction.

15. Such a prohibition 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.¹³ In this regard, a treaty ban on nuclear weapons 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.

16. 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.¹⁴

17. Other acts of encouragement and inducement must also be prohibited, as they are in other treaties banning weapon systems. “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.

and Present Outstanding Issues regarding Iran’s Nuclear Programme,” IAEA, GOV/2015/68, 2 December 2015 <https://assets.documentcloud.org/documents/2631873/IAEA-document.pdf>.

¹² 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.

¹³ 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.

¹⁴ “Guidelines for the observation and exclusion of companies from the Government Pension Fund Global’s investment universe”, adopted by the Norwegian Ministry of Finance on 1 March 2010 pursuant to Act no. 123 of 21 December 2005 relating to the Government Pension Fund, section 7.

18. **The ban treaty should prohibit the transit and transshipment of nuclear weapons through the territories of state parties.** The deployment of nuclear weapons in submarines and bombers may entail the transiting of such weapons through others' airspace and waters. On the basis of national security and public safety—and as a matter of principle—the ban treaty should prohibit the stationing or transit of nuclear weapons in states parties' territory, including in their airspace and territorial waters, or from allowing visits to their ports by foreign ships carrying nuclear weapons or visits to their airfields by foreign aircraft carrying nuclear weapons.

19. 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. Furthermore, 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. 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

20. 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.¹⁵ The Philippine constitutional amendment from 1987 adopts a policy of “freedom from nuclear weapons in its territory.”¹⁶ 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.”¹⁷ Austria's 1999 constitutional law prohibits amongst other things the transport of nuclear weapons.

¹⁵ It is worth noting that this legislation has endured despite the US government reacting by suspending its military alliance with New Zealand. In recent years, the United States has reversed this decision, restoring full military ties with New Zealand in a move that suggests such national legislation need not be a barrier to broader military cooperation with nuclear-armed states.

¹⁶ Philippine Constitution (1987), Article 2, section 8.

¹⁷ Rob van Riet, “Legislative Measures to Further Nuclear Abolition,” World Future Council, 2012.