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

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English only

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## **Banning nuclear weapons: positive obligations and other elements of a legally binding instrument**

**Submitted by the Women's International League for Peace and Freedom<sup>1</sup>**

1. The following is an overview of the positive obligations and other elements that should be included in a treaty prohibiting nuclear weapons.

### **Positive obligations**

2. **The treaty should recognise that victims and survivors of the use and testing of nuclear weapons have rights, as articulated in the development of international human rights law and other instruments prohibiting inhumane weapons, such as the treaties banning cluster munitions and antipersonnel landmines.** The ban treaty needs to remain consistent with existing law and principles relevant to the rights of victims and survivors of the use of weapons that violate international humanitarian law and human rights law, as well as areas such as the rights of persons with disabilities. Whilst the nuclear weapon ban treaty may itself not be the best vehicle for delineating the specific responsibilities of states parties or others in terms of providing assistance to victims and survivors, it should do everything it can to articulate the rights that victims and survivors have to such assistance—which could include medical care, rehabilitation, psychological support, and efforts to provide for social and economic inclusion.

3. Such recognition would flow from the obligations under the Convention on Cluster Munitions, which provides for obligations of states to understand the situation of affected populations and to respond to it in an inclusive and non-discriminatory manner. These obligations are derived from the general responsibility of states to support their citizens in the full realisation of their human rights, regardless of which state caused the harm. These obligations do not provide a direct framework for compensation or wider reparations. They do suggest the necessity of recording casualties or impacts of nuclear weapon use and testing; working to ensure the inclusion of affected people in developing a response to their needs; and promoting accountability of states towards their affected populations.<sup>2</sup>

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<sup>1</sup> This working paper is a shortened version of the third 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>.

<sup>2</sup> *'Victim assistance' in a treaty banning nuclear weapons*, Article 36, January 2015, <http://www.article36.org/wp-content/uploads/2015/01/victims-nuclear-weapons.pdf>.

4. **The ban treaty should also recognise the rights of whistleblowers.** Ensuring that individuals within states parties have the safety to report on their governments or relevant agencies they work for if they see violations of the treaty is important. Whilst the treaty may not be able to establish specific provisions for whistleblower safety, it should do everything it can to reflect that such individuals have rights and that states parties should work to ensure their protection and safety, including through other instruments and agreements.

5. **The ban treaty should reflect the need to rehabilitate territories that have been contaminated as a result of activities related to the use, development, testing, production, transit, transshipment, or storage of nuclear weapons in their territory.**<sup>3</sup> The detonation of a nuclear weapon, in conflict or testing or by accident, creates distinct and challenging patterns of long-term contamination. States parties to a ban treaty should recognise a responsibility to protect their populations from any such contamination.<sup>4</sup> Whilst recognising that nuclear contamination presents distinct technical challenges, such a principle is important to make the threat and the reality of harm from nuclear weapons a thing of the past. The ban treaty may not be the vehicle to set out a programme for environmental rehabilitation, but it should reflect the need and responsibilities of states to pursue it.<sup>5</sup>

6. **The ban treaty should reflect an obligation to inform the public about the risks of nuclear weapons.** Including an obligation for states parties to share information and educate the public about the risks of the development, use, and possession of nuclear weapons could, amongst other things, help discourage states from hiding information about the dangers of nuclear weapons and alert citizens to the dangers of existing radioactive sites. It would also help in the process of norm diffusion, strengthening public understanding of why a ban is necessary, and help maintain political pressure for disarmament, victim assistance, and remediation.<sup>6</sup>

7. **In this respect, the ban treaty should also reflect the right of future generations to know about the nuclear legacy bequeathed to them and how to protect themselves from it.** Due to the long-lived nature of many radioactive materials in nuclear weapon processes, future generations have the right to understand the physical dangers inherent to the nuclear legacy. They should be made aware of the history of the nuclear age, to understand where radioactive

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<sup>3</sup> This could apply, for example, to former nuclear weapon test sites such as the Marshall Islands, French Polynesia, Australia, and Algeria; to veterans of production and testing programmes; or to sites of nuclear weapon accidents, such as Spain and Greenland.

<sup>4</sup> Potential measures could be indicated in the treaty, such as excluding populations from the affected area and processes of decontamination and remediation.

<sup>5</sup> The ban treaty is also an opportunity to reflect on nuclear weapons as “environmental modifiers”. Regardless of whether their testing or use is intended to modify the environment, the impact of their testing and use is such. Further, it is an opportunity to build on the UN Environment Assembly resolution regarding the protection of the environment in areas affected by armed conflict, which amongst other things urges states to comply with the environmental provisions of international humanitarian law. See Doug Weir, “UNEA-2 passes most significant resolution on conflict and the environment since 1992,” Toxic Remnants of War, 28 May 2016, <http://www.trwn.org/unea-2-passes-most-significant-resolution-on-conflict-and-the-environment-since-1992>.

<sup>6</sup> Precedent for risk education can be found the Mine Ban Treaty, the Convention on Cluster Munitions, and the Convention on Certain Conventional Weapons protocol on explosive remnants of war. The UN study on disarmament and non-proliferation education from 2000, contained in A/RES/55/33, and UN General Assembly resolutions on disarmament education (the latest version being A/RES/69/65) are also relevant, as is action 22 of the 2010 NPT action plan and the final document of the 1980 World Congress on Disarmament Education.

contamination remains, to be able to monitor and repair radioactive waste containment and to apply future technologies that may further protect the biosphere.<sup>7</sup>

8. **The treaty should include provisions indicating that states parties have the right to seek and receive assistance in fulfilling their obligations under the treaty.** All other weapons prohibition treaties include this provision. Typically, the treaties specify that such assistance may be provided, *inter alia*, through the United Nations, international, regional or national organisations, non-governmental organisations, or on a bilateral basis. It should also indicate that states parties that are in a position to do so should undertake to provide assistance to contribute to the economic and social recovery needed as a result of the use and testing of nuclear weapons in affected states parties. International cooperation and assistance should also be oriented towards equal and effective participation in meetings, conferences, and implementation mechanisms of those from developing countries as well as gender diversity.

9. **The treaty will need to provide for states to undertake national measures to implement their obligations.** National legislation and policy is necessary to implement any international treaty at the state level. The ban treaty should require states parties to take all appropriate legal, administrative, and other measures, including the imposition of penal sanctions, to prevent or suppress any activity prohibited to states parties under the treaty undertaken by persons or on territory under their jurisdiction or control. The treaty should encourage states to criminalise the prohibited acts. It could build off of UN Security Council resolution 1540 (2004), for example, which “decides that all States, in accordance with their national law, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery.”<sup>8</sup>

#### Other elements

10. **The treaty should encourage states parties to undertake to consult and cooperate with each other regarding implementation of the treaty, and to work together in a spirit of cooperation to facilitate compliance by states parties with their obligations.** It’s important to remember that states joining this treaty are rejecting nuclear weapons in principle and practice. Building a community of states willing to codify this rejection will help build confidence and assist states in finding ways to cooperate to effectively implement the treaty. Most of the prohibitions suggest above would not require new verification mechanisms, or at most, would require globalisation of regional mechanisms or agreements. For example, some of the regional NWFZ treaties specify the parameters for special inspections. New verification measures would likely only be necessary once the elimination of nuclear weapons and delivery systems is pursued through this treaty or elsewhere.<sup>9</sup>

<sup>7</sup> See the Nuclear Guardianship Ethic, <http://www.joannamacy.net/nuclearguardianship/nuclear-guardianship-ethic.html>.

<sup>8</sup> UN Security Council resolution 1540, S/RES/1540 (2004), 28 April 2004, [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1540\(2004\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1540(2004)).

<sup>9</sup> Important work has been undertaken by organisations such as VERTIC in cooperation with Norway and the United Kingdom to consider how verification of nuclear disarmament might work. For a collection of publications and presentations on this work, see VERTIC’s website <http://www.vertic.org/pages/homepage/programmes/verification-and-monitoring/multilateral-disarmament-verification.php>. In addition, the International Panel on Fissile Materials has also considered the technical aspects of nuclear disarmament. See, for example, “Increasing Transparency of Nuclear-warhead and Fissile-material Stocks as a Step Toward Disarmament: A Preliminary Set of Proposals by the International Panel on Fissile Materials,” International Panel on Fissile Materials, presented at the meeting of the First Preparatory Committee for the 2015 Nuclear Non-Proliferation Treaty Review Conference, Vienna, 3 May 2012; and *Global Fissile*

11. **The treaty should also establish a procedure by which states parties may clarify and seek to resolve questions relating to matters of compliance with the provisions of the treaty by other states parties.** States parties may have a question or concern about compliance with the treaty during the course of its implementation. It is advisable for those negotiating the treaty to set out the parameters for resolving potential disputes. For example, the treaty text could stipulate that, when a dispute arises between two or more of its states parties relating to the interpretation or application of the treaty, the states parties concerned should consult together with a view to the settlement of the dispute by negotiation or by other peaceful means of their choice, including recourse to the meeting of states parties and referral to the International Court of Justice.

12. **The treaty should establish a mechanism to facilitate the treaty's implementation and universalisation.** States parties will need to decide what kinds of institutions are necessary for the effective implementation of the treaty. One option is to establish a dedicated agency. Treaties with dedicated agencies tend to have more support for states parties in terms of implementation, as well as for public education. A ban treaty agency could be established under the auspices of the United Nations, with a mandate to oversee the implementation of the treaty, to ensure compliance with its provisions, and to provide a forum for consultation and cooperation among states parties. The agency should also educate the public about the treaty and about the humanitarian impact of nuclear weapons. Alternatively, basic outreach and educational functions could be assigned to an existing, relevant agency or office of the United Nations. An executive body of states parties could be established to take decisions on matters such as agreement with acceding nuclear-armed states as well as compliance issues.

13. **States parties should meet regularly in order to consider and, where necessary, take decisions in respect of any matter with regard to the application or implementation of the treaty.** Meetings of states parties are important for building a community of states, international organisations, civil society groups, and academics to continue working for the complete elimination of nuclear weapons. This has proven very useful in the context of meetings of states parties of other disarmament treaties. The number of states supporting the ban treaty and participating in these meetings will likely grow after it opens for signature. For many states, the legal clarity and moral authority of such a treaty will make it difficult to resist once a political process forces governments to take a clear position either way. Such meetings will also create ongoing pressure for disarmament.

14. **The treaty should specify that states parties are not permitted to make reservations with respect to any articles of the treaty.** It is imperative that all states parties are bound equally by the treaty's provisions.

15. **The treaty should be open for signature by any state, including a state that is not a member of the United Nations.** States such as the Holy See and Palestine are able to join other weapons-related instruments, such as the Arms Trade Treaty (2013), and should be able to become states parties of the nuclear weapon ban treaty.

16. **The treaty should be subject to ratification, acceptance, or approval by its signatories.** Ratification is necessary for a treaty's provisions to apply that state. As is standard for other treaties, any state that has not signed and ratified the treaty prior to its entry into force should be permitted to accede to it at any time thereafter. The treaty should enter into force for that signatory on the date of deposit of its instrument of ratification.

17. **The ban treaty could include provisions for transparency and reporting in relation to ratification and accession to the treaty.**<sup>10</sup> Transparency is an important principle for advancing nuclear disarmament. Transparency objectives have been articulated in various NPT Review Conference outcome documents but compliance with these objectives has been unsatisfactory.

18. **The treaty should enter into force a specified number of months after a specified number of states have deposited their instruments of ratification. Entry into force should not be contingent upon the ratification of any particular state or group of states.** Demanding a specific number of ratifications, or ratifications of specific states, of other treaties (such as the CTBT) has given certain states or groups of states an effective veto of those treaties' entry into force. The ban treaty should be able to enter into force for its states parties in a reasonable timeframe.

19. **States parties should undertake to encourage states not parties to the treaty to ratify, accept, approve, or accede to the treaty, with the goal of attracting the adherence of all states to the treaty.** In order to disseminate the norm against nuclear weapons, states parties should try to get as many other states to join the treaty. Even if they do not hold out much hope of a particular state joining at a particular time, states parties have a responsibility to advance the norm and advocate against nuclear weapons at every opportunity.

20. **The treaty should be of unlimited duration and should remain in force indefinitely. A notification by a state party of its intent to withdraw from the treaty should immediately trigger a meeting of states parties.** Whilst states have the right to withdraw from treaties under the Vienna Convention on the Law of Treaties, other states parties to the treaty should have the opportunity to discuss the matter with the state wishing to withdraw, to see if the issue could be resolved in some other way.

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<sup>10</sup> The ban treaty could require states that join the treaty to make a declaration within a specified time frame, disclosing the presence or affirming the absence of: 1. The number, type and location of all nuclear weapons, nuclear-weapon-capable delivery systems, and nuclear weapon-usable material in their territory and/or under their jurisdiction or control; 2. The status and progress of programmes for the destruction of all nuclear weapons under their jurisdiction or control; and 3. The status and progress of programmes for the removal from their territory of nuclear weapons not under their jurisdiction or control. This would be relevant if a nuclear-armed states is using the ban treaty as the vehicle to eliminate its nuclear weapons, or if a state formally hosting weapons on a territory under its control is renouncing and removing those weapons.