

Humanitarian Positive Obligations for a Nuclear Weapons Ban Treaty

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1. The object and purpose of the proposed nuclear weapons ban treaty is to address and prevent the catastrophic humanitarian and environmental consequences of nuclear weapons. As such, the political process that has led to the beginning of negotiations is rooted in humanitarian disarmament, which seeks to eliminate the suffering caused by problematic weapons. The international community should seize the opportunity to achieve the humanitarian aims of this process by ensuring the nuclear weapons ban treaty includes strong positive obligations as well as prohibitions. Positive obligations would make the process of stigmatizing and limiting the harm of nuclear weapons the responsibility of all states, including those affected and not directly affected by nuclear detonations. Such provisions would encourage states to engage directly in extending and universalizing the norm, working toward a nuclear weapons free world.

2. Existing weapons treaties, especially humanitarian disarmament ones, provide important precedent for positive obligations. Their relevant provisions tend to fall in three categories:

- Rights and remedial measures (e.g. environmental remediation, risk education, victim assistance),
- Promotion of the treaty and of its norms (e.g. universalization and disarmament education),
- International cooperation and assistance to implement the above two sets of obligations.

3. This paper discusses each of these categories in more depth and argues that they offer a foundation on which to build positive obligations in the nuclear weapons ban treaty. All the examples from existing weapons law offered in this paper include positive obligations in the legally operative parts of the treaty. The same should be true for the nuclear weapons ban treaty. This new treaty offers an opportunity to strengthen and build on norms established by positive obligations in other treaties.

4. There is significant international support for such legal provisions. In the 27-31 March 2017 nuclear weapons ban treaty negotiation conference at the United Nations in New York, 27 states plus the Caribbean Community (CARICOM) offered support for provisions on positive obligations. The CARICOM statement, delivered by Antigua and Barbuda on behalf of its 15 member states, asserted that:

The case for the nuclear weapons ban treaty has been driven by serious concerns regarding the humanitarian consequences of nuclear detonation. As a result CARICOM calls for the operative part of the treaty to include positive provisions that address human and environmental harms, recognize rights and offer remedial measures to victims. These provisions should include environmental remediation, risk education, victim/survivor assistance and stockpile destruction.¹

5. The International Committee of the Red Cross (ICRC) and civil society statements from the International Campaign to Abolish Nuclear Weapons (ICAN), Article 36 and the Women's International League for Peace and Freedom (WILPF) offered further support. Civil society also submitted detailed working papers on potential positive obligations (see the 'Further Reading'). A side event that week explored how positive obligations could work, featuring speakers from Harvard Law School's

¹ CARICOM. (29 March 2017) CARICOM Statement on Core Prohibitions at the Nuclear Weapons Ban Treaty Negotiation Conference. <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nuclear-weapon-ban/statements/29March_CARICOM-T2.pdf>.

International Human Rights Clinic, Pace University's International Disarmament Institute, Mines Action Canada and Article 36.²

Rights and Remedial Measures

6. Humanitarian disarmament treaties obligate states to recognize the rights of those who are harmed by weapons and take steps to limit any ongoing harm. With regards to the nuclear weapons ban treaty, there have been proposals to include obligations on environmental remediation, risk education and victim assistance. All of these suggested provisions are well-grounded in existing law on other weapons.

7. Humanitarian disarmament treaties and some other weapons treaties require states to clear remnants of weapons lingering after their use. The 1997 Mine Ban Treaty (MBT) requires affected states to clear all minefields from their territories. Similar obligations are found in the Convention on Certain Conventional Weapons (CCW) 2003 Protocol V on Explosive Remnants of War (ERW) (Article 3) and 2008 Convention on Cluster Munitions (CCM) (Article 4).

8. To minimize the harm done by landmines and ERW before clearance is complete, the MBT (Article 5.2, Article 6.3 & 6.7), ERW Protocol (Article 4, 5 & 8) and CCM (Article 4, 6 & 7) all call on states to inform people of the dangers of mines, ERW and cluster munitions, through fencing and marking contaminated areas, offering warnings and 'risk education to the civilian population' (ERW Protocol, Article 5). These clearance and risk reduction education provisions can serve as models for the nuclear weapons ban treaty. The treaty should obligate states parties to remediate the environment affected by nuclear weapons and educate the local population about the risks and steps that can be taken to minimize them. Although it is likely impossible to return an environment to a pre-detonation state, any efforts to reduce the environmental consequences of nuclear weapons are beneficial.

9. During the March 2017 negotiation conference, 16 states plus CARICOM expressed support in their statements for environmental remediation of areas contaminated by the use (including testing) of nuclear weapons (Algeria, Austria, Bangladesh, Fiji, Guatemala, Holy See, Jamaica, Kazakhstan, Solomon Islands, Sri Lanka, Switzerland, Thailand, Timor-Leste, Trinidad and Tobago, Venezuela, Vietnam). Fiji offered a particularly strong statement based on its 'first hand experience of the destruction and long lasting effects that nuclear weapons have had on our people ... and environmental degradation of the ecosystem':

As a Pacific Island state, the region has faced the environmental and human consequences of more than 300 forced nuclear tests conducted over half a century. Even until today it remains unsafe for habitation, agricultural production and fishing which has drastically and permanently displaced islanders from their homes and dislocated the indigenous way of life for many Fijians of untold pain. ... Fiji endorses ... a commitment to provide ... environmental redress for Pacific islanders who have lost much as a result of nuclear testing....³

10. Further supportive statements were made by ICAN and other civil society groups (Article 36 and WILPF). Mayors for Peace also expressed support for environmental remediation in their working paper.⁴ Detailed research conducted by Harvard Law School's International Human Rights Clinic on the legal

² Elizabeth Minor. (31 March 2017) 'Side Event: Positive Obligations in Treaty to Prohibit Nuclear Weapons.' *Nuclear Ban Daily*. 1(5). p. 6. <<http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nuclear-weapon-ban/reports/NBD1.5.pdf>>.

³ Fiji. (31 March 2017) Fiji Statement at the Nuclear Weapons Ban Treaty Negotiation Conference. <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nuclear-weapon-ban/statements/31March_Fiji-T3.pdf>.

⁴ Mayors for Peace. (31 March 2017) *Recommendations of the Secretary General of Mayors for Peace for the successful outcome of the ban treaty negotiations*. A/CONF.229/2017/NGO/WP.15. <<https://www.un.org/disarmament/ptnw/pdf/A%20CONF.229%202017%20NGO%20WP.15.pdf>>.

and humanitarian case for environmental rehabilitation provisions was presented during the side event on positive obligations.⁵

11. Several weapons treaties also include provisions on victim/survivor assistance. The CCM has a stand-alone article that lays out an affected state party's obligations to victims in its territory. This article recognizes the relevance of 'human rights law', the importance of 'age- and gender-sensitive assistance' and the need to provide physical, psychological, and socioeconomic support to anyone whose rights are affected, regardless of when the weapons were used. States are also expected to 'make every effort to collect reliable relevant data with respect to cluster munition victims' (Article 5). Less detailed provisions on victim/survivor assistance are found in the MBT (Article 6.3) and ERW Protocol (Article 8.2).

12. During the March 2017 negotiation conference, 23 states plus CARICOM expressed support for victim/survivor assistance in the nuclear weapons ban treaty (Algeria, Austria, Bangladesh, Chile, Cuba, Ecuador, Fiji, Holy See, Ireland, Jamaica, Marshall Islands, Mexico, Nepal, Solomon Islands, South Africa, Sri Lanka, Sweden, Switzerland, Thailand, Timor-Leste, Trinidad and Tobago, Venezuela, Vietnam). For example, Algeria, which suffered nuclear testing before independence, stated:

[M]ost important[ly], my delegation would like to see that the treaty should also contain robust measures regarding the recognition of the rights and the needs of victims and survivors of the use and testing of nuclear weapons including with regard transgenerational health effects and a commitment to provide assistance to those victims....⁶

13. Further supportive statements were made by the ICRC, ICAN and other civil society groups (Article 36 and WILPF). Support for victim assistance was also expressed by International Physicians for the Prevention of Nuclear War⁷ and Amplify Youth Network/Nuclear Age Peace Foundation⁸ in their working papers. Mines Action Canada also made an in-depth presentation during the positive obligations side event on its working paper regarding a victim/survivor assistance provision, as well as complementarities with the MBT, CCM and Convention on the Rights of Persons with Disabilities.⁹ Almost all states participating in the nuclear weapons ban treaty negotiations are party to at least one of these treaties and so should be familiar with the types of obligations found in victim/survivor assistance provisions. Mines Action Canada also distributed answers to 'Frequently Asked Questions', to dispel some of the misunderstandings about a potential victim/survivor assistance provision.¹⁰

Promotion of the Treaty and of its Norms

14. Recent weapons treaties have included obligations on states to promote universalization of the treaty and discourage violations of its norms. For example, the CCM requires states to 'promote the norms it

⁵ Article 36 & International Human Rights Clinic, Harvard Law School. (March 2017) 'Environmental Remediation in the Nuclear Weapons Ban Treaty.' <<https://www.un.org/disarmament/ptnw/pdf/A%20CONF.229%202017%20NGO%20WP.15.pdf>>.

⁶ Abdelkarim Ait Abdeslam. (29 March 2017) Statement of Algeria on Core Prohibitions at the Nuclear Weapons Ban Treaty Negotiation Conference. <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nuclear-weapon-ban/statements/29March_Algeria-T2.pdf>.

⁷ IPPNW. (28 March 2017) *The health and humanitarian case for banning and eliminating nuclear weapons*. A/CONF.229/2017/NGO/WP.11. <<https://www.un.org/disarmament/ptnw/pdf/A%20CONF.229%202017%20NGO%20WP.11.pdf>>.

⁸ Amplify Youth Network/Nuclear Age Peace Foundation. (31 March 2017) *Youth and Multilateral Nuclear Disarmament Negotiations: A Voice to be Heard*. A/CONF.229/2017/NGO/WP.17. <<https://www.un.org/disarmament/ptnw/pdf/A%20CONF.229%202017%20NGO%20WP.17.pdf>>.

⁹ Mines Action Canada. (2017) 'Victim Rights and Victim Assistance in a Treaty Prohibiting Nuclear Weapons: A Humanitarian Imperative.' <https://d3n8a8pro7vhm.cloudfront.net/minesactioncanada/pages/173/attachments/original/1490716605/Negotiations_working_paper_final.pdf?1490716605>.

¹⁰ Mines Action Canada. (2017) 'Victim Rights and Assistance: Frequently Asked Questions.' <https://d3n8a8pro7vhm.cloudfront.net/minesactioncanada/pages/173/attachments/original/1490716496/FAQs_Victim_Assistance.pdf?1490716496>.

establishes' by encouraging accession of states not party and discouraging them 'from using cluster munitions' (Article 21.1 & 2). Similarly, the 2013 Arms Trade Treaty (ATT) establishes that its annual Conferences of States Parties will 'consider and adopt recommendations regarding the...promotion of its universality' (Article 17.4.b).

15. In addition to promoting the norm among states, several instruments call on states to educate their citizens and militaries about the norms embedded in it. The CCW requires states to disseminate the treaty 'as widely possible' and to include it in the curriculum of their 'programmes of military instruction' (Article 6). Similarly, the 2001 UN Programme of Action on Small Arms and Light Weapons endorses education for a 'culture of peace', including public awareness of the illicit trade in small arms; the 1999 Programme of Action on a Culture of Peace calls for education to promote general and complete disarmament.

16. With the nuclear weapons ban treaty, states should consider building on this precedent to develop a positive obligation to promote disarmament education. The conferences on the humanitarian impact of nuclear weapons showed there is a clear need for citizens to understand the catastrophic risks of nuclear weapons and to promote a stigmatizing norm against them. The 'importance' of disarmament education was emphasized in the Report of the Open-Ended Working Group on Nuclear Disarmament in 2016, particularly regarding 'the humanitarian consequences of nuclear weapons' (para 59, 63 & Annex 1, para 3). Disarmament education was endorsed by the 2010 Nuclear Non-Proliferation Treaty Review Conference Outcome Document (Action 22).

17. During the March 2017 negotiation conference, five states plus CARICOM expressed support for provisions on norm diffusion (Holy See, Ireland, Liechtenstein, Solomon Islands, Thailand). For example, Thailand stated '[W]e wish to reiterate that the true success of this instrument depends on its universalization and compliance.' They suggested that 'there is a merit to consider ... disarmament education and awareness raising ... [to be] included in the instrument.'¹¹

18. Further support for educational provisions was offered by Amplify Youth Network/Nuclear Age Peace Foundation in its working paper.¹² Research conducted by Pace University's International Disarmament Institute on educational provisions in disarmament instruments and their relevance to the ban treaty was presented during the side event on positive obligations.¹³

International Cooperation and Assistance

19. The humanitarian disarmament and other weapons treaties mentioned above – the MBT (Article 6), ERW Protocol (Article 8) and CCM (Article 6) – have provisions requiring international cooperation and assistance to implement the commitments they establish. Requiring international cooperation and assistance will be crucial in the nuclear weapons ban treaty, so that the burden of positive obligations is shared collectively and all states parties play a role in ensuring that the new norms are implemented.

20. During the March 2017 negotiation conference, 13 states plus CARICOM and the ICRC expressed support for provisions on international cooperation and assistance (Cuba, Fiji, Holy See, Nepal, Solomon Islands, Philippines, South Africa, Sri Lanka, Switzerland, Thailand, Timor-Leste, Trinidad and Tobago, Vietnam). For example, Sri Lanka asserted in a statement that:

In our quest to totally eliminate nuclear weapons, international cooperation, both in terms of finances and technical aspects, plays a pivotal role. Therefore, we strongly believe that the Treaty

¹¹ Varapote Chensavasdijai. (31 March 2017) Thailand Statement on Institutional Arrangements at the Nuclear Weapons Ban Treaty Negotiation Conference. <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nuclear-weapon-ban/statements/31March_Thailand-T3.pdf>.

¹² Amplify Youth Network/Nuclear Age Peace Foundation, 2017.

¹³ Matthew Bolton. (2017) 'The Case for Risk Education and Dissemination Provisions in the Nuclear Weapons Ban Treaty.' <<https://politicalminefields.files.wordpress.com/2017/03/nuclear-weapons-ban-treaty-and-educational-provisions.pdf>>.

*must provide for international cooperation and assistance, so that States parties could find recourse to them to meet the obligations arising from the Treaty.*¹⁴

21. Similarly, Switzerland stated that

*In view of the humanitarian dimension of the treaty, commitments to come to the assistance of any State faced by a nuclear attack of any type would seem appropriate. A number of options could be pursued, including victim assistance, assistance in cleaning efforts after a nuclear detonation or ensuring international cooperation and assistance*¹⁵

22. Further support for international cooperation and assistance was conveyed in statements by the ICRC and ICAN. Support was expressed too in civil society working papers submitted by Article 36 and WILPF.¹⁶ All of the panelists during the side event on positive obligations also emphasized the crucial need for international cooperation and assistance to be included in the treaty.

Conclusion

23. As the text of the nuclear weapons ban is drafted and negotiated, states and civil society must mobilize to ensure strong positive obligations in the operative part of the treaty. These should include: recognition of rights and remedial measures (environmental remediation, risk education, victim assistance), promotion of the norm (universalization and disarmament education) and international cooperation and assistance.

¹⁴ Sri Lanka. (29 March 2017) Sri Lanka Statement on Core Provisions at the Nuclear Weapons Ban Treaty Negotiation Conference. <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nuclear-weapon-ban/statements/29March_SriLanka-T2.pdf>.

¹⁵ Sabrina Dallafior. (28 March 2017) Switzerland Statement in General Exchange of Views at the Nuclear Weapons Ban Treaty Negotiation Conference. <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nuclear-weapon-ban/statements/28March_Switzerland.pdf>.

¹⁶ Article 36. (2017) *Positive Obligations in a Treaty Prohibiting Nuclear Weapons: Stockpile Destruction, Environmental Remediation, and Victim Assistance*. A/CONF.229/2017/NGO/WP.10. <<http://www.article36.org/wp-content/uploads/2017/03/A-CONF.229-2017-NGO-WP.10.pdf>>; WILPF. (17 March 2017) *Banning nuclear weapons: positive obligations and other elements of a legally binding instrument* A/CONF.229/2017/NGO/WP.3. <<https://www.un.org/disarmament/ptnw/pdf/A%20CONF.229%202017%20NGO%20WP.3%20WILPF%20WP3%20-%20positive%20obligations.pdf>>.

e. Further Reading

- Article 36. (2017) *Positive Obligations in a Treaty Prohibiting Nuclear Weapons: Stockpile Destruction, Environmental Remediation, and Victim Assistance*. A/CONF.229/2017/NGO/WP.10.
<<http://www.article36.org/wp-content/uploads/2017/03/A-CONF.229-2017-NGO-WP.10.pdf>>.
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<<https://www.un.org/disarmament/ptnw/pdf/A%20CONF.229%202017%20NGO%20WP.3%20WILPF%20WP3%20-%20positive%20obligations.pdf>>.