

Improving Positive Obligations in the Draft Convention on the Prohibition of Nuclear Weapons

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Executive Summary

The humanitarian framing of the Draft Convention for the Prohibition of Nuclear Weapons (DCPNW) and its positive obligations – on victim assistance, environmental remediation, universalization, national implementation and international cooperation and assistance – offer the potential for tremendous normative progress on nuclear weapons. They focus policy and legal attention on the unacceptable harm caused by nuclear weapons to people and the environment, rather than abstract and unverifiable notions of “deterrence.” However, comparing the DCPNW with other humanitarian disarmament instruments – such as the Antipersonnel Mine Ban Treaty (MBT), Convention on Certain Conventional Weapons (CCW) Protocol V on Explosive Remnants of War (ERW Protocol) and Convention on Cluster Munitions (CCM) – shows there is room for improvement as states turn the DCPNW into a final treaty at the UN in New York in June and July 2017. Specifically, as states consider how to improve the DCPNW, they should build on the foundation of other humanitarian disarmament instruments through:

- **Stronger human rights and environmental framing of the preamble, particularly regarding the impact on victims, indigenous peoples, gender equality and sustainable development,**
- **Making victim assistance an obligation and elaborating further on its necessary activities and institutional arrangements,**
- **Making environmental remediation an obligation and elaborating further on its necessary activities and institutional arrangements,**
- **Including a risk reduction education obligation in the environmental remediation provision,**
- **Including obligations to promote and universalize the norms stigmatizing nuclear weapons, condemn violations, and support disarmament education,**
- **Specifying further the types of national implementation measures to be put in place including legal, administrative and other measures,**
- **Adding transparency and reporting obligations to ensure accountability in implementation,**
- **Specifying further international cooperation and assistance measures, including the establishment of a voluntary trust fund to aid implementation of positive obligations and other provisions.**

The following sections explore how to improve the DCPNW’s positive obligations, starting with the framing in the preamble, before considering victim assistance, environmental remediation and norm promotion. It then considers institutional arrangements, including national implementation and reporting and international cooperation and assistance.

Improving the Preamble's Framing of Positive Obligations

While a crucial improvement over the narrow “national security” framing of traditional nuclear arms control instruments, the current humanitarian framing of the DCPNW neglects other important dimensions of the unacceptable harm of nuclear weapons, including their impact on human rights, the environment and sustainable development. Strengthening the preamble of the treaty, particularly through references to human rights law, environmental law and sustainable development will provide a rationale for more robust positive obligations in the operative part of the treaty.¹

For example, the current preamble of the DCPNW frames victims through the discourse of humanitarianism, rather than human rights. It is very encouraging that the DCPNW expresses mindfulness of the “suffering” of victims (DCPNW, Preambular Paragraph 3). However, without also recognizing the abrogation of their rights, it suggests a reduced obligation on states to take action. By contrast, the CCM expresses a determination “to ensure the full realisation of the rights of all” victims and recognizes “their inherent dignity” (CCM, PP6). It recognizes that victims cannot be treated as a singular group, given “age” and “gender” differences and “the special needs of vulnerable groups” (CCM, PP8). It also acknowledges the importance of the Convention on the Rights of Persons with Disabilities (CRPD) (CCM, PP9). As a result, the CCM preamble resolves that states parties must “do their utmost in providing assistance to cluster munition victims, including medical care, rehabilitation and psychological support, as well as providing for their social and economic inclusion” (CCM, PP7). The Arms Trade Treaty (ATT) also includes human rights framing in its preamble (ATT, PP6).

Similarly, the framing of the gendered impact of nuclear armament is focused on the “disproportionate impact of ionizing radiation on maternal health and on girls” (DCPNW, PP2), rather than a more comprehensive recognition of the threat that nuclear weapons pose to gender equality. A more effective framing can be found in the preamble of UN Environmental Assembly's Resolution 2/15 on “Protection of the environment in areas affected by armed conflict”, which specifically acknowledges the “need to apply a gender perspective” (UNEA/2/15, PP15). Additional useful language on gender can be found in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) preamble, which states that the pursuit of nuclear disarmament, “will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women” (CEDAW, PP11). It is worth noting that vulnerability to radiation varies not only due to biological sex but also according to people's genetic make-up; the preamble should acknowledge the need to consider differing levels of vulnerability in protecting the human rights of those exposed to the impact of nuclear weapons use or testing.²

¹ Analysis of the environmental aspects of the preamble is indebted to: Doug Weir. (25 May 2017) “The Nuclear Ban Treaty Needs Work If It's to Deliver on the Environment.” Toxic Remnants of War Network. <<http://www.trwn.org/the-nuclear-ban-treaty-needs-work-if-its-to-deliver-on-the-environment/>>.

² Details on the genetic differences in vulnerability to radiation can be found here: Denis A. Smirnov, et al. (2009) “Genetic analysis of radiation-induced changes in human gene expression.” *Nature*. 459(7246). Pp. 587-591.

The preamble does not recognize the significant and particular impact of nuclear testing on indigenous communities. By contrast, the preamble of UN Environmental Assembly's Resolution 2/15 on "Protection of the environment in areas affected by armed conflict", which specifically acknowledges the disproportionate impact of environmental degradation in war on indigenous peoples (UNEA/2/15, PP14). Specifically referencing the rights of indigenous peoples in the preamble will ensure that the collective rights of indigenous communities are considered as well as the rights of the individuals affected. Further model language can be found in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), particularly, Article 29, which requires states to "ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent" and to establish "programmes for monitoring, maintaining and restoring the health" of people "affected by such materials." Similarly, Article 30 of UNDRIP discourages states from engaging in "military activities" on indigenous peoples' lands without appropriate consultation and consent

The current DCPNW preamble acknowledges of the impact of nuclear weapons on the "environment" (DCPNW, PP2) and the requisite need to "protect" it against "widespread, long term and severe damage" (DCPNW, PP4). This is an important normative step, encouraging states to take the environment into account in global policymaking on nuclear weapons. However, the phrasing of "widespread, long term and severe damage" (DCPNW, PP4), which derives from Additional Protocol 1 of the Geneva Conventions (Articles 35.3 and 55), focuses only on only the worst damage caused by nuclear weapons. Better language is found in the Environmental Modification Convention (ENMOD), which was negotiated shortly before Additional Protocol 1, opted instead for the phrasing "widespread, longlasting *or* severe effects" (ENMOD, Article 1.1, emphasis added).

Additionally, the DCPNW preamble frames the need to protect the environment only in the discourse of humanitarian law, neglecting the potential contributions of human rights and environmental law. The UN Special Rapporteur on Human Rights and the Environment has found that "A safe, clean, healthy and sustainable environment is integral to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation."³ Particularly good language can be found in the preamble of UNEA/2/15, which recognizes "that sustainable development and the protection of the environment contribute to human well-being and the enjoyment of human rights" (PP13).

Indeed, framing the DCPNW not only as an instrument of humanitarian disarmament but also as part of collective effort for sustainable development could provide an additional rationale for the treaty. The DCPNW preamble does reference the "grave implications" of nuclear weapons for "human survival, the environment, socioeconomic development, the global economy, food security and for the health of future generations" (DCPNW, PP2). However, the preamble could more strongly, frame the treaty as contributing to Sustainable Development Goal (SDG) 16, which requires states to pursue peace and justice, as well as SDGs on food, health, education, gender, water and the environment. Potential language can be found in the preamble of the UN Programme of

³ UN Special Rapporteur on Human Rights and the Environment. (2017) "Introduction." <<http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SREnvironmentIndex.aspx>>.

Action on Small Arms and Light Weapons (PoA), which frames illicit guns as posing “a serious threat to peace, reconciliation, safety, security, stability and sustainable development at the individual, local, national, regional and international levels” (PoA, PP2). Additional language can be found in the ATT, framed as part of a broader effort to reduce military “diversion ... of the world’s human and economic resources” (ATT, PP2) from development. It also declares that peace and security is “interlinked and mutually reinforcing” with human rights and development (ATT, PP6).

As a result, as states consider how to improve the preamble of the DCPNW, they should build on the foundation of other humanitarian disarmament instruments through:

- **Stronger human rights framing, with an acknowledgement of the applicability of human rights law and environmental human rights, particularly regarding the impact on victims, indigenous peoples and gender equality,**
- **Stronger expression of the threat of nuclear weapons to sustainable development, linking nuclear disarmament to its pursuit.**

Strengthening Victim Assistance Obligations

It is very encouraging that assistance to “individuals affected by the use or testing of nuclear weapons” is included in the DCPNW in Article 6.1. DCPNW Article 6.1 instructs states to provide such assistance “in accordance with applicable international humanitarian and human rights law” and take ensure that it is “age- and gender-sensitive.” Assistance is defined broadly, “including medical care, rehabilitation and psychological support, as well as ... social and economic inclusion.” This language, which mirrors that of CCM Article 5.1, currently the highest available standard, is stronger than related provisions in the MBT (Article 6.3) and ERW Protocol (Article 8.2).

However, as currently drafted, other elements of DCPNW Article 6.1 provision represents a considerable step backward from victim assistance provisions in the CCM and the obligations states have in regards to the Convention on the Rights of Persons with Disabilities (CRPD). While not all “individuals affected by the use or testing of nuclear weapons” are persons with disabilities, a number are and therefore the state obligations under the CRPD are relevant.

Firstly, and most problematically, the draft Article 6.1 only obligates states “in a position to do so” to provide assistance to victims. By contrast, the CCM says states “shall” provide assistance to victims under their own jurisdiction and control (CCM, Article 5.1). Most states participating in the negotiations on the DCPNW are already party to the CCM and/or the CRPD. As a result, they are already required by the existing humanitarian and human rights norms to assist victims of conventional weapons. It does not make sense to have a lower standard of care for victims of nuclear weapons, particularly given that the CCM preamble resolves to “avoid discrimination among victims of various types of weapons” (CCM, PP10). The CCM also obligates other states to assist affected states meet their obligations (CCM, Article 6.7).

Secondly, the provision does not offer detailed guidance on how to organize victim assistance.⁴ Unlike the CCM, it does not require states to “make every effort to collect reliable relevant data” regarding victims (CCM, Article 5.1) or “assess the needs” they face (CCM, Article 5.2). It does not encourage the development of National Action Plans and budgets, mobilization of resources, designation of a governmental focal point or establishment of standards and best practices. By contrast, such activities and implementation arrangements are specifically enumerated in the CCM’s Article 5.2. Moreover, while the CCM (CCM, Article 7.1) requires states to report on implementation of victim assistance activities, the DCPNW does not require states to report on their implementation of any positive obligations.

Finally, Article 6.1 uses a more inexact and broad formulation – “individuals affected by the use or testing of nuclear weapons” – rather than straightforwardly referring to “victims,” a term that has been used in previous instruments. There is debate about whether this would have any legal implications. However, in terms of the more broad normative recognition of victims, this seems unnecessarily obtuse. The MBT, ERW Protocol and CCM all refer to “victims” directly and the CCM defines “cluster munition victims” (CCM, Article 2.1).

As a result, as states consider how to improve the victim assistance provision of the DCPNW, they should build on the normative foundations of other humanitarian disarmament treaties, through:

- **Making victim assistance an obligation of states that have victims in their jurisdiction or control, in addition to obliging all other states to assist them in meeting this obligation,**
- **Elaborating further on this obligation, including requiring data collection on victims, reporting on victim assistance activities and enumeration of the specific activities and institutional arrangements needed to carry out victim assistance, including, inter alia, National Action Plans and resource mobilization,**
- **Specifically mentioning “victims” as such, not only “individuals affected by the use or testing of nuclear weapons” and clarifying what this means in terms of harms suffered.**

Improving Environmental Remediation Obligations

It is encouraging that assistance for “environmental remediation” is included in the DCPNW in Article 6.2. This will contribute significantly to the recognition that nuclear weapons have caused (and would cause if tested or used in the future) environmental damage that causes harm to both people and the environment.

However, Article 6.2 is even weaker than the provision on victim assistance. As currently drafted, this provision represents a major step backward from similar provisions in the MBT (Article 5), ERW Protocol (Article 3) and CCM (Article 4). It also contrasts negatively with the major normative

⁴ For a useful conceptualization of how to organize victim assistance in dealing with military environmental contamination, see: Doug Weir. (2015) *Environmental Mechanics: Re-Imagining Post-Conflict Environmental Assistance*. pp. 54-61. <http://www.trwn.org/wp-content/uploads/2015/11/TRWP__Environmental_Mechanics.pdf>.

progress made on environmental protection in armed conflict in the UN Environment Assembly and the International Law Commission.⁵

Firstly, Article 6.2 only allows states the “right to request and to receive assistance” for environmental remediation, rather than obliging them to engage in remediation itself. By contrast, clearance of contamination by weapons is an obligation in the MBT (Article 5), ERW Protocol (Article 3) and CCM (Article 4). Again, a human rights framing would help strengthen the treaty, because it is unclear why communities affected by the use and testing of nuclear weapons deserve a lower level of protection than those who live next to a minefield or ERW-contaminated area. Moreover, unlike the other humanitarian disarmament instruments there is no specific obligation on other states to “provide assistance” for remediation to affected states (e.g. MBT, Article 6.4; ERW Protocol, Articles 7.1 and 8.1; CCM, Article 6.2 and 6.4).

Secondly, the DCPNW has no mention whatsoever of risk reduction education to limit the harm caused by areas contaminated by the use or testing of nuclear weapons. Given the humanitarian framing of the treaty, this seems like a major oversight. It contrasts with the precedent in other humanitarian disarmament treaties. 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. For example, the CCM requires affected states to “Conduct risk reduction education to ensure awareness among civilians living in or around cluster munition contaminated areas of the risks posed by such remnants” (CCM, Article 4.2). It also requires all states parties to “provide assistance to identify, assess and prioritise needs and practical measures in terms of...risk reduction education” (CCM, Article 6.5), in order to “reduce the incidence of injuries or deaths” (CCM, Article 6.11). The CCM folds the risk reduction education into the article on clearance; states may wish to consider this as a model. It is unclear, from a human rights perspective, why those who face the risks of cluster munitions and landmines should deserve education on reducing the risks of harm they face, but those who face the legacy risks of nuclear attacks and testing do not.

Thirdly, the provision does not offer detailed guidance on how to organize environmental remediation. Unlike other humanitarian disarmament instruments, the DCPNW does not require survey or assessment of the scope of the contamination (e.g. MBT, Article 5.2; ERW Protocol, Article 3.3; CCM, Article 4.2.a), nor marking, monitoring and fencing of contaminated areas (e.g. MBT, Article 5.2; ERW Protocol, Article 5; CCM, Article 4.2.c). It does not require states that are responsible for having caused harm in other states to provide appropriate information and assistance (e.g. CCM, Article 4.4). It does not encourage states to develop National Action Plans for remediation nor not require reporting on the scope of the problem nor progress on remediation. Because, unlike the CCM, it does not require states to “take into account international standards” in remediation or other forms of assistance (CCM, Article 4.3), there is no guarantee that such activities will be subject to appropriate quality management. Providing more detailed guidance can ensure that treaty makes explicit linkages between victim assistance and environmental remediation. For

⁵ Analysis of the environmental remediation provision is indebted to: Doug Weir. (25 May 2017) “The Nuclear Ban Treaty Needs Work If It’s to Deliver on the Environment.” Toxic Remnants of War Network. <<http://www.trwn.org/the-nuclear-ban-treaty-needs-work-if-its-to-deliver-on-the-environment/>>.

example, environmental monitoring data can and should be used to support health assistance in affected communities.

As a result, as states consider how to improve the environmental remediation provision of the DCPNW, we recommend it build on the normative foundations of other humanitarian disarmament treaties, through:

- **Making environmental remediation an obligation on states that have areas of contamination in their jurisdiction or control, in addition to inviting all other states to assist them in meeting this obligation (particularly those that caused harm to the territory of other states),**
- **Including an obligation on affected states to conduct risk reduction education and encouraging other states parties to provide assistance for risk reduction education to affected states.**
- **Elaborating further on this obligation, requiring survey and assessment, risk communication, reporting and enumeration of the specific institutional arrangements, including quality standards, National Action Plans and resource mobilization,**

Increasing Obligations for Norm Diffusion, Disarmament Education and Universalization

The process that led to the DCPNW has framed the proposed treaty as a discursive and normative exercise, aiming to stigmatize nuclear weapons. The preamble of the DCPNW refers the “need to make every effort to ensure that nuclear weapons are never used again under any circumstances” (PP1). It also stress “the role of public conscience in the furthering of the principles of humanity as evidenced by the call for the total elimination of nuclear weapons” (PP14). The success of a nuclear ban treaty will in part be measured in the diffusion and universalization of the norm it established. It is crucial, then, that the treaty establish positive obligations and institutional mechanisms aimed at promoting the norm that nuclear weapons are inherently inhumane and cause unacceptable harm.

To that end, Article 13 of the DCPNW on “Universality” obligates states party to “encourage States not party to this Convention to ratify, accept, approve or accede to this Convention, with the goal of attracting the adherence of all States to this Convention.”

However, other disarmament and arms control instruments go further than the DCPNW in establishing dissemination and education obligations. The CCM explicitly requires states to “promote the norms it establishes”, not only by encouraging accession but also discouraging states not party “from using cluster munitions” (CCM, 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” (ATT, Article 17.4.b).

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” (CCW, Article 6). The PoA encourages states to “promote dialogue and a culture of peace by encouraging, as appropriate, education and public awareness programmes on the problems of the illicit trade” in small arms (PoA, Para. 41). Similarly, UNEA/2/15 has a provision calling on states to raise “greater international awareness of the issue of environmental damage during armed conflicts and the need to adequately protect the environment when it is affected by armed conflict” (UNEA/2/15, OP2).

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 also endorsed by the 2010 Nuclear Non-Proliferation Treaty Review Conference Outcome Document (Action 22).

One way of encoding obligations of norm diffusion in humanitarian treaties is through a “respect clause.” Common Article 1 of the Geneva Conventions obligates states “to respect and ensure respect” for international humanitarian law; according to custom and state practice this includes a duty to disseminate information about humanitarian norms and cultivate respect for them.⁶ Article 21 of the CCM has elements that could serve as a model.

An alternative place for a disarmament education provision could be as a soft obligation in the articles on international cooperation (DCPNW, Article 8) and assistance (DCPNW, Article 6) and/or national implementation (Article 7), obliging states to provide assistance for disarmament education and awareness raising.

As a result, as states consider how to improve the positive obligation provisions of the DCPNW, we recommend it build on the normative foundations of other humanitarian disarmament treaties, through:

- **Including obligations to promote and universalize the norms stigmatizing nuclear weapons and condemn violations.**
- **Stressing the importance of diffusion of the norm to individual people and communities – not just states – by establishing a positive obligation for disarmament education.**
- **Considering the addition of a “respect clause” to strengthen obligations to uphold the norms promoted by the treaty.**

Improving National Implementation and Reporting Obligations

To put the DCPNW’s obligations and provisions into action, Article 7 on “National Implementation” requires states to “take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited” by the treaty (DCPNW, Article 7.2). This strong phrasing – including the criminalization of prohibited acts – will contribute tremendously to the stigmatization of nuclear weapons. However, the language on

⁶ Knut Dormann & Jose Serralvo. (2014) “Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations.” *International Review of the Red Cross*. 96(895/896). p. 731.

implementation of other obligations (including positive obligations) is vaguer, instructing states generally to “adopt the necessary measures implement its obligations under this Convention” (DCPNW, Article 7.1). By contrast, the CCM specifies these types of measures include “legal, administrative and other measures” (CCM, Article 9).

Moreover, since there are no specific articles on transparency or reporting on national implementation (or international cooperation and assistance) there is little clarity on how states will be held accountable – whether legally or politically – for implementation of the treaty’s provisions. This contrasts with other humanitarian disarmament treaties, which include extensive provisions on transparency and reporting (CCM, Article 7; ATT, Article 13).

As a result, as states consider how to improve the national implementation provisions of the DCPNW, we recommend it build on the normative foundations of other humanitarian disarmament treaties, through:

- **Specifying further the types of national implementation measures to be put in place including legal, administrative and other measures,**
- **Adding transparency and reporting obligations to ensure accountability in implementation.**

Improving International Cooperation and Assistance Obligations

The DCPNW also includes provisions for international cooperation and assistance. Article 6 of the DCPNW on “Assistance” refers specifically to the implementation of victim assistance and environmental remediation, stating that it “may be provided, inter alia, through the United Nations system, international, regional or national organizations or institutions, non-governmental organizations or institutions, or on a bilateral basis” (Article 6.3).

However, compared with other related instruments, there is little specification in the DCPNW of the types of assistance to be provided. By contrast, the MBT (Article 6), ERW Protocol (Articles 7 and 8), CCM (Article 6) and ATT (Article 16) include lists, e.g. “legal or legislative assistance, institutional capacity-building, and technical, material or financial assistance”, as well as potential activities, including “stockpile management, disarmament, demobilization and reintegration programmes, model legislation, and effective practices for implementation” (ATT, Article 16.1). Other humanitarian disarmament treaties also suggest institutional mechanisms to facilitate such assistance, such as conducting needs assessment, formulating National Action Plans and budgets, designating governmental focal points and establishing quality standards (e.g. CCM, Article 4.2 & 5.2; ERW Protocol, Article 3; ATT, Article 5). The CCM suggest states “in a position to do so may contribute to relevant trust funds” (CCM, Article 6.9), while the ATT actually establishes a “voluntary trust fund” to aid implementation and encourages states to “contribute resources to the fund” (ATT, Article 16.3).

The provisions on “International Cooperation” obligate states parties to “cooperate with” each other to “facilitate the implementation of the obligations of this Convention” (DCPNW, Article 8.1), and establishes a “right to seek and receive assistance” (DCPNW, Article 8.2). However, this language is rather bare-bones compared with other similar humanitarian disarmament instruments

(e.g. MBT, Article 6; CCM, Article 6). For example, the ATT encourages states to “exchange experience and information on lessons learned” in implementation (ATT, Article 15.7).

As a result, as states consider how to improve the international cooperation and assistance provisions of the DCPNW, we recommend it build on the normative foundations of other humanitarian disarmament treaties, through:

- **Specifying further international cooperation and assistance measures, including the establishment of a voluntary trust fund to aid implementation of positive obligations and other provisions.**

Further Reading

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WILPF. (17 March 2017) *Banning nuclear weapons: positive obligations and other elements of a legally binding instrument* A/CONF.229/2017/NGO/WP.3.

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