



BANNING NUCLEAR WEAPONS

PRINCIPLES AND ELEMENTS FOR A LEGALLY BINDING INSTRUMENT

WOMEN'S INTERNATIONAL LEAGUE FOR
PEACE & FREEDOM



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Introduction

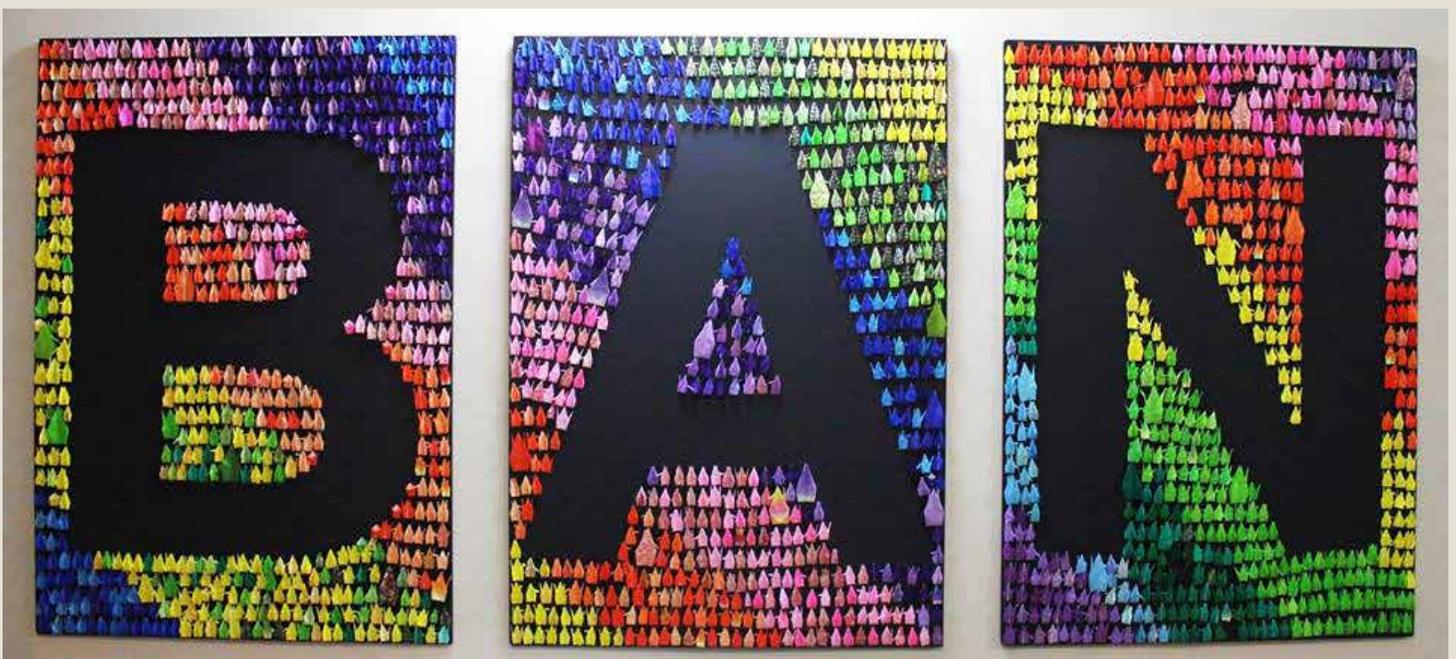
At the United Nations (UN) General Assembly in 2016, the vast majority of governments voted to negotiate a legally binding treaty to prohibit nuclear weapons. This historic decision means that on 27 March 2017, states will gather at the UN in New York to begin work on this treaty.

Momentum for the prohibition of nuclear weapons has been growing since 2010. Renewed attention to the humanitarian impact of nuclear weapons led to three conferences hosted by Norway (2013), Mexico (2014), and Austria (2014); joint statements from a growing number of governments from 2012–2015; and meetings at the UN in Geneva in 2016 to discuss what legal and political measures are needed to address concerns about the risk and consequences of a nuclear weapon detonation. These conversations led to a recommendation that the UN General

Assembly negotiate a treaty prohibiting nuclear weapons, leading to their elimination.

At its core, the humanitarian initiative has provided stark and irrefutable evidence that nuclear weapons cause death and displacement on a catastrophic scale, with profound and potentially irreversible damage to health and the environment, to socioeconomic development, and to the social order. No state or international body could adequately address the immediate humanitarian emergency or long-term consequences caused by nuclear weapon detonations.

Nuclear testing in several parts of the world has demonstrated the enduring impact of serious and persisting health and environmental impacts that cannot be undone and have yet to be adequately



addressed. The risks of nuclear weapon use are real and increasing. There have been numerous accidents and near misses that have occurred while nuclear weapons are being manufactured, deployed, transported, and stockpiled.

While banning nuclear weapons does not immediately negate these risks or consequences, it will help to forever change the legal, political, economic, and social landscape surrounding nuclear weapons. This treaty has the transformative potential to codify the illegality of nuclear weapons, stigmatise their possession, and facilitate nuclear disarmament.

A legally binding international instrument that prohibits nuclear weapons based on their unacceptable consequences would put nuclear weapons on the same footing as the other weapons of mass destruction, which are subject to prohibition through specific treaties.

It can build on existing norms and reinforce existing legal instruments. It should build upon the highest standards contained in the regional nuclear weapon free zone treaties and other relevant agreements, reinforcing and strengthening the commitments to which most states have already agreed. In line with existing human rights principles and the evolution of legal instruments dealing with inhumane weapons, it should also reaffirm the rights of people who have been victimised by the detonation of nuclear weapons, and seek to protect future generations from such harm.

The following is an overview of the principles, prohibitions, and positive obligations that should be included in a treaty banning nuclear weapons, in order to reinforce and strengthen existing law and codify once and for all the illegitimacy of nuclear weapons. Above all else, it is imperative that this treaty makes all aspects of the possession, use, threat of use, or preparation for use of nuclear weapons categorically illegal, without exception.

Principles and objectives

Every treaty has principles and objectives, which can be laid out in its preamble. It will be important for the preamble of the treaty banning nuclear weapons to reflect the concerns expressed through the study of the humanitarian effects of nuclear weapons, as well as existing law governing nuclear weapons. The principles and objectives of the treaty must be oriented toward achieving and maintaining a nuclear weapon free world.

Humanitarian principles

The treaty should express deep concern about the catastrophic humanitarian consequences of any use of nuclear weapons.

Why is this important? 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.

The treaty should recognise the gendered impacts of the development, testing, and use of nuclear weapons.

Why is this important? 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.¹ 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 weapons affect human health, in order to help motivate their prohibition and elimination.

1. 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.

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.

Why is this important? 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.”² 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.”³

The treaty should also declare that any effort to use or threaten to use nuclear weapons is a crime against humanity.

Why is this important? 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.”⁴

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.

Why is this important? 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

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

3. Ibid.

4. 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>.

5. “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>.

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

“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.”⁵ This was echoed in the Humanitarian Pledge emerging from this conference, which has so far been endorsed by 127 states.⁶ 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.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.⁸ This concept of the dictates of public conscience appears in the “Martens 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.”⁹ 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.¹⁰

The objective of elimination

With all this providing motivation, the treaty should register states parties' determination to eliminate nuclear weapons and their means of delivery.

Why is this important? 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.

7. “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.

8. 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: 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.

9. 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/57jnh.htm>.

10. Ibid.

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.

Why is this important? 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.

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.

Why is this important? 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!

The treaty must be sure to reject any role for nuclear weapons in security doctrines or arrangements.

Why is this important? In light of nuclear weapons' indiscriminate nature, inherent immorality, and potential to destroy life on earth, they have no role in providing security to anyone. 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.

The treaty should also recognise the ultimate objective of general and complete disarmament.

Why is this important? Most UN resolutions and major treaties related to disarmament and arms control reflect this goal, including the nuclear Non-Proliferation Treaty (NPT).¹¹

The treaty should stress that the vast resources allocated to the production, modernisation, and maintenance of nuclear weapons should instead be redirected to meeting social needs.

Why is this important? Billions of dollars are being spent on developing new nuclear weapons or “modernising” existing ones as well as 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.

11. 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>.

Legal principles

The treaty should reaffirm the NPT and the ICJ advisory opinion.

Why is this important? 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.”¹² 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.¹³

The treaty should also reaffirm its 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.

Why is this important? 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.¹⁴

The treaty should encourage states parties to promote treaty universality.

Why is this important? 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.

Human rights principles

The treaty should recognise the rights of victims and survivors of nuclear weapons, and acknowledge the disproportionate and ongoing impact of the testing and development of nuclear testing on indigenous communities.

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

13. See <http://www.lcnp.org/wcourt> for more information.

14. 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>.

Why is this important? The humanitarian justification for the prohibition of nuclear weapons is 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.

The treaty should also articulate the right to protect the world commons for future generations.

Why is this important? 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.¹⁵

The treaty should also reflect the rights and obligations of whistleblowers in the context of fulfilling the treaty's objectives.

Why is this important? 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.¹⁶

Principles for public engagement

The treaty could also encourage states parties to engage in risk education.

Why is this important? 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.

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.

Why is this important? 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.

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

16. 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, <http://fissilematerials.org/library/gfmr09.pdf>.

Prohibitions

In accordance with the principles and objectives set out in the preamble, the nuclear weapon ban treaty must contain specific prohibitions against nuclear weapon-related activities. These should be as clear and comprehensive as possible, drawing upon other treaties prohibiting weapons but also being mindful of the existing rules governing nuclear weapons as well as specific and unique aspects of their development and deployment and of the urgent need to challenge their current place in “security” architecture, policies, and practices.

The prohibitions in the treaty should apply to states parties, their nationals, and any individuals subject to their jurisdiction.

Stockpiling and possession

The ban treaty must prohibit the stockpiling of nuclear weapons.

Why is this important? 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.

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.”¹⁷

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.

Ban treaty states parties could agree that a nuclear-armed state that has decided to eliminate

17. 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.”

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 arrangements.¹⁸ 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 and join the treaty after that has been completed.

Deployment

The treaty should prohibit the deployment of nuclear weapons.

Why is this important? 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.

Use and threat of use

The ban treaty should prohibit the use and threat of use of nuclear weapons.

Why is this important? 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

18. 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.

understanding that no use of nuclear weapons is consistent with international law.

Other treaties banning weapons may not include threat of use, but it is important for a nuclear weapon ban treaty because the concept of nuclear “deterrence” relies on the threat of 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)¹⁹ states that “aggression with nuclear weapons or the threat of such aggression ... would endanger international peace and security.”²⁰ A prohibition on threat of use within the ban treaty would apply not just to aggression but to all circumstances.

The treaty should also prohibit the engagement in any preparations for the use of nuclear weapons, including planning and training.

Why is this important? 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 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.²¹ 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.²² 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.

Acquisition, transfer, stationing, and control

The treaty should prohibit the transfer or acquisition of nuclear weapons.

Why is this important? 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.

The ban treaty should also prohibit states

19. 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.

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

21. 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.

22. 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>.

parties from allowing nuclear weapons to be stationed on a territory under their control.

Why is this important? 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.

Development and production

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.

Why is this important? All NWFZ treaties prohibit the production of nuclear weapons. Three prohibit the development of nuclear weapons.²³ 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.²⁴

Testing

The treaty should prohibit the testing of nuclear weapons.

Why is this important? Testing is categorised separately from development by nuclear-armed states and thus needs to be explicitly prohibited by the nuclear weapon ban treaty.²⁵ 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.²⁶ Furthermore, the CTBT has not yet entered into force. The nuclear weapon ban treaty 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

23. Bangkok, Pelindaba, and Semipalatinsk

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

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

26. 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 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>.

moratoriums against testing and/or to inspire new such moratoriums.

Assistance and finance

The treaty should prohibit the assistance, encouragement, or inducement of any nuclear weapon-related activities, including specifically through financing.²⁷

Why is this important? 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.

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.

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.²⁸ 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.

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.²⁹

Other acts of encouragement and inducement

27. 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.

28. 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.

29. “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.

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.

Transit

The ban treaty should prohibit the transit and transshipment of nuclear weapons through the territories of state parties.

Why is this important? 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.

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

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.³⁰ The Philippine constitutional amendment from 1987 adopts a policy of “freedom from nuclear weapons in its territory.”³¹ 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.”³² Austria’s 1999 constitutional law prohibits amongst other things the transport of nuclear weapons.

30. 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.

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

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

Delivery systems and fissile materials

This treaty is about banning nuclear weapons. However, fissile materials are necessary for the creation of nuclear weapons, and delivery systems (bombers, missiles, submarines) are necessary for their use. So how should a treaty prohibiting nuclear weapons deal with these items?

It could prohibit the development and transfer of both delivery systems and fissile materials. This will be necessary to achieve and maintain a nuclear weapon free world. Addressing the issue in the nuclear weapon ban treaty, at least by including language that recognises the need for nuclear weapon elimination processes to include these issues or that flags existing materials and processes on these items would be useful.³³

The United States and Soviet Union strategic arms control treaties and the Intermediate Nuclear Forces treaty seek to achieve their restrictions on nuclear weapons by controlling not just warheads but also respective delivery systems.

A ban treaty that prohibits the development and transfer of both nuclear weapon delivery systems and weapon-usable fissile materials would yield a more stable and resilient nuclear weapon free world than a ban treaty that permits states to retain or acquire significant stockpiles of nuclear weapon-capable delivery systems and nuclear weapon-usable fissile materials.³⁴

33. See some suggestions in the *Global Fissile Material Report 2009: A Path to Nuclear Disarmament*, International Panel on Fissile Materials, 2009, <http://fissilematerials.org/library/gfmr09.pdf>.

34. The International Panel on Fissile Material has noted that “The United States managed to develop nuclear weapons starting with no nuclear infrastructure in three years (1942–1945). A difference between a warning time of years or weeks could be critical, however, to the ability of the international community—or in some cases, a country’s internal political processes—to deal with the threat.” See *Global Fissile Material Report 2009: A Path to Nuclear Disarmament*, International Panel on Fissile Materials, 2009, <http://fissilematerials.org/library/gfmr09.pdf>.

Positive obligations

In addition to prohibitions, a nuclear weapon ban treaty should also contain positive obligations for states parties to help with implementation and the achievement of its humanitarian aims.

Recognition of rights

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.

Why is this important? 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.

Such recognition would flow from the obligations under the Convention on Cluster Munitions, which obligates states to understand the situation of affected populations and respond in an inclusive and non-discriminatory manner. These obligations are derived from the general responsibility of states to support their citizens in the realisation of their human rights, regardless of which state caused the harm. These obligations do not provide a 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.³⁵

The ban treaty should also recognise the rights of whistleblowers.

Why is this important? 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.

35. See *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>.

Environmental rehabilitation

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.³⁶

Why is this important? 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.³⁷ Whilst recognising that nuclear contamination presents 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.³⁸

Risk education

The ban treaty should reflect an obligation to inform the public about the risks of nuclear weapons.

Why is this important? 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.³⁹

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.

36. 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.

37. Potential measures could be indicated in the treaty, such as excluding populations from the affected area and processes of decontamination and remediation.

38. 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>.

39. Precedent for risk education can be found in 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.

Why is this important? 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 contamination remains, to be able to monitor and repair radioactive waste containment and to apply future technologies that may further protect the biosphere.⁴⁰

International cooperation and assistance

The treaty should include provisions indicating that states parties can seek and receive assistance in fulfilling their obligations under the treaty.

Why is this important? 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 from 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.

National implementation measures

The treaty will need to provide for states to undertake national measures to implement their obligations.

Why is this important? 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.”⁴¹

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

41. 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)).

Other elements

Facilitation and clarification of compliance

The treaty should encourage states parties to consult and cooperate with each other regarding implementation of the treaty, and to work together to facilitate compliance by states parties with their obligations.

Why is this important? 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.⁴²

Settlement of disputes

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.

Why is this important? 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.

42. 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/home-page/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 First Preparatory Committee for the 2015 Nuclear Non-Proliferation Treaty Review Conference, Vienna, 3 May 2012; and *Global Fissile Material Report 2009: A Path to Nuclear Disarmament*, International Panel on Fissile Materials, 2009, <http://fissilematerials.org/library/gfmr09.pdf>.

Institutional arrangements

The treaty should establish a mechanism to facilitate the treaty's implementation and universalisation.

Why is this important? 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.

States parties should meet regularly.

Why is this important? 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.

Amendments and reservations

The treaty should allow for the possibility of amendments.

Why is this important? Most treaties allow for amendments, though the process of amending a treaty is typically—and purposefully—arduous. But it's possible that future developments could require an update to the treaty text. Any amendment to the treaty must be made by an agreed qualified number of states parties, i.e. at least two-thirds.

The treaty should not allow states parties to make reservations with respect to any articles of the treaty.

Why is this important? It is imperative that all states parties are bound equally by the treaty.

Joining the treaty

The treaty should be open for signature by any state, including a state that is not a member of the United Nations.

Why is this important? 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.

The treaty should be subject to ratification by its signatories.

Why is this important? Ratification is necessary for a treaty's provisions to apply that state. 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 ban treaty could include provisions for transparency and reporting in relation to ratification and accession.⁴³

Why is this important? 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.

States parties should encourage states not party to the treaty to join the treaty, with the goal of universalisation.

Why is this important? 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.

Entry into force

The treaty should enter into force swiftly after a specified number of states have ratified it. Entry into force must not be contingent upon the ratification of any particular state or group of states.

Why is this important? 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.

Duration and withdrawal

The treaty should be of 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.

Why is this important? 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.

43. 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 state 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.

Conclusion

This document has outlined Reaching Critical Will's view of important principles, prohibitions, and positive obligations for a treaty banning nuclear weapons. This treaty should use the regional nuclear weapon free zones treaties as a starting point, build upon existing nuclear weapon-related agreements, and, motivated by the urgent need to prevent the catastrophic humanitarian consequences of nuclear weapons, advance a categorical prohibition of all activities that undermine the achievement and maintenance of a nuclear weapon free world.

An international agreement to prohibit nuclear weapons is the best opportunity we have to stigmatise these remaining weapons of mass destruction, codify their illegality and illegitimacy into international law, and help set standards and rules to help facilitate their elimination. Such a treaty is urgently needed and long overdue. 2017 is the year for banning nuclear weapons!







ICAN campaigners in Australia transport a (model) nuclear bomb from Melbourne to Alice Springs and dismantle it in the desert near the Pine Gap military and surveillance base, September 2016. From ban to elimination! © ICAN Australia



Reaching Critical Will

Reaching Critical Will is the disarmament programme of the Women's International League for Peace and Freedom (WILPF), the oldest women's peace organisation in the world.

WILPF is a member of the International Steering Group of the International Campaign to Abolish Nuclear Weapons (ICAN).

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