

A decorative graphic consisting of a grid of small grey dots, with several larger red dots scattered throughout, primarily in the upper and lower right areas.

The Nuclear Weapons Ban and Human Security for All

Assessing the Draft Convention on the Prohibition
of Nuclear Weapons from a Human Security Perspective

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- Current negotiations for a nuclear weapons ban treaty have revived the efforts to abolish nuclear weapons. Similar to other types of weapons, it is hoped that the stigmatization and prohibition of nuclear weapons will pave the way towards their elimination.
- The Draft Convention on the Prohibition of Nuclear Weapons (DCPNW) offers a strong basis for negotiations on a global nuclear weapons ban in June and July 2017. If adopted, it would be the most significant shift in nuclear politics since the end of the Cold War and a policy victory for human security.
- While finalizing the treaty text in a timely fashion, states should still seize the opportunity to enhance its human security dimensions, for instance by incorporating references to human rights and environmental law; bolstering the core prohibitions by adding an explicit prohibition on financing nuclear weapons production; and by strengthening positive obligations on victim assistance, environmental remediation and disarmament education.
- The final treaty should offer nuclear-armed and nuclear alliance states a pathway for engagement with and eventual accession to the agreement.

Introduction

While largely unnoticed by the news media, global nuclear politics experienced a gamechanging shift on May 22, 2017, when the United Nations released its Draft Convention on the Prohibition of Nuclear Weapons (DCPNW, or Draft Nuclear Weapons Ban) (United Nations 2017). The process that led to its creation has offered a different model of nuclear disarmament diplomacy than traditional arms control discussions, with an openness to the concerns of small states, the Global South, survivors and civil society. If the June and July 2017 negotiations on the text succeed in adopting a final treaty, it will be the most significant shift in nuclear politics since the end of the Cold War and a policy victory for human security.

In the history of eliminating types of weapons, stigmatization and prohibition usually precedes elimination. A nuclear weapons ban treaty would therefore fill a strange gap in international law, which has prohibited other weapons of mass destruction (chemical and biological) or that cause unacceptable harm (landmines and cluster munitions), but not nuclear weapons.

Nuclear weapons are dangerous vestiges of an outmoded way of thinking, one in which the object and guarantor of security is the nation state. Nuclear deterrence theory relied on a view of the world in which threats primarily came from the political and military institutions of another state. Underlying its doctrines were a host of unstable assumptions, namely, that government leaders made decisions using a logic of a predictable rationality; nuclear technology could be controlled; what was good for the state was good for its citizens; one nation's people cared little about the threat of their arsenal on people beyond their borders; and security issues were somehow separate from (and more important than) humanitarian, human rights and development concerns.

But as the DCPNW's preamble notes, »the catastrophic humanitarian consequences« (1st recital) of nuclear weapons »transcend national borders« and »pose grave implications for human survival« (2nd recital). »Human security« is a more appropriate concept for the global challenges of the 21st century than the narrow notions of national security that have maintained nuclear arsenals. Developed through two decades of international discussions between governments, international organizations, academia and civil society, human security acknowledges

that threats to human life and livelihood result not only from military assault, but also »disease, hunger, unemployment, crime, social conflict, political repression and environmental hazards« (United Nations Development Programme 1994: 22). Achieving human security for all thus requires »integrated policies that focus on people's survival, livelihood and dignity« (Ogata & Sen 2003: iv), not just armed defense.

However, the traditional arms control and non-proliferation »machinery« is ill-suited to pursuing a human security approach to nuclear weapons. It is dominated by the very states most entwined in the nuclear apparatus. There are few opportunities for non-nuclear-armed states and civil society to express their genuine security concerns about nuclear weapons. For example, the 2015 Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) fell apart without producing an agreement on ways forward, blocked by nuclear-armed states that abused consensus rules as a veto. The narrow self-interest of the states most to blame for the persistence of nuclear arsenals blocked any progress toward shielding people from the risks they pose.

By contrast, the process that produced the DCPNW has been framed around »the imperative of human security for all«, seeking »to promote the protection of civilians against risks stemming from nuclear weapons«. It has sought »to identify and pursue effective measures to fill the legal gap for the prohibition and elimination of nuclear weapons« (Vienna Conference 2014a) through multilateral forums that are »open to all and blockable by none« (statement by Brazil, quoted in ICAN 2016). It has been driven by non-nuclear-armed states, the International Committee of the Red Cross and an energetic civil society coalition, the International Campaign to Abolish Nuclear Weapons (ICAN).

The next section provides the background on the Humanitarian Initiative on Nuclear Weapons, the unique process that led to the DCPNW. The following three sections analyze the content of the treaty. In analyzing the DCPNW, this paper argues that the transformative potential of the draft Nuclear Weapons Ban lies in its contributions to the promotion of human security for all. These include the strong humanitarian framing of the preamble, the draft treaty's categorical prohibitions against nuclear weapons and its inclusion of positive provisions on victim assistance and environmental remediation. However, states

negotiating at the June-July conference can improve the treaty text by strengthening the human security framing. This includes buttressing the preamble with rights-based language, adding provisions to reinforce the prohibitions and strengthening the treaty's positive rights-based obligations to aid people and environments affected by the production, testing and use of nuclear weapons. Before concluding, the paper offers an overview of key political challenges ahead for the treaty negotiations in June and July 2017.

Background on the Humanitarian Initiative on Nuclear Weapons

The Nuclear Weapons Ban negotiations are the culmination of what has been called the Humanitarian Initiative on Nuclear Weapons. In 1968, the NPT obligated all states parties without nuclear weapons to forswear producing or acquiring them. In return, all states parties – including those with nuclear arsenals – were obligated to »pursue negotiations in good faith on effective measures relating to (...) nuclear disarmament« (Article 6). However, almost 50 years later, nine states still possess some 15,000 nuclear weapons, of which more than 4,000 are operationally deployed. These states continue to spend billions of dollars on »modernizing« and expanding the capabilities of these arsenals (Acheson et al. 2017).

Many non-nuclear-armed states and civil society organizations are seriously concerned with the decades of slow progress toward a world free of nuclear weapons. Efforts to advocate for a comprehensive nuclear weapons convention (based on a model initially drafted by civil society in 1997 and championed by Costa Rica and Malaysia) had struggled to gain traction. In part this was because the nuclear weapons convention concept combined prohibition of nuclear weapons with their elimination. Eliminating nuclear weapons requires the good faith engagement of nuclear-armed states, which have been loath to start negotiations on a nuclear weapons convention, linking progress on elimination to impossible preconditions.

However, pro-disarmament states and civil society advocates saw potential in a seemingly banal sentence in the outcome document of the 2010 NPT Review Conference, in which governments expressed »deep concern« at the »catastrophic humanitarian consequences« that would

result from the use of nuclear weapons (Review Conference 2010: paragraph 80). Responding to this concern, from 2013 to 2014, more than 150 states convened in a series of conferences in Oslo, Nayarit and Vienna to examine the humanitarian impact of nuclear detonations, past and future. These conferences found that nuclear weapons posed »profound« threats to human security, including the high risk of »accidental, mistaken, unauthorized« use and potential »long-term damage to the environment, climate, human health and well-being, socioeconomic development, social order« – even the »survival of humankind« (Vienna Conference 2014b).

As the Vienna conference in December 2014 drew to a close, the Austrian foreign minister presented what became known as the »Humanitarian Pledge«. The pledge called on states to follow »the imperative of human security for all«, by seeking to »stigmatize, prohibit and eliminate nuclear weapons in light of their unacceptable humanitarian consequences and associated risks« (Vienna Conference 2014b). The subtle language of the Humanitarian Pledge offered a way to separate the process of stigmatizing and prohibiting nuclear weapons from their eventual elimination. Stigmatization, as a normative function, could occur without the support of nuclear-armed and nuclear alliance states. Non-nuclear-armed states did not need to wait for nuclear possessors to agree to a nuclear weapons convention, they could change the normative context on their own. By the end of the 2015 NPT Review Conference, the Humanitarian Pledge had more than 100 state signatories and in December that year, the UN General Assembly (UNGA) voted to establish a working group in Geneva to explore »taking forward multilateral nuclear disarmament negotiations« (UNGA 2015). This body recommended UNGA to mandate »a conference in 2017, open to all states, with the participation and contribution of international organizations and civil society, to negotiate a legally binding instrument to prohibit nuclear weapons« (UN 2016: paragraph 67). Despite strenuous objections from nuclear-armed and nuclear alliance states, UNGA voted overwhelmingly to adopt that recommendation in December 2016, scheduling negotiations over two meetings in March and June-July 2017. The March meeting adopted rules of procedure that allowed all UN Member States, including the Holy See and Palestine, to participate fully in all decisions, made by majority vote. The meeting also allowed participation of the International Committee of the Red Cross and civil society. Negotiations proceeded despite a

boycott by the nuclear-armed states and many nuclear alliance states, including Germany.

The states and civil society advocates driving the Humanitarian Initiative seek a treaty prohibiting nuclear weapons, even without the direct involvement of major military powers. They draw inspiration from the tradition of treaties limiting the humanitarian impact of weapons, including the 1907 Hague Conventions, the Antipersonnel Landmine Ban Treaty (MBT), the Convention on Cluster Munitions (CCM), and the Convention on Certain Conventional Weapons (CCW) Protocol V on Explosive Remnants of War (ERW) (Acheson et al. 2014; New Agenda Coalition 2015). The power of these »humanitarian disarmament« instruments derives from generating stigma and addressing human suffering, rather than imposing intrusive verification or punitive sanctions. They differ from traditional arms control and nonproliferation treaties in the following respects.

- Framing treaties primarily in humanitarian, rather than security, terms. Preambles express a desire to mitigate suffering, maintain standards of humanity and respond to the »dictates of the public conscience«.
- Maintaining strong, categorical prohibitions of weapons or practices that cause unacceptable humanitarian harm.
- Offering »positive obligations« that promote the norms and limit harm caused by the weapons they address through remediating areas made hazardous by weapons use, educating people about the risks posed by the weapon and respecting the rights of victims.

Recent developments in this tradition have expanded beyond a humanitarian framing, incorporating useful contributions from human rights law (e.g. the CCM) and environmental law (e.g. UN Environment Assembly Resolution 2/15 (UNEP/EA.2/Res.15)). Humanitarian disarmament thus could also lead the way to deal with the human security implications of nuclear weapons.

The discussion at the Nuclear Weapons Ban negotiations in March 2017 coalesced around the humanitarian disarmament approach and is reflected in the draft treaty text released on May 22, 2017. Simply the advent of a draft convention prohibiting nuclear weapons is a major normative improvement in global nuclear politics. Even if it was adopted with no further improvements, the text would represent a major policy victory for human

security. Nevertheless, there is room for improving the DCPNW regarding its framing, prohibitions and positive obligations.

Human Security Framing

The DCPNW preamble frames nuclear weapons as a humanitarian problem, establishing a moral and ethical case for their prohibition. It expresses concern about their »catastrophic humanitarian consequences« and »grave implications for human survival, the environment, socioeconomic development, the global economy, food security and for the health of future generations«. It expresses mindfulness of victims' »suffering«, making especial reference to the »hibakusha«, survivors of the atomic bomb attacks in Hiroshima and Nagasaki. And the preamble introduces humanitarian language to nuclear policymaking, rooting the treaty in the »principles of humanity and (...) dictates of public conscience«. This contrasts with the narrow national security framing of traditional nuclear arms control. For example, the NPT preamble is framed in terms of avoiding »nuclear war« and preventing threats to »the territorial integrity or political independence of any State«.

Nevertheless, the drafters of the DCPNW have not abandoned more traditional elements of disarmament, arms control and non-proliferation treaties, instead blending them cleverly with the humanitarian approach. For example, unlike the MBT and CCM, the DCPNW preamble includes a commitment to pursue »general and complete disarmament under strict and effective international control«, as well as reaffirmations of commitments under the NPT (9th to 13th recitals and Article 19). This hybrid character folds the humanitarian disarmament tradition into security-based approaches, bringing these different strains of the law and normative traditions together. This reflects the fact that while progress in humanitarian disarmament has often come through nontraditional channels (the landmine and cluster munition bans were negotiated outside the UN), the ongoing nuclear ban negotiations have an UNGA mandate. The result is a powerful combination for progressive normative development.

However, this particular blend of policy traditions neglects other important human security dimensions of the unacceptable harm of nuclear weapons, including their impact on human rights, the environment and sustain-

able development. For example, framing the preamble as a response only to the »suffering« of victims, without recognizing the abrogation of their rights, suggests a reduced obligation on states to take action. By contrast, the CCM preamble not only recognizes the suffering of victims, it expresses a determination »to ensure the full realisation of the rights« to which they are entitled and recognizes »their inherent dignity«.

The DCPNW preamble also neglects the potential contributions of environmental law. Particularly good model language can be found in the preamble of the UN Environment Assembly's Resolution 2/15 on protection of the environment in areas affected by armed conflict. Framing the DCPNW as contributing to the 2030 Agenda for sustainable development – particularly the goals on peace and justice, food, health, education, gender, water and the environment – would provide an additional rationale for the treaty. Potential language can be found in the preamble of the UN Programme of Action on Small Arms and Light Weapons (PoA), which frames illicit guns as posing »a serious threat to (...) sustainable development at the individual, local, national, regional and international levels« (2nd recital).¹

In addition, unlike the MBT and CCM, the DCPNW does not specifically acknowledge the role of the civil society coalition that called for the treaty's negotiation. This is a major oversight. States often try to limit civil society participation in policy deliberations on global security policy. But it is precisely the involvement of ICAN that has generated the political will to negotiate this treaty. Their role, both past and future, must be acknowledged to ensure that the treaty is implemented robustly and contributes effectively to human security for all.

Strong Prohibitions

The DCPNW's core provisions are a series of categorical prohibitions (»never under any circumstances«) against nuclear weapons, including:

- Development, production, manufacture, acquisition, possession or stockpiling (Article 1(1)(a));
- Transfer (Article 1(1)(b) and (c));
- Use (Article 1(1)(d));

- Testing (Article 1(1)(e));
- Assisting, encouraging or inducing any of the above prohibited acts, or seeking assistance from others to engage in prohibited acts (Article 1(1)(f) and (g)).

States are also obligated to prohibit the stationing, installment, deployment or testing of nuclear weapons on their territories by other states (Article 1(2)). The DCPNW requires all states parties to »take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress« any prohibited activities (Article 7(2)). This sweeping ban will have a powerful stigmatizing impact, framing those states that continue to possess nuclear weapons as pariahs, increasing political pressure for disarmament.

The ban may also increase the political costs for leaders in states with anti-nuclear publics that nonetheless station US nuclear weapons. The Netherlands attended the March negotiations, instructed to do so by the Dutch parliament, despite unrelenting pressure from NATO and its own military to boycott the proceedings. Norwegian parliamentarians have also passed a resolution supporting the ban, despite the government's opposition. In Germany, more than 90% of citizens back the idea of a prohibition treaty and 85% want US nuclear weapons removed from their country (Dressler 2016). In the United Kingdom, the debate on a nuclear weapons ban is becoming entwined the politics of Scottish independence, given widespread anti-nuclear sentiment in Scotland (Press Association 2016). As a result, an eventual ban treaty would be a crucial new human security instrument, through which states parties can pursue a reduction of the threat of nuclear weapons by generating moral disgrace and impetus for multilateral disarmament.

Moreover, the DCPNW does not specifically ban financing, despite considerable support among states and civil society for an »explicit prohibition on investments in companies producing nuclear weapons«. Research by the NGO PAX suggests that such a prohibition would encourage many financial institutions to disinvest from nuclear weapons, further increasing pressure for disarmament (PAX 2017: paragraph 4). Some argue that the assistance prohibition could be interpreted to include financing. State practice on other weapons prohibitions suggests that it may, but states should make that clear in the negotiation record.

1. For further analysis of the DCPNW preamble, see Bolton (2017).

Other states and civil society organizations worry that the DCPNW does not specifically prohibit threatening to use nuclear weapons.² They want the treaty to delegitimize nuclear deterrence doctrines, which rely on the implicit threat, rather than the use of nuclear weapons. However, several states and civil society organizations worry that including a specific provision on threat will create legal complications. UN Charter Article 2(4) already prohibits »the threat or use of force«, which is understood to apply to express threats. Banning use of nuclear weapons therefore inherently bans express threats. Yet proponents of nuclear deterrence argue that it is not an express threat, but an implicit and defensive posture; legal opinion on this is unclear. As a result, several states worry that introducing a prohibition on threat of use will reduce clarity, which could be used as an excuse not to join the treaty and could undermine universalization.

Resolving the dispute over the threat of use issue may require addressing it obliquely, rather than mentioning it directly in the treaty text. One solution could be to add a »respect clause« to the treaty. Common Article 1 of the Geneva Conventions obligates states »to respect and ensure respect« for international humanitarian law »in all circumstances«. A more detailed version of such a clause could include provisions requiring states parties to communicate the norms to nuclear-armed states, declare that they will not accept nuclear deterrence »protections« from other states, refuse to participate in planning, preparations or joint operations where nuclear weapons are involved and condemn violations of the prohibitions by states not party. Whether simply expressed or more elaborately specified, a respect clause could discourage any behavior, not otherwise specified, that would undermine the core prohibitions. States could read into the negotiating record that they understand it to mean that deterrence doctrines and threatening to use nuclear weapons are contrary to the object and purposes of the treaty and should be addressed in national legislation and policy.

Robust Positive Obligations

An important indicator of the DCPNW's humanitarian approach is its inclusion of positive obligations to assist victims and remediate environments affected by nuclear

weapons use and testing (Article 6). These provisions frame the impact of nuclear weapons as an ongoing threat to human security, undermining claims that nuclear weapons are a source of protection. They build on and contribute to a growing body of international law – in the MBT, ERW Protocol and CCM – that obligates states to address the harm weapons cause to people and their environments. Positive obligations in the DCPNW will enable symbiosis with the 2030 Agenda for Sustainable Development, contributing to sustainable development goals on, inter alia, poverty, health, education and the environment. For example, DCPNW Article 6(1) instructs states to provide »medical care, rehabilitation and psychological support, as well as (...) social and economic inclusion« for victims.

However, the DCPNW's victim assistance and environmental remediation obligations need to be strengthened to align them with standards set by other human security instruments, like the MBT, ERW Protocol and CCM. Crucially, they need to be rephrased as obligations, rather than only required of states »in a position to« help. A particularly glaring omission, from a human security perspective, is the lack of provisions on surveying, marking and fencing contaminated areas and providing risk reduction education to affected communities. Using the CCM as a model, the treaty should also specify the activities and institutional arrangements necessary to provide victim assistance and environmental remediation, such as enacting national laws and policies, taking into account standards and best practices, establishing national action plans and mobilizing resources. More detailed elaboration of the provisions on national implementation and international cooperation and assistance are also necessary for robust implementation.

The process that led to the DCPNW has framed the proposed treaty as a discursive and normative exercise, aiming to stigmatize nuclear weapons. However, as currently drafted, the DCPNW lacks provisions promoting the norm that nuclear weapons are inherently inhumane and cause unacceptable harm. Other human security instruments go further than the DCPNW's provision on »universality« (Article 13) in dissemination and disarmament education obligations, calling on states to educate their citizens and militaries about the norms they establish (e.g. CCM Article 21; CCW Article 6; PoA paragraph 41).

2. See e.g. Acheson (2017: 7 and 13-14).

Finally, like many multilateral disarmament and arms control treaties, the eventual treaty should establish a voluntary trust fund, and perhaps a secretariat or implementation support unit, to facilitate implementation and universalization activities.

Political Challenges Ahead

One of the key challenges facing the treaty negotiations is how comprehensive its provisions will be. Some of the main proponent states of the ban want the treaty to be as parsimonious as possible. They see the efficiency of the negotiation process to be an important source of its legitimacy and an indictment of what they see as the negligent lethargy of the nuclear-armed and nuclear alliance states. They want to demonstrate that, with the appropriate political will, progress in nuclear disarmament is achievable and need not be unduly convoluted. They fear that loading the treaty with what they see as complex or controversial provisions will make it difficult to finish by the July 2017 deadline. They do not want the nuclear-armed and nuclear alliance states to mock the process as an unrealistic sideshow. They worry that previous UNGA efforts advocating a comprehensive nuclear weapons convention became bogged down in doing too much at once. Calling for a »streamlined treaty«, they are concerned that tying elimination to prohibition replicates the political problems that stalled the nuclear weapons convention. They would generally prefer issues concerning nuclear-armed states eliminating their arsenals to be negotiated on an ad hoc basis if, in the future, any of those states decide to join the treaty. As a result, the streamliners would also prefer to avoid getting into difficult debates on the inclusion of provisions on testing, threat of use, transit, and verification. Some of them are skeptical of strong positive obligations. For example, Austria's Vice-Minister of Foreign Affairs told the March 2017 meeting, »There is a risk that we want to achieve too much«, calling on states to »stay together behind this one, narrow, clear objective: a legal prohibition of nuclear weapons. (...) Everything else can come later.«


The streamlining camp is challenged by two other broad factions, which share in common a desire to take the political opportunity offered by the ban process to accomplish a broader range of goals.

On the one hand, there are many states – primarily from the non-aligned movement – that have long advocated for the nuclear weapons convention and were somewhat reluctant converts to the ban treaty approach. They would like the treaty to include at least minimal provisions on elimination. Many of them would prefer the treaty to include provisions requiring nuclear-armed states to eliminate their arsenals before acceding to it. Others in this camp would prefer the treaty to be a framework convention, including prohibitions, to which additional protocols on elimination could be added later.

On the other hand is a group of states and civil society advocates that have long championed the humanitarian disarmament approach referred to in this paper. They are committed to the progressive development of humanitarian disarmament law and want the Nuclear Weapons Ban to replicate and build on the humanitarian and human rights framing of the MBT, ERW Protocol and CCM, including robust positive obligations. They share in common with the streamliners a desire to avoid linking prohibition to elimination. However, this faction contends that the current DCPNW does not offer a clear pathway for nuclear-armed and nuclear alliance states to join the treaty. As a result, they advocate for provisions similar to the stockpile destruction provisions in the MBT and CCM, which allow possessor states to join the prohibition before eliminating their arsenals within a specific time frame. The MBT and CCM sacrifice strong verification measures in favor of categorical prohibitions and have allowed NATO members to accede while the US continues to possess the prohibited weapons. This, the humanitarian disarmament group advocates, could be a useful model and would undermine claims that nuclear weapons are somehow »special« or »different« from other unacceptable weapons.³

Despite these three broad camps, however, the Nuclear Weapons Ban negotiations have proceeded in a much more productive and genial fashion compared to other disarmament and arms control negotiations – particularly on nuclear weapons. This is because the vast majority of the states in the room support the ban treaty and are engaged in the negotiations in good faith, despite their differences. The few potential spoilers are sidelined by majority-voting rules and are under the watchful eye of civil society.

3. See e.g. the paper submitted by the organization Article 36 to the Nuclear Weapons Ban negotiations (Article 36 2017).



This good will means that it is very likely that at the end of the June-July 2017 meeting, the UN will have adopted a final Nuclear Weapons Ban treaty text. The focus of the treaty's supporters will then need to refocus toward achieving universalization and vigorous implementation. In particular, they will need to consider how to involve nuclear-armed and nuclear alliance states – including Germany – which will find it more difficult to claim the treaty is »unrealistic«.

Doubling Down on Human Security for All

A Nuclear Weapons Ban treaty based on the DCPNW would represent a major step forward in the development of global law and policy for human security. By reframing nuclear weapons as a threat to human security, rather than a source of protection, it could spur new mobilization for nuclear disarmament. The DCPNW's innovative blending of different strains of disarmament law could also serve as a useful precedent for human security policymaking on other weapons that cause unacceptable harm, such as autonomous weapons systems. Moreover, the multilateral, open and value-driven character of the negotiation process could serve as a model for addressing other human security challenges, such as the use of explosive weapons in populated areas and even more comprehensive disarmament efforts.

As states meet in June and July 2017 for further negotiations on the text, they should seize the opportunity to further enhance the treaty's human security dimensions, while completing negotiations in a timely fashion. To do this, they should:

- incorporate references to human rights law, environmental law and sustainable development in the preamble;
- bolster the core prohibitions, by adding an explicit prohibition on financing nuclear weapons production and a respect clause;
- strengthen the treaty's positive obligations on victim assistance, environmental remediation and norm promotion and disarmament education; and
- offer a pathway for engagement with and eventual accession to the treaty by nuclear-armed and nuclear alliance states.



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