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

13 June 2017

English

New York, 27-31 March 2017 and 15 June-7 July 2017

Strengthening the Positive Obligations on Victim Assistance, Environmental Remediation and Norm Promotion in the Draft Convention for the Prohibition of Nuclear Weapons**Submitted by Pace University**

1. This paper is submitted on behalf of Pace University's International Disarmament Institute.
2. The humanitarian framing of the Draft Convention for the Prohibition of Nuclear Weapons (DCPNW) and its positive obligations – on victim assistance, environmental remediation, universalization, national implementation and international cooperation and assistance – offer the potential for tremendous normative progress on nuclear weapons. They focus policy and legal attention on the unacceptable harm caused by nuclear weapons to people and the environment, rather than abstract and unverifiable notions of “deterrence.” However, comparing the DCPNW with other humanitarian disarmament instruments – such as the Antipersonnel Mine Ban Treaty (MBT), Convention on Certain Conventional Weapons (CCW) Protocol V on Explosive Remnants of War (ERW Protocol) and Convention on Cluster Munitions (CCM) – shows there is room for improvement as states turn the DCPNW into a final treaty.
3. Research conducted by the International Disarmament Institute on the DCPNW's positive obligations has found that it requires work to bring the draft treaty text into alignment with norms established by other humanitarian disarmament treaties. Specifically states should consider:
 - Strengthening the human rights and environmental framing of the preamble, particularly regarding the impact on victims, indigenous peoples, gender equality and sustainable development,
 - Making victim assistance an obligation and elaborating further on its necessary activities and institutional arrangements,
 - Making environmental remediation an obligation and elaborating further on its necessary activities and institutional arrangements,
 - Including a risk reduction education obligation in the environmental remediation provision,

- Establishing obligations to promote and universalize the norms stigmatizing nuclear weapons, condemn violations and support disarmament education
- Specifying further the types of national implementation measures to be put in place including legal, administrative and other measures,
- Adding transparency and reporting obligations to ensure accountability in implementation,
- Specifying further international cooperation and assistance measures, including the establishment of a voluntary trust fund to aid implementation of positive obligations and other provisions.

4. This working paper summarizes the International Disarmament Institute's research, focusing on provisions regarding victim assistance, environmental remediation and norm promotion. Analysis of the preamble and provisions on national implementation and international cooperation and assistance can be found in the full paper.¹ This paper also builds on the International Disarmament Institute's earlier working paper (WP22) submitted to the conference, analyzing the debates about positive obligations during the March 2017 negotiations.²

Strengthening Victim Assistance Obligations

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

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

7. Firstly, and most problematically, the draft Article 6.1 only obligates states "in a position to do so" to provide assistance to victims. By contrast, the CCM says states "shall" provide assistance to victims under their own jurisdiction and control (CCM,

¹ Matthew Bolton. (May 2017) "Improving Positive Obligations in the Draft Convention on the Prohibition of Nuclear Weapons." International Disarmament Institute. <<https://disarmament.blogs.pace.edu/2017/05/31/improving-positive-obligations-in-the-draft-convention-on-the-prohibition-of-nuclear-weapons>>.

² Pace University International Disarmament Institute. (May 2017) *Humanitarian positive obligations for a Nuclear Weapons Ban Treaty*. A/CONF.229/2017/NGO/WP.22. <<https://disarmament.blogs.pace.edu/files/2017/05/Positive-Obligations-Working-Paper-1snu44i.pdf>>.

Article 5.1). Most states participating in the negotiations on the DCPNW are already party to the CCM and/or the CRPD. As a result, they are already required by the existing humanitarian and human rights norms to assist victims of conventional weapons. It does not make sense to have a lower standard of care for victims of nuclear weapons, particularly given that the CCM preamble resolves to “avoid discrimination among victims of various types of weapons” (CCM, PP10). The CCM also obligates other states to assist affected states meet their obligations (CCM, Article 6.7).

8. Secondly, the provision does not offer detailed guidance on how to organize victim assistance.³ Unlike the CCM, it does not require states to “make every effort to collect reliable relevant data” regarding victims (CCM, Article 5.1) or “assess the needs” they face (CCM, Article 5.2). It does not encourage the development of National Action Plans and budgets, mobilization of resources, designation of a governmental focal point or establishment of standards and best practices. By contrast, such activities and implementation arrangements are specifically enumerated in the CCM’s Article 5.2. Moreover, while the CCM (CCM, Article 7.1) requires states to report on implementation of victim assistance activities, the DCPNW does not require states to report on their implementation of any positive obligations.

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

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

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

³ For a useful conceptualization of how to organize victim assistance in dealing with military environmental contamination, see: Doug Weir. (2015) *Environmental Mechanics: Re-Imagining Post-Conflict Environmental Assistance*. pp. 54-61. <http://www.trwn.org/wp-content/uploads/2015/11/TRWP__Environmental_Mechanics.pdf>.

Improving Environmental Remediation Obligations

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

12. However, Article 6.2 is even weaker than the provision on victim assistance. As currently drafted, this provision represents a major step backward from similar provisions in the MBT (Article 5), ERW Protocol (Article 3) and CCM (Article 4). It also contrasts negatively with the major normative progress made on environmental protection in armed conflict in the UN Environment Assembly and the International Law Commission.⁴

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

14. Secondly, the DCPNW has no mention of risk reduction education to limit the harm caused by areas contaminated by the use or testing of nuclear weapons. Given the humanitarian framing of the treaty – and precedent – this seems like a major oversight. The MBT (Article 5.2, Article 6.3 & 6.7), ERW Protocol (Article 4, 5 & 8) and CCM (Article 4, 6 & 7) all call on states to inform people of the dangers of mines, ERW and cluster munitions, through fencing and marking contaminated areas, offering warnings and risk education. For example, the CCM requires affected states to “Conduct risk reduction education to ensure awareness among civilians living in or around cluster munition contaminated areas of the risks posed by such remnants” (CCM, Article 4.2). It also requires all states parties to “provide assistance to identify, assess and prioritise needs and practical measures in terms of...risk reduction education” (CCM, Article 6.5), in order to “reduce the incidence of injuries or deaths” (CCM, Article 6.11). The CCM folds the risk reduction education into the article on clearance; states may wish to consider this as a model. It is unclear, from a human rights perspective, why those who face the risks of cluster munitions and landmines should deserve education on reducing the risks of harm they face, but those who face the legacy risks of nuclear attacks and testing do not.

⁴ Analysis of the environmental remediation provision is indebted to: Doug Weir. (25 May 2017) “The Nuclear Ban Treaty Needs Work If It’s to Deliver on the Environment.” Toxic Remnants of War Network. <<http://www.trwn.org/the-nuclear-ban-treaty-needs-work-if-its-to-deliver-on-the-environment/>>.

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

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

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

Increasing Obligations for Norm Diffusion, Disarmament Education and Universalization

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

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

19. However, other disarmament and arms control instruments go further than the DCPNW in establishing dissemination and education obligations. The CCM explicitly requires states to “promote the norms it establishes”, not only by encouraging accession but also discouraging states not party “from using cluster munitions” (CCM, Article 21.1 & 2).

20. In addition to promoting the norm among states, several instruments call on states to educate their citizens and militaries about the norms embedded in it. The CCW requires states to disseminate the treaty “as widely possible” and to include it in the curriculum of their “programmes of military instruction” (CCW, Article 6). The PoA encourages states to “promote dialogue and a culture of peace by encouraging, as appropriate, education and public awareness programmes on the problems of the illicit trade” in small arms (PoA, Para. 41).

21. The “importance” of disarmament education was emphasized in the Report of the Open-Ended Working Group on Nuclear Disarmament in 2016, particularly regarding “the humanitarian consequences of nuclear weapons” (para 59, 63 & Annex 1, para 3). Disarmament education was also endorsed by the 2010 Nuclear Non-Proliferation Treaty Review Conference Outcome Document (Action 22).

22. One way of encoding obligations of norm diffusion in humanitarian treaties is through an “ensuring respect clause.” Common Article 1 of the Geneva Conventions obligates states “to respect and ensure respect” for international humanitarian law; according to custom and state practice this includes a duty to disseminate information about humanitarian norms and cultivate respect for them.⁵ Article 21 of the CCM has elements that could serve as a model.

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

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

⁵ Knut Dormann & Jose Serralvo. (2014) “Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations.” *International Review of the Red Cross*. 96(895/896). p. 731.

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