



Forbidding financing: a prohibition on the financing of nuclear weapon producers

Introduction

In March 2017, negotiations started at the United Nations for a treaty banning nuclear weapons. During the first round of negotiations the core prohibitions to be included in the new legal instrument were discussed. There was a general understanding that the treaty should contain clear and comprehensive prohibitions to outlaw nuclear weapons. The draft text, released by Ambassador Whyte on 22 May, provides a strong basis for such a categorical prohibition. However the text could be strengthened in a number of areas. One way to strengthen the text is to include an explicit reference to financing in the first article dealing with assistance. This paper addresses some of the questions raised about such a reference, and provides some information on best practices to support that inclusion.

Why include a prohibition on financing?

The inclusion of a prohibition on financing will build on existing international law by making explicit the growing understanding in the international community that financing constitutes a form of assistance.¹ It will also strengthen and make more effective the nuclear weapons prohibition by limiting the flow of capital to the companies involved in nuclear arsenals and thereby hampering production of nuclear weapons. It would be in line with the intents and purpose driving the nuclear ban treaty, as it not only effectively prohibits these weapons but also extends the logic of outlawing nuclear weapons to the financial sector.

“Our understanding is that ‘assistance’ could also encompass ‘financing’, but again this is something that we would be interested to hear more on in exchanges with delegates.”

Ireland, 29 March 2017

The inclusion of financing would provide clarity to both states parties and financial institutions². This signalling function is important to financial institutions. Many in the financial sector now use the Non-Proliferation Treaty as a justification for continuing to provide capital to companies involved in the nuclear weapons programmes of the NPT recognised nuclear armed states. These financial institutions, not unlike some of those states, argue that nuclear weapons are not actually illegal for them. Just as the Convention on the Prohibition of Nuclear Weapons is addressing other legal gaps, it will also remove any uncertainties for the financial sector by clearly establishing the illegality of any stockpiling or retention of nuclear weapons.

The relationship between the nuclear weapon production and financial industries is greater than commonly thought. Financial institutions provide crucial and necessary support to companies, so that they are able to carry out projects like producing key components for nuclear weapons. Most

nuclear armed states rely on private companies for the production, maintenance and modernization of their nuclear weapons. Publicly available documentation shows private companies are involved in the nuclear arsenals of, at least, France, India, Israel, the United Kingdom and the United States. When financial institutions invest in companies associated with nuclear weapon production, they provide the financing that is needed for the projects that are currently making these weapons more likely to be used while increasing their kill capacity.

Financial institutions have a choice, and many already choose not to invest in companies associated with the production of weapons that are designed to violate international humanitarian law when they are used. However, there are still hundreds of financial institutions that continue investing and a clear prohibition on this type of assistance can facilitate and compel divestment.

Best practices for implementation

The most easily negotiable and implementable option would be to include a clear and concise financing prohibition in the assistance paragraph. This then clarifies any ambiguities and puts a clear obligation on states to positively assess their roles and responsibilities in terms of all types of assistance they may be providing. The details for implementation should be left to national measures (including legislation). There are a number of advantages to such an approach, including the ability for states to adapt to national contexts, clarification of any ambiguities about this part of assistance as well as removing the need for extensive negotiations about detailed and technical financing definitions.

1. Adapt to national context & consolidate obligations

Previous experiences have shown states are well placed to implement general financing prohibitions in their national contexts. For example, research by PAX shows that 10 states have already adopted national legislation prohibiting investments in cluster munitions³, understood to be prohibited by the 'assistance' provision in the Convention on Cluster Munitions. Some states have also already done so for the financing of nuclear weapons. In Australia and New Zealand it is a crime for a person or company to facilitate nuclear weapons manufacture anywhere in the world. In both countries a company is also prohibited from providing services, including lending money, to another company if it can reasonably suspect that the services provided will contribute to a WMD program. In Switzerland, the Swiss War Materials Act prohibits direct investment in nuclear weapons producers. Liechtenstein implements the same legislation.

Implementing a prohibition on financing as part of the assistance clause of the nuclear weapons prohibition through national legislation also allows states to consolidate their obligations under other existing prohibitions and restrictions on financing, from UN Security Council Resolution 1540 to the International Convention for the Suppression of the Financing of Terrorism. Best practices

on national implementation could be shared at meetings of states parties and assistance with implementation measures could be asked for and provided, should States choose to do so.

2. Provide clarity about what a prohibition on financing limits

It is important to recognize that other existing prohibitions on financing do not restrict purchasing other goods produced by companies that might also have been engaged in prohibited activities. The same could apply here. In practical terms, a prohibition on financing would apply to all types of investments and financing, including providing loans, investment banking services such as underwriting bond or share issuances, and asset management activities such as shareholding. A prohibition on financing would therefore not require a boycott of nuclear weapon producing companies; it would only prohibit investing in them. Financing and investing are done with the intention of making a profit. Investing in a producer of nuclear weapons is therefore not only a form of assistance with the production of these weapons, it also means profiting from an activity that is prohibited because of its inhumane consequences.

3. No significant additional obligations

A third advantage is that this approach is not likely to pose significant additional obligations on states parties beyond what is already in place. For example, all United Nations member states are already required to prevent the financing of non-state actors that are threatening proliferation. UN Security Council Resolution 1540 (2004)⁴ “decided that all States shall refrain from supporting by any means non-State actors that attempt to acquire, use or transfer nuclear, chemical or biological weapons and their delivery systems.”

UNSC Resolution 1540 recognized that financing is a key resource that needs to be taken into account when states want to ban a specific practice. Support for achieving this in the UNSCR 1540 context is provided by the Financial Action Task Force (FATF) which sets standards and promotes effective implementation to combat the financing of proliferation to non-state actors. As stated by the FATF: “As primary entry points into the international financial system, the private sector plays a crucial role in protecting its integrity.”⁵ The recommendations made available by the FATF can be a useful resource for states as they implement a ban on financing nuclear weapon producers.

“As primary entry points into the international financial system, the private sector plays a crucial role in protecting its integrity”

FATF

Although it is important as a matter of consistency and principle that states themselves do not invest public funds (such as government pension and superannuation funds or sovereign wealth funds) in companies producing (key components of) nuclear weapons, applying the financing prohibition to private actors is especially important, as most investments in the nuclear weapons

industry are made by the private financial sector. The 2016 PAX report 'Don't Bank on the Bomb', for example, showed that between January 2013 and August 2016, 390 financial institutions from 26 countries invested over USD 499 billion in a red flag list of 27 companies involved in the production, maintenance or modernization of nuclear weapons⁶.

In support of national implementation measures, civil society will continue to play a key role in holding the private financial sector accountable, as it has in the past. Both the non-governmental and private sector make available information (sometimes at a fee) useful for implementation. Such information includes lists of companies involved in producing key components for nuclear arsenals, or lists of the institutions known to have engaged in financial relationships with producing companies. These resources can facilitate public-private partnerships in fulfilling national implementation measures.

In sum, analogous to other international agreements, the new convention on the prohibition of nuclear weapons should create a simple prohibition on financing the making, having and getting of nuclear weapons, and also require states to implement national legislation to meet the obligations of the treaty.

Conclusion

There is a growing understanding that financing is a form of prohibited assistance. Including an explicit prohibition on financing in the nuclear weapons ban treaty will help make this understanding universal, and thereby build on existing international law. A significant number of states indicated during the first week of negotiations for the nuclear weapons ban treaty that they want financing included as one of the core prohibitions of the new treaty. This paper has argued that it is important that such an explicit prohibition be included, as it will strengthen the impact of the treaty and of international law in general.

The provision included in the treaty could be simple, in line with the way 'assistance' has been included in other treaties. Implementation should be left up to states parties, who would be best equipped to implement it in a way suited to their national contexts. It will also be useful to share best practices on all aspects of treaty implementation, including the financial prohibition at meetings of states parties.

All financing provided to nuclear weapon producing companies assists them in the production of key components of weapons that are designed to violate international humanitarian law. In keeping with the spirit of the nuclear ban treaty, financing is a logical term to include.

*This paper was written by Maaïke Beenes and Susi Snyder for PAX, June 2017.
Comments and questions can be directed to: snyder@paxforpeace.nl.*

Sources

- 1 PAX submitted a working paper to the negotiations laying out these arguments for why the ban treaty should include a prohibition on financing: A/CONF.229/2017/NGO/WP.5
- 2 Article 36, IHRC (2017) “A prohibition on financing in the nuclear weapons ban treaty” page 1, <http://www.article36.org/wp-content/uploads/2017/03/Financing-TPs-3-25-17.pdf>, last viewed 14 June 2017.
- 3 PAX (2016) “Worldwide Investments in Cluster Munitions, a shared responsibility”, available at www.stopexplosiveinvestments.org/report, last viewed 14 June 2017.
- 4 United Nations (2004) “Security Council decides all states shall act to prevent proliferation of mass destruction weapons”, available at <http://www.un.org/press/en/2004/sc8076.doc.htm>, last viewed 14 June 2017.
- 5 FATF, 2015-2016 annual report, p44, available at <http://www.fatf-gafi.org/publications/fatfgeneral/documents/annual-report-2015-2016.html>, last viewed 14 June 2017.
- 6 PAX (2016) Don’t Bank on the Bomb, available at www.dontbankonthebomb.com, last viewed 14 June 2017.