Building on the Ban

Increasing impact by decreasing investment

Introduction

On 7 July 2017, 122 states adopted the Treaty on the Prohibition of Nuclear Weapons in the United Nations in New York. During the negotiations states agreed on a text that recognizes the unacceptable humanitarian consequences of nuclear weapons. States now need to sign and ratify the treaty and implement its provisions. This paper looks at the issue of investing in nuclear weapon producers in relation to the TPNW's provision that prohibits assistance with production of nuclear weapons. It calls on states to clarify publicly that they consider investments in nuclear weapon producers banned under the TPNW, and to adopt national legislation to prevent such investments.

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Investments contribute to production of controversial weapons

The relationship between nuclear weapon production and financial institutions cannot be overlooked. Financial institutions provide the necessary support to companies so they are able to carry out their projects. 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 to maintain, refurbish, test, and modernise nuclear weapons. In short: no money means no production. Research by PAX shows that between January 2013 and August 2016, at least 390 financial institutions from around the world invested US$ 498 billion in 27 private companies involved in the nuclear arsenals of France, India, Israel, the UK and the US. Investors profit from the production of weapons that are unacceptable to most of their clients and could lead to the death of millions of people.

Investments are not neutral. Financing and investment are active choices, based on a clear assessment of a company and its plans. A bank doesn't invest in an arms manufacturer because they also happen to make toasters: banks and other financial institutions know where their money goes. Banks' existing due diligence practices already identify links to the weapons sector, though not always revealing a company's involvement with the nuclear arms industry. Any financial service delivered to a company by a financial institution demonstrates tacit approval of their activities. Conversely, explicitly excluding a company because of the way it does business or because of the nature of its products also sends a strong signal of disapproval to the offending company.

The international norm against investing in producers of controversial weapons

There is a growing norm among states that financing or investing in companies that produce controversial weapons is a form of assistance with the production of those weapons. While there are currently no known explicit prohibitions on financing in international laws prohibiting inhumane and indiscriminate weapons, it is common to include a prohibition on assistance with prohibited acts. There is a growing understanding that financing falls within the scope of these prohibitions, notably the prohibition on assistance with the production and development of banned weapons. Examples of international instruments where this understanding is visible include the Convention on Cluster Munitions; the International Convention for the Suppression of the Financing of Terrorism; and Nuclear Weapon Free Zone Treaties.

a. The Convention on Cluster Munitions

The 2008 Convention on Cluster Munitions (CCM) prohibits the use, development, production, acquisition, retention and transfer of cluster munitions. Article 1(1)c of the CCM states that "*Each State Party undertakes never under any circumstances to assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.*"

Under Article 9 of the CCM, the Convention's provisions apply to all persons and legal entities under the jurisdiction or control of the State Party, and the government is required to adopt "all appropriate legal, administrative and other measures to implement" the treaty.

Because assistance is not clearly defined in international law, practice by States Parties is looked at for clarification[1]. So far, 30 states (of 119 that have joined) explicitly acknowledge that the CCM's prohibition on assistance in the development and production of cluster munitions also prohibits investments in cluster munitions. 10 more states have adopted national legislation to this end.[2] This practice therefore increasingly makes clear that financing constitutes assistance with production, and that this applies also to financial institutions investing in producers of cluster munitions. These legislative acts have provided clarity and guidance to the financial industry on definitions, scope, and responsibility.

Success Story: Textron

US based company Textron announced it would stop the production of cluster munitions. Commentators in financial media have suggested that one reason for this decision would be to increase the 'ownability' of Textron shares for mainly European investors, which largely exclude cluster munitions producers from financing.[3]

[1] Wiebe, Smyth & Casey-Maslen (2010) *Article 1*. In: G. Nystuen & S. Casey-Maslen.*The Convention on Cluster Munitions: a commentary*. New York: Oxford University Press.
[2] States Banning Investments: Factsheet. October 2017. Available at http://www.stopexplosiveinvestments.org/uploads/2017Oct31 States Banning Investment Factsheet.pdf.
[3] Worldwide Investments in Cluster Munitions: a shared responsibility 2016, Page 15. Available at www.stopexplosiveinvestments.org/report.

b. International Convention for the Suppression of the Financing of Terrorism

An international agreement that does explicitly deal with financing is the International Convention for the Suppression of the Financing of Terrorism [ICSFT]. This convention is built on the recognition of the idea that financing provides a crucial form of assistance to terrorist groups, and must therefore be prohibited. As terrorism is a tactic, and not a tangible weapon, additional complexities arise in the ICSFT. In New Zealand, legislators drew on the language of the ICSFT for the national implementation legislation for the CCM, that also prohibits the financing of cluster munitions. This illustrates the growing understanding that financing is a form of assistance, and that if assistance with certain acts is to be banned, so should financing.

c. Nuclear Weapon Free Zone treaties

All Nuclear Weapon Free Zone treaties [NWFZ] contain obligations on parties not to assist other states with prohibited acts, but these prohibitions are not the same for each treaty. For example, all NWFZ treaties prohibit the production of nuclear weapons, but only three explicitly prohibit the development of nuclear weapons (treaties of Bangkok, Pelindaba, Semipalatinsk). All but the Rarotonga Treaty prohibit assistance with possession.

According to the PAX research "Don't Bank on the Bomb" most investments in nuclear weapon producing companies come from financial institutions headquartered in countries that are not party to any nuclear weapon free zone agreements. The research shows that not a single financial institution headquartered in the regions covered by the treaties of Tlatelolco and Pelindaba have any significant financial relationships with nuclear weapon producing companies. This could suggest that the prohibitions of action to "*assist or encourage… development or manufacture*" of nuclear weapons is applied to investment in nuclear weapon producing companies. The exceptions are financial institutions operating in Australia (Treaty of Rarotonga), and Singapore (Treaty of Bangkok). The global prohibition is a new encouragement to these remaining outliers to end investments.

Success Story: Lockheed Martin

Lockheed Martin describes itself as the largest arms manufacturer in the world. It announced that it stopped its involvement in the production of rockets, missiles or other delivery systems incorporating cluster munitions warheads and wouldn't accept future orders. It expressed the hope that this decision would enable it to be included in investors' portfolios again. This suggests that pressure by financial institutions was a contributing factor in Lockheed Martin's decision to end its involvement with cluster munitions production.[4]

[4] Don't Bank on the Bomb 2016, page 6, available at http://www.dontbankonthebomb.com/report/

The Treaty on the Prohibition of Nuclear Weapons

The Treaty on the Prohibition of Nuclear Weapons [TPNW] was adopted on 7 July 2017 and opened for signature in September 2017. Article 1 of the treaty contains its prohibitions. Under article 1(a) states parties are not allowed to "*develop, test, produce, manufacture, otherwise acquire, possess or stockpile nuclear weapons or other nuclear explosive devices*". Under article 1(e), it is also prohibited to "[*a*]*ssist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Treaty*".[5]

As mentioned above, the concept of assistance is not a clearly defined legal term, so practice by States Parties is necessary to determine its meaning.[6] Implementation of these provisions, will be guided by negotiating records, discussions and agreements during Meetings of States Parties and by state practice.

Including a ban on financing was already suggested in the final report of the Open Ended Working Group.[7] During the negotiation for the TPNW, many countries stated their understanding that the prohibition on assistance includes a prohibition on financing and that investment in nuclear weapon producers would not be in line with the intent and purpose of the Treaty.[8]

States cannot eliminate weapons they do not possess themselves, but they can and do establish norms that make continuing possession untenable. There are also ways to extend the impact of norms outside the treaty parties, including by promoting the understanding that financing of prohibited acts is also prohibited. This has proven to impact companies and states involved with the production and retention of weapons in states that remain outside the prohibition, and it will increase the stigma attached to nuclear weapons.

There are many examples, from the South African Apartheid regime to child labour to tobacco when shunning by the financial industry had a profound social impact. While it is unlikely that divestment by a single financial institution or government would create sufficient pressure on a company for it to end its involvement in nuclear weapons production, divestment by even a few institutions or states based on the same justification can impact a company's strategic direction. Explicitly prohibiting financing in the ratification process for a new legal instrument offers a clear guidance and justification for financial institutions to divest.

Financial institutions make their own judgements, but also look to governments to provide clarity on what constitutes unethical investment. For example, research by PAX shows that many financial institutions refer to the Non-Proliferation Treaty [NPT] as a justification for the exclusion of nuclear weapon producers. A significant number also refer to the NPT to argue that nuclear weapons are not comprehensively prohibited and therefore remain a legitimate investment. In sum, it is important to make it clear that the nuclear weapon business is not legitimate, just as nuclear weapons are not legitimate.

[5] Please refer to http://undocs.org/A/CONF.229/2017/8 for the full text of the Treaty.
[6] Wiebe, Smyth & Casey-Maslen (2010) *Article 1*. In: G. Nystuen & S. Casey-Maslen.*The Convention on Cluster Munitions: a commentary*. New York: Oxford University Press.
[7] Report of the Open Ended Working Group taking forward multilateral nuclear disarmament negotiations, Annex II, page 17, available at: http://www.reachingcriticalwill.org/images/documents/Disarmamentfora/OEWG/2016/Documents/OEWG-report-final.pdf
[8] Interpretive statements: financing prohibited. Available at : https://www.dontbankonthebomb.com/interpretive-statements-financing-prohibited/

Recommendations

- **Make a statement:**

In order to create the basis for a common understanding that investment in nuclear weapon producers are banned under the TPNW, states are encouraged to make a statement such as:

> *We understand that Article 1(f) of the Treaty, which prohibits assistance with the other acts prohibited under Article 1, includes a prohibition on investments in producers of nuclear weapons.*

- **Adopt national legislation:**

We urge all states to adopt national legislation explicitly prohibiting all investments in producers of nuclear weapons. This can be part of the national legislation to implement the Treaty on the Prohibition of Nuclear Weapons. Such legislation should:

- Prohibit investments in **all companies** involved in the production, development or maintenance of nuclear weapons;
- Apply to **all types of investments** in such companies;
- Apply to **all financial institutions** and individuals under the country's jurisdiction;
- Provide for a **monitoring and enforcement** mechanism.

For more detailed information, please refer to www.dontbankonthebomb.com

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