



Banning investment:

An explicit prohibition on the financing of nuclear weapon producers

Introduction

In March 2017, negotiations will start at the United Nations for a treaty banning nuclear weapons. This new treaty should comprehensively prohibit the making, having, getting and using of nuclear weapons, as well as ban any assistance of those prohibited acts. This paper looks at how to reinforce the prohibition on assistance by including an explicit prohibition on investments in companies producing nuclear weapons, and examines what such language could look like. The main benefit is making explicit the growing understanding in international law that financing constitutes a form of assistance.

Why include a prohibition on financing?

States cannot eliminate weapons they themselves do not possess, but there are ways to extend the impact of norms outside the treaty. One way is to promote the understanding that the financing of prohibited acts is prohibited. This is one way to effectively pre-empt the argument against the efficacy of a treaty banning nuclear weapons on those states that have nuclear weapons. In negotiations, states can include elements in the treaty that will have direct effects on states not party. Assisting anyone to make, have, get, or use nuclear weapons in any way would run counter to the intent of a nuclear weapons prohibition treaty and providing financial resources to companies involved is assistance. Including a ban on financing was already suggested in the final report of the Open Ended Working Groupⁱ. Explicitly prohibiting the financing of nuclear weapon producers, including any support, financially or otherwise, to anyone involved in nuclear weapon production with the exception of those activities required for safe stockpile elimination would have an effective impact on the companies and states involved with the production and retention of nuclear weapons and increase the stigma attached to nuclear weapons.

From stigmatizing to shunning

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. Current practices around due diligence identify link 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 company.

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 still a legitimate investment.ⁱⁱ The inclusion of a prohibition on financing in a new treaty banning nuclear weapons would make it clear that the nuclear weapon business is not legitimate, just as nuclear weapons are not legitimate.

The relationship between the nuclear weapon production and financial industries cannot be overlooked. Financial institutions provide crucial and necessary support to companies, so that 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 and use, they provide the financing to maintain, refurbish, test, and modernise nuclear weapons. 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 USⁱⁱⁱ.

Including a specific prohibition on the financing of prohibited acts in the nuclear ban treaty is in line with the vision driving the treaty – to codify the illegitimacy of nuclear weapons. It will also limit the flow of financing to the companies involved in nuclear arsenals and thereby have a concrete impact beyond the countries that initially accede to the treaty. It would also provide clarity to financial institutions and stimulate the strengthening of existing policies and practices of financial institutions in acceding countries.

There are many examples, from the South African Apartheid regime to child labour to tobacco where 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

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.¹

This suggests that pressure by financial institutions was a contributing factor in Lockheed Martin's decision to end its involvement with cluster munitions production.

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 financing¹.

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 a new legal instrument offers a clear guidance and justification for financial institutions to divest.

Building on existing agreements

While there are currently no known explicit prohibitions on financing in other international instruments prohibiting inhumane and indiscriminate weapons, it is common to include a prohibition on assistance with prohibited acts in convention and treaties and there is a growing understanding that financing constitutes a form of assistance with prohibited acts.

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."

In a legal sense, this ban on assistance with prohibited activities applies only to state parties, but both State Parties, States not party and non-state actors are covered by 'anyone'. Under Article 9 of the CCM it applies 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,^{iv} practice by States Parties is looked at for clarification. So far, 28 States (of 119 that have joined) explicitly acknowledge that the CCM prohibition on assistance in the development and production of cluster munitions also prohibits investments in cluster munitions. 10 States have adopted national legislation to this end.^v 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.

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^{vi} (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.

Nuclear Weapon Free Zone treaties

All Nuclear Weapon Free Zone treaties (NWFZ)¹ 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 countries that are not party to any nuclear weapon free zone agreements. No financial institutions headquartered in the area 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 also applied to investment in nuclear weapon producing companies. The exceptions are financial institutions operating in Australia (Treaty of Rarotonga), and Singapore (Treaty of Bangkok). A global prohibition would encourage these outliers to end their investments.

What would a prohibition on financing look like?

Building on the existing agreements above, a treaty banning nuclear weapons is likely to explicitly prohibit the assistance, encouragement, or inducement or anyone to commit prohibited acts. Just as the CCM prohibits the assistance, encouragement or inducement of

¹ Latin American Nuclear-Weapon-Free Zone Treaty (Treaty of Tlatelolco): Nations must not take any action "to assist or encourage" the development or manufacture of nuclear weapons inside or outside the zone. Treaty for the Prohibition of Nuclear Weapons in Latin America, opened for signature 14 February 1967, Article 1(2);

South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga): Nations must not do anything "to assist or encourage the manufacture" of nuclear weapons by any other nation, whether it is in the zone or not. South Pacific Nuclear Free Zone Treaty, opened for signature 6 August 1985, article 3(c);

African Nuclear-Weapon-Free Zone Treaty (Treaty of Pelindaba): Nations must not "take any action to assist or encourage the research on, development, manufacture ... of any nuclear explosive device". African Nuclear-Weapon-Free-Zone Treaty, opened for signature 11 April 1996, article 3(c);

Southeast Asian Nuclear-Weapon-Free Zone Treaty (Treaty of Bangkok): Nations must "refrain from engaging in, encouraging or authorizing, directly or indirectly, ... manufacture ... of any nuclear weapon". Treaty on the Southeast Asia Nuclear Weapon-Free Zone, opened for signature 15 December 1995, article 3(4)(b);

Central Asian Nuclear Weapon Free Zone Treaty (Treaty of Semipalatinsk): Parties undertake "Not to take any action to assist or encourage the conduct of research on, development, manufacture, stockpiling, acquisition or possession of any nuclear weapon or other nuclear explosive device;" and not to allow in its territory" Any actions, by anyone, to assist or encourage the development, production, stockpiling, acquisition, possession of or control over any nuclear weapon or other nuclear explosive device." Treaty on a Nuclear-Weapon-Free Zone in Central Asia, opened for signature 8 September 2006, articles 3(c) and 3(d)(iii).

anyone to engage in prohibited activities. The ICSFT goes further by not only prohibiting the provision of funds *to anyone*, but also *by anyone*. The reasons outlined above justify including an explicit reference to financing in the new ban treaty to build on the interpretation of previous inhumane weapons prohibitions as well as to provide clarity and guidance to the investment community. Adopting similar language in a nuclear weapons treaty could therefore prohibit its parties, their nationals, and any other individual or entity subject to its jurisdiction from the assistance, encouragement, inducement or investment in acts prohibited by the treaty.

Conclusion

Although existing conventions and treaties prohibiting inhumane and indiscriminate weapons do not contain explicit prohibitions on financing, there is a growing understanding that financing is a form of prohibited assistance. This is shown by state practice around the Convention on Cluster Munitions, the rationale behind the International Convention for the Suppression of the Financing of Terrorism and the practice of financial institutions from countries that have joined Nuclear Weapon Free Zone treaties. Including an explicit prohibition on financing in a nuclear weapons ban treaty will make this understanding explicit, and thereby build on existing international law. It will strengthen and make more effective the nuclear weapons prohibition treaty by limiting the flow of capital to the companies involved in nuclear arsenals of states that remain outside of the new treaty. It would also be in line with the intents and purpose driving the nuclear ban treaty, so that it not only effectively prohibits these weapons but also extends the logic of outlawing nuclear weapons to the financial sector. The inclusion of financing in a nuclear weapon prohibition *now* would also strengthen the impact of future efforts to reduce humanitarian harm through strengthened application of global norms and international law, and is a cooperative approach to ensuring the creation and maintenance of a world without nuclear weapons.

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Sources

ⁱ 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/Disarmament-fora/OEWG/2016/Documents/OEWG-report-final.pdf>

ⁱⁱ Don't Bank on the Bomb 2016 available at <http://www.dontbankonthebomb.com/report/>

ⁱⁱⁱ Don't Bank on the Bomb 2016, page 6, available at <http://www.dontbankonthebomb.com/report/>

^{iv} G. Nystuen and S. Casey-Maslen (eds.), 2010, The Convention on Cluster Munitions: a Commentary. Article 1. Oxford University Press, New York, Article 1.

^v Worldwide Investments in Cluster Munitions: a shared responsibility 2016, Page 15. Available at www.stopexplosiveinvestments.org/report.

^{vi} International Convention for the Suppression of the Financing of Terrorism, 1999, available at <http://www.un.org/law/cod/finterr.htm>.