



NUCLEAR BAN DAILY



Reaching Critical Will

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Nuclear Ban Daily is produced by Reaching Critical Will, the disarmament programme of the Women's International League for Peace and Freedom (WILPF) during meetings related to the UN conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading to their elimination, taking place 15 June-7 July 2017. The views expressed in this publication are not necessarily those of WILPF.

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RUNNING THROUGH DRAFT TWO

Ray Acheson | *Reaching Critical Will, Women's International League for Peace and Freedom*

The President's team released a new draft treaty text on Tuesday morning, which was the focus of the debate in the afternoon plenary session. The overwhelming majority of states taking the floor said that this text is going in the right direction, is a good basis for further work, and reflects many of the points of convergence reached last week. All states did say the text needs further work, but most expressed confidence that agreement could be reached on a treaty by 7 July. This is welcome news.

States seem generally pleased with the **preamble**. The preamble would benefit from the addition of a reference to the principles of international environmental law, to complement the references to international humanitarian law and human rights law.

The introduction of a new paragraph on nuclear energy, however, is extremely problematic. The paragraph affirms an "inalienable right" of states parties to "peaceful uses" of nuclear energy. This so-called right is enshrined within the Non-Proliferation Treaty (NPT) and reflects an outdated understanding of the risks of this technology and an ill-conceived bargain to help convince non-weapon states not to develop nuclear weapons

We now know that nuclear energy increases proliferation opportunities. All nine nuclear weapon states have used nuclear reactors to create plutonium for their nuclear weapons. In Britain and France, civilian nuclear energy and military programmes overlapped. North Korea and India acquired nuclear weapons through so-called "peaceful" civilian nuclear programmes. Fears about Iran's nuclear energy program drove a major diplomatic effort to limit its weapons potential.

The economic, environmental, humanitarian, safety, and security challenges of nuclear energy are there for all to see in the

persistent health and environmental impacts of uranium mining and nuclear waste, and catastrophic impacts of nuclear energy seen at Chernobyl and Fukushima. This treaty may not be able to do anything to address the situation of nuclear energy, but it must not give any legitimacy to this failed and destructive technology.

The focus of the treaty instead should be on the prohibition of nuclear weapons. Interestingly, the **general obligations** have not been amended at all, despite a number of calls for prohibitions on planning and preparations, transit, financing, and threat of use. The prohibition on use may be sufficient to cover threat of use, though an explicit reference would be welcome for clarity. The other three should be explicitly prohibited. While some states have argued that assistance would cover activities related to these terms, having explicit prohibitions on them would provide guidance and clarity to the changes in policies and practices that will be required for some states parties.

Articles 2-5 of the treaty may need the most work. Several delegations argued that the declarations in article 2 should reflect the obligations in article 1. This treaty is not just about nuclear-armed states—it's also about those that are currently involved in planning and preparations to use nuclear weapons, in hosting or stationing nuclear weapons, etc.

In addition, it's important for article 2, and the rest of this section, to address facilities and not just activities. This is particularly important for questions of irreversibility when it comes to the destruction of nuclear weapon programmes as required by article 4. The declarations should thus include all facilities used to develop, produce, manufacture, test, store, install, or deploy nuclear weapons and related activities.

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ADDRESSING TRANSIT: THE NEW ZEALAND EXPERIENCE

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Negotiating parties have been debating whether the ban treaty should include an explicit prohibition on the transit of nuclear weapons. Proponents of including an explicit ban on transit argue that it is necessary to establish a comprehensive prohibition on nuclear weapons, and that its omission would undermine the normative and practical value of the treaty. The current draft treaty text bans the provision of “assistance” to any nuclear weapon activities, but does not define what assistance includes. Proponents thus argue that omission of a ban on transit might be perceived as allowing space for states parties to interpret the treaty as permitting visits from nuclear armed vessels and aircraft. (Several of the regional nuclear weapon free zones allow such visits at present.)

Conversely, those opposed to including a prohibition on transit have argued that implementing such a ban is not practicable, and would thus undermine the credibility of the treaty. That is, verifying and enforcing compliance with a ban on transit would likely require the cooperation of the nuclear-armed states, which at present are strongly opposed to the treaty. In the context of states parties’ territorial waters, some who oppose a ban on transit note that the nuclear-armed and umbrella states could challenge a ban on the basis that it is inconsistent with the right to innocent passage under existing international law—though that would depend on the definition of innocent passage.

Since several of these issues touch on national implementation measures, it is useful to examine the experience of New Zealand, which has operated a domestic legal prohibition on “nuclear explosive devices” for the last 30 years. The New Zealand law appears to walk a fine line between the positions outlined above, and may thus be worthy of delegates’ further consideration.

The New Zealand Nuclear Free Zone, Disarmament and Arms Control Act 1987 prohibits the manufacture, acquisition, possession, control over, and stationing of nuclear explosive devices within the Nuclear Free Zone established by the law, and prohibits any person from aiding, abetting, or procuring others to undertake such activities. The law also applies these prohibitions to all citizens and permanent residents who are agents of the government, including the armed services, anywhere in the world. The Zone comprises “(a) all of the land, territory, and inland waters within the territorial limits of New Zealand; and (b) the internal waters of New Zealand; and (c) the territorial sea of New Zealand; and (d) the airspace above the areas specified in paragraphs (a) to (c).” Nuclear explosive devices are defined as “any nuclear weapon or other explosive device capable of releasing

nuclear energy, irrespective of the purpose for which it could be used, whether assembled, partly assembled, or unassembled,” but excludes their delivery vehicles.

The 1987 law obliges New Zealand’s government to implement these prohibitions in the country’s internal waters, but makes implicit allowance for the legal and practical complications regarding their implementation in territorial waters, and thus, avoids the need for the nuclear-armed states to cooperate in their implementation. To achieve these ends, the law bans the government from permitting (as opposed to requiring that it actively prevent) visits by nuclear explosive devices to internal waters. Section 9(2) of the law reads: “The Prime Minister may only grant approval for the entry into the internal waters of New Zealand by foreign warships if the Prime Minister is satisfied that the warships will not be carrying any nuclear explosive device upon their entry into the internal waters of New Zealand.” Section 10(2) applies the same condition on the granting of permission for foreign military aircraft to land in New Zealand. The Prime Minister must “have regard to all relevant information and advice that may be available to the Prime Minister including information and advice concerning the strategic and security interests of New Zealand.” With regard to transit specifically, the Nuclear Free Zone law allows ships to pursue “innocent passage (in accordance with international law) through the territorial sea” and allows ships and aircraft to pursue “transit passage (in accordance with international law) through or over any strait used for international navigation.”

By obliging the Prime Minister not to permit the transit of nuclear weapons, the law sidesteps some of the verification and enforcement challenges raised by delegates with regard to a transit ban. The government’s protocols for complying with its legal obligations also create an official paper trail, publicly accessible pursuant to freedom of information law, asserting that any visiting military ships or aircraft are not carrying nuclear weapons. This is a direct challenge to the US “neither confirm nor deny” policy regarding the presence of nuclear weapons on its ships. The New Zealand law thus constitutes a direct challenge to nuclear deterrence as it is practiced by the Western alliance—a point highlighted in much of the Western opposition to the New Zealand law. •

