



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 This so-called right is enshrined within the Non-Proliferation Treaty (NPT) and reflects an outdated understanding of the risks of this technology and an ill-conceived bargain to help convince non-weapon states not to develop nuclear weapons.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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Editorial, continued

New Zealand raised concern that the text requires the same declarations from states currently possessing nuclear weapons as it does from the few others that have no safeguards at all; and that declarations are only required on prior destruction and general safeguards obligations but not on current possession or stationing of nuclear weapons. Furthermore, none of the core requirements of safeguards contained in the annex of the first draft text have been retained. Ireland, Switzerland, and others also expressed concern about the state of the safeguards provision in this draft.

Article 4 has problems. As New Zealand noted, the language in this section allowing nuclear-armed states to join the treaty would seem to contradict the prohibition against possession of nuclear weapons. Such concerns must be resolved. States need to decide about the value of postponing provisions to eliminate nuclear weapon programmes into the future or setting the stage for that now.

Article 4(1)–(4)’s “join and destroy” approach is much more stringent than Article 4(5), which reflects a “destroy and join” option. While states joining the treaty and then submitting a plan for elimination are required to do so in a time-bound, verifiable, and irreversible manner, those joining the treaty after destroying their nuclear weapons only have to cooperate with the IAEA on verifying the correctness and completeness of their inventory of nuclear material. This must be expanded to include verification of the comprehensive elimination of concerned state’s nuclear weapon programme.

The **positive obligations** on victim assistance and environmental remediation also need work. The victim assistance provision still says that only “states in a position to do so” shall provide assistance, despite a large number of states calling for this caveat to be removed. On Tuesday, the Caribbean Community (CARICOM) reiterated that call. Human rights law requires all states to provide assistance to victims in areas under their jurisdiction or control, and this must be reflected in the treaty. In addition, while the victim assistance provision usefully delineates types of assistance to be provided, this type of detail is still missing from the provisions on environmental remediation. As Costa Rica said, we should be more ambitious about these obligations.

A few states reiterated their call for responsibility for assistance and remediation to be placed with those states that have tested or used nuclear weapons, rather than the affected state. However, as other states and civil society organisations have pointed out, the primary

responsibility for ensuring that victims’ rights are respected and needs are met lies with the state in whose jurisdiction or control they live or work. This is consistent with states’ sovereignty, general human rights obligations, and responsibilities towards any of their citizens.

Establishing strong international cooperation and assistance provisions is crucial to helping affected states meet their obligations to victims, and in order to establish responsibility for these matters amongst all states party to the treaty. The treaty should also strongly encourage the states that have caused this humanitarian and environmental devastation to help affected states meet their victim assistance obligations. This would not prevent affected states from pursuing redress for such harms through other peaceful means.

In regards to **institutional arrangements and final provisions**, small changes should be made to various sections. For example, article 9’s list of items for consideration of meetings of states parties is unnecessary and potentially limits the flexibility to discuss matters that aren’t explicitly mentioned here. In article 11, it would be best to have annual meetings, to which civil society is invited to participate. As several delegations noted on Tuesday, the number of ratifications for entry into force of the treaty should remain at 40 as it was in the original draft. The change to article 19’s description of the relationship of the ban to other instruments is very welcome and must remain.

The **withdrawal** provision of the treaty needs serious work. Put simply, there is no justification for withdrawal from this treaty. If it is, the mechanism for doing so much be extremely robust. As Mexico warned, the proposed threshold for withdrawal is extremely low. At a minimum, it should require 24 months notice to withdraw. The obligation for a state to give a statement about the “extraordinary events it regards as having jeopardized its supreme interests” must be deleted, as this suggests that the development and use of nuclear weapons (the only reason to withdraw from this treaty) is somehow justified in some circumstances.

These are not comprehensive remarks or perspectives from states or from WILPF on the treaty text. More discussion is reflected in the “News in brief” article of this edition of the Nuclear Ban Daily, and more discussion is yet to come. •

Thanks to Zia Mian and Kathleen Sullivan for their contributions to this article.



ADDRESSING TRANSIT: THE NEW ZEALAND EXPERIENCE

Lyndon Burford | Disarmament and Security Centre, New Zealand

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. •



ARGUMENTS FOR INCLUDING TRANSIT IN THE NUCLEAR BAN TREATY

Alimzhan Akhmetov | Center for International Security and Policy, Kazakhstan

During the negotiations on the draft treaty there has been an interesting discussion of the states on the suggestion of including a provision prohibiting the transit of nuclear weapons.

The overwhelming majority of states favor a comprehensive prohibition on nuclear weapons, which is, in fact, the goal of the treaty being drafted. In this context, the inclusion in the draft instrument of a provision prohibiting the transit of nuclear weapons is critically important and justified.

Nevertheless, some states have expressed doubts about the need for this prohibition in view of the complexity of its implementation, and also arguing its position by the fact that the prohibition of nuclear weapons itself implies the prohibition of transit. Some have also argued that a ban on the transit of nuclear weapons could undermine some of the nuclear weapon free zone treaties that do not explicitly prohibit transit, but leaves the solution of this issue to the national level.

In this connection, the following arguments should be considered in defence of the prohibition on the transit of nuclear weapons.

The treaty being drafted is the first in history international legal treaty to prohibit nuclear weapons. In this regard, it is important to provide a comprehensive prohibition on nuclear weapons. We should not rely on the argument that transit is covered by other prohibitions—for one thing, this logic could be applied to prohibiting

many of the activities currently contained in article 1 of the draft. It will be appropriate to recall here one of the rules of chess: “Excessive protection—protection with a ‘reserve,’ that is, the number of defenders exceeds the number of attacking figures, an important position item, around which the struggle should unfold.” A prohibition on the transit of nuclear weapons, along with other prohibitions, will provide “excessive protection” of the obligations of states to prohibit nuclear weapons and their complete destruction.

To indicate the potential importance of a prohibition on the transit of nuclear weapons, we can look to the Russian Federation’s reservation to the Protocol on Negative Safeguards to the Treaty on a Nuclear-Weapon-Free Zone in Central Asia: “The Russian Federation reserves the right not to consider itself bound by the obligations provided for by the Protocol in the event that any State Party to the Treaty, in accordance with Article 4 of the Treaty, admits entry into its ports and landing on its airfields of foreign military vessels and aircraft with nuclear weapons or other nuclear explosive devices on board, as well as in any form of transit through its territory of nuclear weapons or other nuclear explosive devices.”

This reservation indicates that transit could be an important activity to prohibit in order to help facilitate practical changes to the practices and policies of the nuclear-armed states even if they have not joined the treaty themselves. •

CALENDAR OF EVENTS: WEDNESDAY, 28 JUNE 2017

| When | What | Where | Who |
|-------------|--|-------------|--|
| 08:00 | Morning Inter-Faith Vigil | Isaiah Wall | Humanitarian Disarmament Interfaith Working Group |
| 09:00-09:50 | ICAN campaigners meeting | CR B | ICAN |
| 10:00-13:00 | Informal session | CR 1 | |
| 10:00-12:00 | The Nuclear Mystique, slide show, Mega Mission Creep - A Psycho-Historical Evolution of Towards Nuclear Fundamentalism, and tool for consciousness raising | CR B | Transcend International, Psychologists for Social Responsibility |
| 13:15-14:30 | What are the difficulties to reach an agreement on the treaty and how to overcome them | CR B | International Peace Bureau |
| 15:00-18:00 | Informal session, TBC | CR 1 | |
| 16:00-17:30 | Interfaith dialogue and actions for nuclear disarmament | CR B | Abolition 2000 Interfaith Working Group |



NEWS IN BRIEF

Allison Pytlak | *Reaching Critical Will of the Women's International League for Peace and Freedom*

The positions conveyed in this edition are not comprehensive. They are snapshots based on the preliminary reactions of states, which are mostly waiting for instructions from capital on the revised draft treaty text. The vast majority said this draft is a good basis for further negotiations.

Preamble

- Iran expressed concern that its proposals for the preamble have not been included in the revised draft text.
- Palestine noted that threat of use is not referenced here, or in an operational paragraph.
- Ecuador said that the new preamble is long but sets us on the right road. Ireland expressed a similar reaction that although it is lengthy, it is balanced and takes into account the views of most states.
- Costa Rica said that the new version amalgamates many concepts. PP9 has been strengthened with the reference to IHL. It welcomed PP22, and said it would like to keep the reference to 'general and complete disarmament'.
- Brazil is glad to see the new reference to IHL.
- Algeria and Brazil welcomed the new paragraph on nuclear energy.
- Egypt wants to strengthen the paragraph that references the "slow pace of nuclear disarmament".
- Egypt requested the deletion or reformulation of the PP referencing the CTBT to reflect that that instrument has not entered into force.
- Peru felt that the reference to threat of use had been "couched in a general way" in the preamble and ought to be made more explicit.
- Peru appreciated that education about peace and disarmament has been included.

Article 1

- Cuba, Guatemala, Iran, and Peru noted the absence of a prohibition on transit in this article, which they had supported.
- Algeria, Egypt, Iran, Cuba, Brazil, and Guatemala noted that there is not a prohibition on the threat of use of nuclear weapons, which they had supported.
- Algeria noted a lack of prohibition on "comprehensive testing".
- Ecuador said that this is the most important article

in the treaty and referenced proposals that it had sent in last Friday. Brazil also referenced its importance.

- Malaysia feels that, as drafted, the article covers the whole spectrum of prohibited activities.
- Argentina stated that this article should include the concept of elimination and has sent language to the secretariat about this in the past.
- Cuba regretted that the sole prohibition relating to testing is for trials of explosive nuclear weapons, which allows other kinds of tests to happen that are more frequent.
- Brazil would like to see the prohibition on testing broadened, and to add a reference to "nuclear explosive devices".
- Egypt would like a reference to "stationing" in the first part of this article.

Article 2

- Austria urged including a responsibility for states that have nuclear arms on their territory, or that use or possess them, to be required to make declarations, which will have repercussions for article 4. There should also be language for those with nuclear weapons stationed on their territory. This was supported by Brazil.
- Cuba said that the scope is too restricted and not consistent with the prohibitions outlined in article 1.
- Nigeria said that it had highlighted the issues of only requiring declarations of states that had owned or possessed nuclear weapons in the past.
- New Zealand noted that the revised draft continues to retain the requirement for states parties to submit declaration on past possession, but lacks a separate requirement for a state party to declare any current possession or existence of nuclear weapons on its territory. Brazil and Thailand also noticed this change.

Article 3

- Austria urged using a stronger word than "maintain" given the high importance of safeguards for this treaty, and urge all countries to conclude a safeguards agreement.
- Malaysia feels that this is improved and will not interfere with any existing regimes or lower standards, though further work could be done.

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News in brief, continued

- Argentina said it would like to see the provision on safeguards made tighter.
- Palestine is concerned there is no reference to accession of states that do not have a safeguards agreement, which could present a potential loophole.
- Netherlands said that the current text doesn't encourage states parties to adopt higher standards of safeguards. It would like to codify a commitment from member states to adopt higher standards.
- Brazil doesn't support retaining the language that is here, noting that there is not any language to apply those states that do not apply safeguards agreements. It noted that what was originally the draft annex could have been incorporated into the text.
- New Zealand said it is not appropriate to require the same declaration from nuclear-armed states and non-nuclear armed states that do not hold safeguards agreements. It is concerned that there are no core requirements for safeguards as had been outlined in the original draft annex, and that the annex was deleted.
- Switzerland said it understands the new version is aimed at compromise on safeguards, but argued some aspects will need to be improved. It wondered what safeguards are necessary for former nuclear-armed states under article 4.

Article 4

- Brazil said that this article brings in a new approach. Although the terminology is at times inconsistent, its initial reaction is positive.
- Thailand said the new draft of this article reflects discussions so far. There may be a need to harmonize the reference to a "competent national authority" in 4.1 with the reference to a "competent international authority" in 4.4.
- Thailand is concerned that the article leaves out many weapons or devices that are located in any place under the jurisdiction or control of a states party.
- New Zealand said that there is a contradiction between article 4 and article 1, because 4.1 allows a state to become a state party while still possessing nuclear weapons. This must be reconciled. Mexico agreed.
- New Zealand said that 4.1 needs to be further fleshed out with respect to the process and rules of procedure for agreeing to a time-bound plan.

Articles 2–5

- Iran called for the deletion of articles 2–4, arguing this treaty should only set out provisions for the prohibition of nuclear weapons, not their elimination.
- Ecuador noted that the elimination provisions are also important in the treaty, and questioned if it's better to leave fully developing articles on elimination for later on, or to be precise now.
- Malaysia appreciates that the article 2–4 structure is clearer, but further work is needed to ensure any conceivable scenarios are covered.
- Palestine said this version addresses some of the earlier problems but needs more work.
- Ireland said that this package of articles is going in a constructive direction, but it will study it more closely.
- South Africa said it appreciates the attempt to deal with this articles and recognizes that elements of what it suggested with Austria are there, but argued this needs more work.
- Liechtenstein said it is important to focus these articles going forward because they are the most technically challenging and politically sensitive.
- Guatemala said that article 4 has been improved but that article 5 remains ambiguous.
- Mexico said it is vital that the problems within these articles be resolved and still need much work.
- Thailand welcomed the inclusion of "join and destroy" in this section but said these articles need more work and clarification.

Article 6

- Mozambique requested to delete the phrase "in accordance with its constitutional process" because it feels that this it creates a conflict with the treaty as a piece of international law.
- Mozambique questioned if the activities outlined in 6.2 should be included in present article 1 as a general obligation.

Article 7

- Ecuador urged a "balance" in this article to reflect the responsibilities of the states that caused harm to people or the environment, and called for states to look at this issue from the perspective of the victims and those needing assistance. Brazil made a similar point, supported by Thailand and Egypt.

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News in brief, continued

- Malaysia welcomed the change in title but said it looks forward to seeing the primary responsibility for assistance fall to the state that engaged in use or testing.
- CARICOM would like to see language that obligates all affected states to address human and environmental harm, recognize the rights of those affected and offer remediation. It suggested the deletion of the words "in a position to do so" in article 7.1 so as to match the related provision in the Convention on Cluster Munitions (CCCM).
- Costa Rica said that this article should be more ambitious.

Article 8

- Nigeria felt that this article has been sharpened.

Article 9

- Malaysia said the tasks for the meetings of states parties (MSPs) are inevitable and necessary.
- Ireland plans to study this article in connection with articles 2-5.
- Switzerland does not see the need for such an exhaustive list of items to cover.

Article 11

- Ecuador noted the new suggestion of having conferences to review proposed treaty amendments, and said that these are issues best brought to the attention of MSPs, including for reasons of cost. Malaysia took note of this concern and said it should be discussed, but felt the paragraph on amendments has been straightened out.
- Brazil and Guatemala said they are not sure of the need for such conferences.

Article 14

- Austria noted that the date of the opening for signature should be specified here, suggesting that this could be 20 September 2017 during the High Level opening of the UN General Assembly. Brazil, New Zealand, and Thailand agreed with the need for setting a date.

Article 16

- Costa Rica and Sweden supported having 50 ratifications as a threshold for entry into force. New Zealand supports 40.
- Brazil and Thailand noted that there are presently two thresholds listed in the article, –40 and

50—which needs clarifying and is likely an editorial oversight.

- Thailand also questioned the coupling of accession and entry into force, when the former only happens after the latter has occurred.

Article 17

- Mozambique, supported by Brazil, suggested a change in the wording to clarify that the treaty as a whole shall not be subjected to reservations, rather than "the Articles of this treaty".

Article 18

- Ecuador and Palestine prefer that treaty withdrawal not be possible.
- Mozambique suggested shortening or deleting this paragraph.
- Brazil said that a three-month period is "very weak" and makes the treaty fragile.
- Guatemala registered concerns with the withdrawal provisions.
- Egypt would like to see this provision "watered down".
- Mexico cautioned that the threshold for withdrawal specified here is very low and states must be careful to not create incentives to do so.
- New Zealand is concerned about the merits of the right to withdraw and the impact that would have on the treaty's object and purpose. More conditionalities should be included in a withdrawal process, including the triggering of an extraordinary MSP.

Article 19

- Malaysia and Thailand welcomed the revision of this article.
- Mozambique is glad to see that this article outlines a relationship that speaks about the reinforcement and complementarity with other treaties, but not subordination.
- Netherlands called for stronger language in this article to subordinate the ban treaty to the NPT. It feels that the draft does not make it clear as to how the new treaty will engage with nuclear-armed states, and that it is worried about the direction that this treaty is going in with respect to other instruments that it is meant to complement, such as the CTBT and NPT.

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News in brief, continued

New paragraphs

- Mozambique, Nigeria, and South Africa suggested adding a new paragraph between the preamble and article 1 to establish the object and purpose of this treaty.
- Netherlands would like a new PP to recognize that this treaty is a step towards fulfilling article VI of the NPT.

Institutional support

- New Zealand urged more language to be included about the role and function of the UN Office of Disarmament Affairs for its support of the treaty.

Civil society

- Ecuador, Ireland, and Guatemala supported the inclusion of civil society partners in future meetings.
- CARICOM welcomed the full participation of civil society in future negotiations and would like to see more public meetings.
- Peru said the participation of civil society is highly desirable.
- South Africa indicated it was fine with civil society observing negotiations. •



Civil society engages with the revised draft text, 27 June 2017 © ICAN