

Intervention on Transit to the UN negotiations on a Treaty to Prohibit Nuclear Weapons Alyn Ware, June 23, 2017

Note: This is the written version.

Due to time constraints, only the sections in italics were delivered orally

Madame President, Your excellencies, ladies and gentlemen,

I have been asked to comment on the issue of prohibition of transit of nuclear weapons as applied in New Zealand under the 1987 Nuclear Weapon Free Zone, Disarmament and Arms Control Act and in various of the regional nuclear-weapons-free zone treaties, in case this experience may assist in determining how to address the issue of transit of nuclear weapons in the draft nuclear prohibition treaty.

At the outset, I need to reaffirm that the approach to be taken in the nuclear prohibition treaty should be determined by the States in the negotiations according to the aims and political realities underlying these negotiations. While we may learn from the practice and approaches of other nuclear prohibition regimes, they each had their own set of political realities to deal with and, accordingly, they dealt with these in differing ways, including on the issue of transit.

In the case of the current negotiations, a clear prohibition on transit might be desirable and contribute to a treaty that is strong on its core prohibition of nuclear weapons. It would indeed reinforce an aim of the treaty which is to delegitimize and prohibit nuclear weapons and have some impact on nuclear-armed States.

On the other hand, a treaty which leaves the issue of transit to each State party to determine in their individual implementation measures, might provide the possibility for a greater number of States to join the treaty, including those under military relationships with nuclear-armed States.

The New Zealand prohibition on transit is strong and clear. In the regional nuclear-weapon-free zones, the handling of transit is more varied and generally weaker. This has enabled a much larger number of countries to join nuclear weapon-free zones than have so-far been able or willing to adopt comprehensive nuclear prohibition legislation like New Zealand.

Let me start with New Zealand, where the issue of transit was a key aspect of the legislation. Indeed, the legislation was drafted to lock in a new policy, adopted in 1984, specifically prohibiting port visits of nuclear armed warships and aircraft carrying nuclear weapons. Such vessels had been visiting New Zealand prior to 1984 as part of military relationships with nuclear-armed States – especially the United States. Public opposition to these visits, and to New Zealand continuing to be part of an extended nuclear deterrence relationship, led to the new policy and to the legislation.

As such, the NZ legislation specifically prohibits the entry into internal waters of warships carrying nuclear explosive devices. The legislation also establishes a territorial nuclear-weapon-free zone that includes not only the land-based territory, but also the territorial waters and airspace. The general prohibitions of the legislation apply in this territory, including to manufacture, acquire, possess, or have control over, any nuclear explosive device, or to aid, abet or procure anyone to do any of the above.

This legislation was challenged by New Zealand's allies, in particular the United States, who argued that the legislation was contrary to New Zealand's obligations under the ANZUS Treaty – a military alliance agreement between Australia, New Zealand and the United States. The ANZUS treaty does not specify a nuclear deterrence relationship. However, the United States position at the time was that the NZ legislation was incompatible with ANZUS, which required acceptance of US nuclear practice in NZ-US military cooperation. The US would not publicly separate its maritime nuclear forces from their non-nuclear forces. Indeed, the US maintained a policy of neither confirming nor denying which of their warships were carrying nuclear weapons.

New Zealand was careful not to directly challenge the 'neither confirm nor deny' policy head on. New Zealand extended a welcome to the United States to continue with port visits of non-nuclear warships. New Zealand would not request inspection of such visiting warships, but rather the Prime Minister would make a determination on whether or not to accept such vessels based on the information available to New Zealand.

For many years the US would not accept this policy and there were no visits of US warships. However, other military cooperation continued, as affirmed in the Wellington Declaration of 2010 and the Washington Declaration of 2012. And the US has now accepted the policy on warship visits and a US conventionally armed warship visited NZ in November 2016.

In New Zealand, the ban on nuclear transit has triumphed, but it took nearly 30 years.

The regional NWFZs, have in most cases, taken a different approach.

The principal aims of the NWFZ treaties in Latin America and the Caribbean, South Pacific, South East Asia, Africa and Central Asia, were to establish territorial zones where possession and use of nuclear weapons are prohibited as well as the stationing of nuclear weapons on the territories.

The main focus of these zones was not on transit, and the zone treaties vary on this issue.

The Latin America and Caribbean NWFZ is quite strong on this issue. It prohibits deployment of nuclear weapons in the zone, and defines the zone to include the territorial waters and airspace.

The South East Asian, African, Central Asian and Pacific NWFZ are more permissive. They allow for States parties to determine themselves whether to allow port visits or transit of nuclear armed vessels. It is probably correct to say that the more permissive provisions in the latter NWFZ agreements have allowed some States to join who might otherwise have not been able to do so.

If negotiators for the prohibition treaty decide not to include a specific prohibition on transit in order to ensure greater membership in the treaty, it would still be possible for States parties to adopt such a prohibition in their national implementation measures. Indeed, the current text in the draft treaty prohibiting states parties from assisting, encouraging, or inducing anyone to engage in any activity prohibited under the treaty, could be interpreted as including a prohibition on transit, and thus could be used by governments, parliaments and civil society to support such a prohibition in their national implementation measures.