

The ban treaty, transit and national implementation: Drawing on the Aotearoa-New Zealand experience*



Protestors block the nuclear submarine USS Haddo in Auckland harbour (1979)

A working paper to the UN Conference on negotiating a legal agreement to prohibit nuclear weapons from:

Aotearoa Lawyers for Peace

New Zealand Affiliate of the International Association of Lawyers Against Nuclear Arms

Parliamentarians for Nuclear Nonproliferation and Disarmament

Comments and feedback to alyn@lcnp.org

* *Aotearoa is the indigenous name for New Zealand. Both Aotearoa and New Zealand are official names for the country.*

The ban treaty, transit and national implementation: Drawing on the Aotearoa-New Zealand experience¹

Summary:

*The question of whether to prohibit nuclear weapons transit in the treaty has emerged as a difficult issue with differing positions amongst negotiating states. The New Zealand experience demonstrates the feasibility of including in the nuclear ban treaty a **prohibition on port visits of ships and landing of aircraft armed with, or carrying, nuclear weapons.** With regard to **transit of nuclear weapons through territorial waters and airspace**, there are difficulties to verify, implement and enforce a prohibition on such transit. An alternative approach could be adopted which does not specifically prohibit transit, but obliges States parties to not give any permission for such transit.*

Introduction:

The question of whether the nuclear prohibition treaty should include a prohibition on the transit of nuclear weapons has emerged as a difficult issue, with differing positions amongst negotiating states.

Some delegations have said that a clear prohibition of transit is vital in order to ensure the complete prohibition of nuclear weapons by States parties within territories under their jurisdiction. In addition, such a prohibition would be consistent with the more general aim of the treaty to delegitimize nuclear weapons through their comprehensive prohibition.

A prohibition of transit would also be one of the few aspects to the treaty that could impact directly on policies and practices of the nuclear-armed States. In general, the provisions of the treaty do not apply to States which are not parties, and none of the nuclear-armed States have indicated that they would join the treaty. Their stockpiles

Imagine if the ban treaty is adopted, and then a few months later, a nuclear-armed submarine makes a port visit to one of the States parties to the treaty. Would that not make a mockery of the treaty?

and policies of threat and use of nuclear weapons do not fall under the jurisdiction of the States who will join the treaty, and so would not be affected. However, the transit of their nuclear weapons through the waters and airspaces of States parties would be impacted if such transit is prohibited under the treaty.

Some delegations have expressed opposition because it raises difficult issues on implementation, verification and compliance, with regard to actions of parties **and** non-parties to the treaty. Is it possible for a state party to the treaty to detect the transit of nuclear-armed submarines in their territorial waters? If they do detect such transit, what action would they be required to take? How difficult would it be to ensure that military aircraft transiting a State's territorial airspace do not carry nuclear weapons or their components?

States supporting a prohibition of transit have noted that difficulties in verification, implementation and compliance have not prevented States from including a prohibition of transit of nuclear material in the 1979 Convention on the Physical Protection of Nuclear Materials (CPPNM). This treaty specifically obligates States parties to '*not allow the transit of its territory by land or internal waterways or through its airports or seaports of nuclear material.*'

Ecuador suggested to the negotiating conference that, "*If states can be expected to not permit the transit of nuclear material why could they not be expected to do the same for nuclear weapons?*" This is a valid point. On the other hand, the CPPNM applies only to nuclear materials for peaceful purposes, for which there is an existing international verification and control regime. The nature and modalities of nuclear weapons transit would be very different to those of nuclear materials.

One significant difference is on transparency. There are a number of aspects of their nuclear forces which the nuclear armed States are not willing to confirm or accept verification over, such as locations of their nuclear-armed submarines, and the air transport of nuclear weapons to nuclear-weapons hosting States. As such, the control methods and mechanisms in the CPPNM would not be able to be applied to verify and ensure compliance with a treaty ban on nuclear weapons transit.

¹ Principal author: Alyn Ware, International Representative for Aotearoa Lawyers for Peace and Global Coordinator for Parliamentarians for Nuclear Nonproliferation and Disarmament. The author thanks others who assisted in the preparation of this paper including Commander Robert Green (Royal Navy retired), Co-chair of the Disarmament and Security Centre; John Burroughs, Executive Director of Lawyer's Committee on Nuclear Policy; Professor Roger Clark, Rutgers Law School; Hans Kristensen, Federation of American Scientists.

Most of the regional nuclear weapon free zones do not prohibit transit of nuclear weapons. However, the reason for this appears to be not the difficulties in compliance of a prohibition on transit, but because some of the States parties to these treaties wanted to retain the right to allow and accept the transit of nuclear weapons, including port visits of nuclear armed vessels and transit of nuclear armed aircraft. As such, most of the regional nuclear weapon free zones include provisions permitting States parties to decide themselves on whether to allow such port visits and transit.²

But is this the approach desired for the prohibition treaty whose aim is to prohibit and delegitimize nuclear weapons, not merely to create a zone where they are not stationed? Imagine if the prohibition treaty is adopted, and then a few months later, a nuclear-armed submarine makes a port visit to one of the States parties to the treaty. Would that not make a mockery of the treaty?

The current draft text of the prohibition treaty (Article 1 (f)) could be interpreted in such a way as to prohibit such port visits. The article prohibits acts which *'assist, encourage, or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.'* However, without definitions of these terms, it is not clear whether this would definitely apply to port visits.

It is even less certain that transit in territorial waters would be covered by Article 1 (f). Transit of nuclear weapons through territorial waters, if undertaken, does not necessarily include any permissive action, support or even knowledge by the territorial power that such transit is occurring. Without this, it is a stretch to infer that the territorial power is assisting, encouraging or inducing the act of transit by the nuclear armed power.

On the other hand, such transit might be prohibited by Article 2 (a) which obliges each States party to prohibit and prevent deployment of nuclear weapons in its territory or at any place under its jurisdiction or control. However, without

clear definition of what is meant by deployment, it is not clear that this would apply to transit.³

The New Zealand experience:

- *Port visits and aircraft landings*

It would be useful to consider the experience of national laws which prohibit transit of nuclear weapons such as the New Zealand Nuclear Free Zone, Disarmament and Arms Control Act (1987). This legislation prohibits the entry into internal waters of warships carrying nuclear explosive devices, and the landing in New Zealand of aircraft carrying nuclear explosive devices.

Despite policies of nuclear-armed States to neither confirm nor deny whether specific military vessels (ships and planes) carry nuclear weapons, New Zealand has been able to implement and ensure compliance with this aspect of the law.

The New Zealand government has done this by relying on open source information, plus other information, regarding which classes of military vessels are designed for, capable of and known to carry or deploy nuclear weapons. The Nuclear Free Zone Act also established a public body to advise the Prime Minister on this issue (the Public Advisory Committee on Disarmament and Arms Control).

As such, New Zealand has been able to make a determination on which naval vessels from nuclear-armed States could visit New Zealand ports consistent with the law. A number of conventionally armed vessels from some of these countries (France, India, UK and USA) have done so.⁴

In recent times, this determination has become easier to make. With regard to naval vessels, the nuclear armed States no longer deploy nuclear weapons on surface ships in peacetime. The nuclear weapons carried by navies are mostly restricted to ballistic missiles deployed on strategic submarines. These submarines rarely make port visits to other countries.⁵

² For example, the South Pacific NWFZ treaty provides for 'Each Party in the exercise of its sovereign rights remains free to decide for itself whether to allow visits by foreign ships and aircraft to its ports and airfields, transit of its airspace by foreign aircraft, and navigation by foreign ships in its territorial sea or archipelagic waters in a manner not covered by the rights of innocent passage, archipelagic sea lane passage or transit passage of straits.' The Treaty of Tlatelolco (Latin America and the Caribbean NWFZ) takes a different approach than the other NWFZs. It prohibits the deployment of nuclear weapons in the zone, and defines the zone to include the territorial waters and airspace. The Tlatelolco Treaty does not include a clause permitting transit or port visits of nuclear weapons.

³ Deployment usually refers to the putting of troops or military equipment into the field of military operations in order that these might be used in combat if necessary. It would be a matter of interpretation as to whether or-not this applies to nuclear weapons passing through the territories of States parties to the treaty if there was no intention by the nuclear

possessing State to threaten or use the weapons from within these territories.

⁴ When the law was initially adopted, there was opposition to it from some of the nuclear-armed States, in particular the United States, which downgraded its military relationship with New Zealand and decided not to request port visits for their warships. However, military cooperation has mostly been restored, as affirmed in the Wellington Declaration of 2010 and the Washington Declaration of 2012, and port visits to New Zealand of US conventionally-armed warships have resumed.

⁵ The United States and Britain no longer have nuclear weapons for use by surface ships, so even in crisis or wartime the status of their surface ships would not change. Russia and France still have nuclear-capable surface ships. Russia also has nuclear-capable attack submarines, although they do not carry the weapons under normal (peacetime) circumstances. In a crisis or war, however, that could be an issue for the treaty. None of the other nuclear-armed states have nuclear-capable surface ships but Pakistan is equipping some of its attack submarines with nuclear weapons. And there

With regard to aircraft, the current practice (in peacetime) for nuclear-capable combat aircraft is for the nuclear weapons to be stored on ground, not deployed on the aircraft.⁶ During a military crisis or wartime, these weapons could be loaded onto the aircraft for potential use, including by the NATO nuclear sharing countries.

However, combat aircraft are not the only ones that carry nuclear weapons. During peacetime, the US and Russia regularly carry nuclear weapons and their components on transport aircraft. For the US, this includes transport of nuclear weapons to and from bases in NATO nuclear sharing countries. The issue of the landing of aircraft carrying nuclear weapons in non-nuclear States would probably only relate to these circumstances.⁷

- Territorial waters and airspace

The New Zealand legislation also establishes a territorial nuclear-weapon-free zone that includes not only the land-based territory and internal waters, but also territorial waters and airspace. The general prohibitions of the legislation apply in these territories, including not to manufacture, acquire, possess, or have control over, any nuclear explosive device, and not to aid, abet or procure anyone to do any of the above.⁸

It is recognised that perfect verification of compliance in the territorial waters might not be possible. Submarines carrying nuclear weapons are designed for stealth and are not easily detectable. However, in New Zealand's case, the capacity for perfect verification was not considered to be necessary, in order to adopt the general principal of prohibition.

This is partly due to the geographical location of New Zealand, which is far from potential nuclear flash-points and territorial disputes between nuclear-armed States, and surrounded by ocean making **the transit of naval nuclear vessels through New Zealand's territorial waters unnecessary for their general navigation and deployment.** The main purpose that nuclear weapons transited New Zealand's territorial waters prior to the 1987 prohibition was in order for them to make port visits.⁹

The issue of New Zealand's geographical location also makes a prohibition of transit of nuclear weapons through the airspace easier to ensure compliance, than in countries which might be on more direct flight paths of military planes armed with or carrying nuclear weapons or their components.

are unconfirmed rumors that Israeli attack submarines have nuclear capability.

⁶ The nuclear armed States regularly practice deployment on their nuclear-capable aircraft using dummy warheads.

⁷ There is also the possible situation of an elevated nuclear alert when the nuclear-armed States arm their bombers with nuclear weapons, but these planes are designed for long range delivery and would be unlikely to request a landing in a non-nuclear State *en route* to their nuclear targets.

The New Zealand experience demonstrates the feasibility of including in the nuclear ban treaty a prohibition on port visits of ships, and landing of aircraft, armed with or carrying nuclear weapons.

However, the NZ approach was based primarily on a perception and practice that requiring a capacity for perfect verification and compliance of the acts of other States (the nuclear-armed States) was not required to give impact, meaning and purpose to the prohibition law.

Conclusion - transit and the ban treaty

The New Zealand experience demonstrates the feasibility of including in the nuclear ban treaty a prohibition on port visits of ships and landing of aircraft armed with, or carrying, nuclear weapons.

With regard to transit of nuclear weapons through territorial waters and airspace, there are difficulties to verify, implement and enforce a prohibition on such transit. This might make it difficult or impossible for some of the States negotiating the ban treaty to agree to a prohibition on such transit, if they assume that they will be responsible for ensuring compliance with this ban. This could be true especially of those States located in geographical regions where nuclear weapons are routinely deployed and/or transited.

An alternative option suggested by Ecuador has merit and could resolve this. Ecuador proposed that the prohibition treaty include a provision under where States Parties would not permit transit of nuclear weapons. The language could read ***'States Parties shall not give permission for transit of nuclear weapons, except for the purposes of removing nuclear weapons from deployment.'***

Such an approach would clarify that transit would not be permitted by the treaty, and would affirm the normative prohibition against transit, but would not place obligations on State Parties to prohibit and prevent such transit other than refusing permission.

Of course, individual States parties would be free to adopt stronger national implementation measures against transit if they chose to do so.

⁸ The 1987 law provides the right of innocent passage through territorial waters, but under the UN Conventional on the Law of the Sea, this right precludes passage prejudicial to the peace, good order or security of the coastal State.

⁹ Prior to the 1987 law, New Zealand naval forces were also conducting military exercises with US nuclear-capable naval vessels in the Pacific Ocean, and port visits were sometimes associated with this.