

# 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:**

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\* *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 experience<sup>1</sup>

## 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 internal transit of nuclear weapons including port visits of ships and landing of aircraft armed with, or carrying, such 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 permit such transit, except in accordance with the rights of innocent passage.***

## 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 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 between States that are not parties to this Convention unless the State Party has received assurances that this nuclear material will be protected...*'

Ecuador has 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 as far as it relates to port visits of nuclear armed vessels (seaports and airports) and transit by land and internal waters. 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 verifying a ban on nuclear weapons transit,

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?

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would be very different to those of nuclear materials. This would be especially true if that ban also includes the territorial waters and airspace.

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 which ships carry or are armed with nuclear weapons, the locations of strategic 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.

Most of the regional nuclear weapon free zones do not prohibit transit of nuclear weapons. However, the reason for this appears to be not primarily 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.<sup>2</sup>

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<sup>3</sup> (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.<sup>4</sup>

## 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 stationing or transport of nuclear weapons on land and internal waters. This precludes port visits of warships and landings 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 about 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.<sup>5</sup>

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<sup>2</sup> 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.

<sup>3</sup> A/CONF.229/2017/CRP.1/Rev.1

<sup>4</sup> 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.

<sup>5</sup> When the law was initially adopted, there was opposition to it from some of the nuclear-armed States, in particular the United States,

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.<sup>6</sup>

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.<sup>7</sup> During a military crisis or wartime, these weapons could be loaded onto the aircraft for potential use, including by the NATO nuclear sharing countries.

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

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.<sup>8</sup>

#### - 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.

There is no specific prohibition on transit through the territorial waters and airspace. However, there is a

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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.

<sup>6</sup> 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

general prohibition in the legislation against any emplacement, stockpiling or deployment of nuclear weapons in the entirety of the zone, plus a prohibition on any New Zealand person to *'aid, abet, or procure any person to have control over any nuclear explosive device'* anywhere in the zone.

The law provides the right of innocent passage through territorial waters, but under the UN Convention on the Law of the Sea (UNCLOS), this right precludes passage prejudicial to the peace, good order or security of the coastal State.<sup>9</sup>

New Zealand, on adopting the legislation also withdrew its acceptance of, and support for, nuclear deterrence. This included statements that New Zealand would no longer seek to be defended by the nuclear weapons of any other government<sup>10</sup>, as well as statements highlighting the risks nuclear weapons pose to the security of non-possessing States and the world, and a legislative prohibition on any New Zealand official or agent participating **anywhere in the world** in activities to *'aid, abet, or procure any person to manufacture, acquire, possess, or have control over any nuclear explosive device.'*

As such, since the adoption of the legislation, transit of nuclear weapons through its territorial waters, especially of weapons deployed and ready to be launched, can be affirmed by New Zealand to be prejudicial to its peace and security, and not to be innocent passage.

The legislation does not include the same compliance and implementation mechanisms for the territorial waters and airspace as it does for port visits. Indeed, verification of compliance in the territorial waters is difficult. Submarines carrying nuclear weapons, for example, are designed for stealth and are not easily detectable.

However, in New Zealand's case, it has been assumed that the nuclear armed States are no longer transiting

with nuclear weapons. And there are unconfirmed rumors that Israeli attack submarines have nuclear capability.

<sup>7</sup> The nuclear armed States regularly practice deployment on their nuclear-capable aircraft using dummy warheads.

<sup>8</sup> 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.

<sup>9</sup> UN Convention on the Law of the Sea, Article 19

<sup>10</sup> An end to the extended nuclear deterrence relationship that existed under the ANZUS (Australia, New Zealand, United States) Treaty.

nuclear weapons through the territorial waters.<sup>11</sup> Indeed, if any nuclear armed State were discovered to be doing so, it could create an international incident that would most likely be detrimental to the good standing of the transiting State.

In January 1985, two years prior to the legislation being adopted, New Zealand's nuclear free policy was tested by a request from the United States for a visit of the USS Buchanan, a nuclear capable warship. New Zealand denied the request, and as a result the vessel did not enter the territorial waters or internal waters.<sup>12</sup>

In New Zealand's case, it appears that the territorial waters and airspace have been kept free from the transit of nuclear weapons since the adoption of the legislation, without requiring verification and compliance measures.

However, this is partly due to political dynamics and diplomatic relationships between New Zealand and nuclear armed States, and partly due to geography. New Zealand is geographically far from potential nuclear flash-points and territorial disputes between nuclear-armed States, and is surrounded by ocean. This makes the transit of naval nuclear vessels through New Zealand's territorial waters unnecessary for their general navigation and deployment.

The issue of New Zealand's geographical location also gives more confidence in the non-transit of nuclear weapons through the airspace than in countries which might be on more direct flight paths of military planes armed with or carrying nuclear weapons or their components.

However, the NZ approach is probably also based on a perception that requiring a capacity for verification and full compliance of the acts of other States (the nuclear-armed States) in territorial waters was not required to give impact, normative 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 nuclear weapons transit on land and internal waters, including 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, especially if they assume that they will be responsible for ensuring compliance with this prohibition. This could be true especially of those States located in geographical regions where nuclear weapons are routinely deployed and/or transited.

In addition, the provisions of the ban treaty must be consistent with the law of the sea, including the right of innocent passage through territorial waters. According to UNCLOS such passage must be permitted so long as it is not prejudicial to the peace, good order or security of the coastal State.

However, the threats to a coastal state from nuclear weapons transiting their territorial waters, especially nuclear weapons deployed and ready to be launched, can be affirmed as prejudicial to the peace and security of the state, and therefore not to be innocent passage. The existing language of the ban treaty preamble already supports this perspective. Operative language to give it effect would be useful.

As indicated earlier, a strict prohibition would be difficult to verify, implement and enforce. However, there is merit to the alternative option suggested by Ecuador, according to which transit through territorial waters and airspace would not be prohibited, but States parties would be obliged to not permit such transit.

The language could read ***'States Parties shall not give permission for transit of nuclear weapons through airspace and territorial waters, except for the purposes consistent with the right of innocent passage.'***

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.

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<sup>11</sup> 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. 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 these.

<sup>12</sup> There was also an unconfirmed report that a U.S. nuclear-weapons-capable submarine transited the territorial waters of the Cook Islands, a

New Zealand protectorate, in February 1986. The submarine was sighted and identified by a Royal NZ Airforce Orion, leading to a minor diplomatic incident. The New Zealand Prime Minister jokingly referring to it as a 'flatulent whale', embarrassing the United States but effectively resolving the issue. See *The ANZUS Crisis, Nuclear Visiting and Deterrence*, Michael Pugh, Cambridge University Press, 1989. p134