

To: Select Committee of Foreign Affairs, Defence and Trade
From: NZ Centre for Global Studies

Submission:
Examination of the Treaty on the Prohibition of Nuclear Weapons

Summary of Conclusions

1. Ratification

The Treaty is a major step forward in the nuclear disarmament movement and congruent with New Zealand's nuclear-free policy. New Zealand should ratify the Treaty forthwith.

2. Realisation

A State Party's engagement in the Treaty will be meaningful to the extent that its activities under the Treaty assist in the realisation of the ultimate goal – a world permanently free of nuclear weapons. Two components of the Treaty are central to realisation of that goal: universality and irreversibility.

Universality: New Zealand should be active and resolute in fulfilling its obligation under Article 12 to encourage all States to become party to the Treaty. Parliament could request the Minister for Disarmament and Arms Control to report to it annually on its actions in this regard.

Irreversibility: New Zealand could give thought to how the nature of the prohibition obligation under Article 1 might be strengthened to the level of a peremptory norm.

3. Cooperation

New Zealand could, following deposit of its instrument of ratification, work with certain other States Parties to ensure that both components of the Treaty are strengthened and ultimately secured.

Research and considerations supporting the conclusions

1. Ratification

The Treaty on the Prohibition of Nuclear Weapons (2017) is a major step forward in the global movement towards nuclear disarmament, in fulfilment of Resolution 1 (1) of the UN General Assembly in 1946. If and when the Treaty commands universal or near-universal adherence, the international community will have agreed to eliminate nuclear weapons from national arsenals, in fulfilment of the preambular vision, and the substantive obligation in Article VI, of the 1968 Nuclear Non-Proliferation Treaty (NPT).

The 2017 Treaty is consistent with the nuclear-free policy that has been a cornerstone of NZ security doctrine and policy for three decades. Its successful outcome is due in significant part to the diplomatic effort and skill of NZ officials who played a leading role in the negotiations.

There is a natural and compelling reason for New Zealand to ratify the Treaty forthwith.

2. Realisation

The essence of a treaty that seeks to prohibit a type of weapon is two-fold: universality of treaty adherence and irreversibility of legal proscription. Universality is achieved through the political stigmatisation of the weapon. Irreversibility is achieved through a non-revocable legal obligation.

New Zealand could work with other leading proponents of the Treaty to ensure that both components are strengthened and ultimately secured. The two goals are different in nature, and thought would need to be given to how New Zealand proceeds. But if that is done effectively, they could become mutually reinforcing.

(a) Universality

The first central component of the Treaty is its potential universal membership – the precondition of a nuclear-free world.

At present, universality differs in respect of the three weapons of mass destruction (WMDs).¹

- The Biological Weapons Convention (signed 1972; currently 180 States Parties) and the Chemical Weapons Convention (signed 1993; currently 193 States Parties) commands near-universal endorsement.
- The UN resolution adopting the Nuclear Weapons Prohibition Treaty (2017) was less than universal (122-1-1) with 69 States not voting (including all nuclear weapons states plus nuclear-allied states except one which cast the sole negative vote).

The Nuclear Weapons Treaty has an unusual article imposing an obligation on each State Party to encourage non-parties to join, with the goal of ‘universal adherence of all States to the Treaty’ (Article 12). Some 58 States have signed and 10 have ratified to date.² Ratification by 40 more signatories will bring the Treaty into force. Early entry-into-force will be instrumental in encouraging wide adherence to the Treaty by the 64 States which voted for the text at the conference but have not yet signed.

(b) Irreversibility

The second central component of the Treaty is the irreversibility of its substantive obligation – non-possession of nuclear weapons (and as a corollary, non-use). The Treaty raises the question of how, or even whether, the prohibition of an act or a thing might be made irreversible in international law.

Peremptory norm

If an obligation, positive or negative, has the status of a peremptory norm, the obligation becomes, in general, irreversible.³

¹ These are regarded by the international community as comprising biological weapons, chemical weapons and nuclear weapons. A fourth weapon-type, radiological weapons, is regarded as unlikely to be developed, although the EU Foreign Ministers’ Council, in its latest meeting of 28 May ’18, identified radiological weapons along with the other three.

² On 5 June, Switzerland’s lower house adopted Motion 17.4241 ratifying the Treaty; the upper house is expected to finalise the process shortly. <https://www.parlament.ch/en/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20174241>

³ Vienna Convention on the Law of Treaties 1969

Article 53. Treaties conflicting with a peremptory norm of general international law (‘jus cogens’)

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 64. Emergence of a new peremptory norm of general international law (‘jus cogens’)

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

Article 71. Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law

1. In the case of a treaty which is void under article 53 the parties shall: (a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and (b) bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty: (a) releases the parties from any obligation further to perform the treaty; (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination,

In the modern era, peremptory norms deriving from norms deriving from customary law, and from the UN Charter and relevant treaties, that affect state responsibility include piracy, genocide, slavery, torture and military aggression. Separately, certain individual rights in the Civil & Political Rights Covenant are identified as non-derogable on the grounds that they are inalienable to all members of the human family.⁴ Individual criminal liability for specific crimes is also identified in the Rome Statute for the most serious crimes that have in the past ‘shocked the conscience of humanity’.⁵

Whether non-possession of nuclear weapons, and indeed all weapons of mass destruction, may be regarded as a peremptory norm today requires serious consideration.

As early as 1946, UN General Assembly resolution 1(1) established a UN Commission to report to the Security Council on a specific proposal for the elimination from national armaments of atomic weapons ‘and all other major weapons adaptable to mass destruction’.

In the particular case of nuclear weapons:

- The UNGA Declaration of 1965 on the Prohibition of the Use of Nuclear and Thermo-nuclear Weapons’ (Res. 1653, XVI), considered that their use would cause destruction to mankind and civilization to an even greater extent than other weapons already declared by declarations and agreements to be ‘contrary to the laws of humanity and a crime under international law’.
- The UNGA Declaration of 1978, noted that the ‘threat to the very survival of mankind posed by the existence of nuclear weapons’; that their accumulation ‘constitutes much more a threat than a protection for the future of mankind’; and that ‘mankind today is confronted with an unprecedented threat of self-extinction’ arising from the massive and competitive accumulation of the most destructive weapons ever produced.

In the case of chemical weapons, given the virtual universality of adherence and the abhorrence of their alleged use in recent years, the case has been made that their non-possession today amounts to a peremptory norm.⁶

provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

⁴ International Covenant on Civil and Political Human Rights (Article 4.2): no derogation may be made from the right to life; freedom from torture (or cruel, inhuman or degrading treatment or punishment); slavery or servitude; or imprisonment for contractual non-fulfilment.

⁵ Genocide, war crimes, and crimes against humanity. When the Kampala Amendment (2010) to the Rome Statute comes into effect in July 2018, individual liability for the crime of inter-state aggression will apply to the leaders of a ratifying State Party.

⁶ As a result of its universal character and non-derogability, *jus cogens* creates state responsibility *erga omnes*, or ‘flowing to all’. In one case, the International Court of Justice (“ICJ”) stated: [A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Peremptory principles of *jus cogens* therefore impose responsibility ‘flowing to all’ states toward the international community as a whole. This responsibility creates a duty not to allow impunity for such crimes and to prosecute or extradite alleged offenders. For some peremptory rules—such as piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture—universal jurisdiction attaches, “enabl[ing] any state to arrest and prosecute those who have violated certain *jus cogens* norms . . . [,] restricted by neither territory nor nationality.” (p. 1469) ...

the question of whether chemical weapons use itself is a *jus cogens* crime is unclear. For example, would the use of a chemical weapon on a military bunker be a *jus cogens* violation? Given the gruesome nature of such weapons and incorporation of human rights law into *jus cogens*, the answer seems to be yes. (p.1491)

In *The Prohibition of Chemical Weapons: Moving towards Jus Cogens Status*, Hyun, C. (Southern California Law Review, Vol. 88, No. 6 (2015), pp. 1463- 1491)

Substantive obligation

If non-possession of a weapon of mass destruction is regarded as a peremptory norm, its prohibition would, as a logical requirement, need to be complete in scope and unlimited in time. In fact, this is the stated intention of each of the three WMD texts.

The three texts are effectively identical in their ultimate goals and substantive obligations. The provisions, first struck in the Biological Weapons Convention (1972), have been repeated in identical form in the Chemical Weapons Convention (1993) and now in the Nuclear Weapons Convention (2017):

Preamble:	The biological and chemical convention preambles express, for the sake of all mankind, the determination to ' <u>completely exclude the possibility</u> ' of use. The nuclear treaty preamble recognises the need to ' <u>completely eliminate</u> ' the weapon. ⁷
Substantive article:	In all three texts, each State Party undertakes ' <u>never in any circumstances</u> ', to develop the prohibited type of weapon.
Duration:	In all three texts, the binding instrument 'shall be' of unlimited duration.

If there is a determination to completely exclude the use of a thing and completely eliminate it, if there is an obligation never to use it in any circumstances, and if there is a recognition that the binding nature of the obligation is unlimited in duration, then a necessary inference must be drawn that the thing is forever illegal and prohibited. Yet this is not the case. The three WMD treaties allow for the option of withdrawal.

Treaty withdrawal

The UN Charter and the Civil & Political Rights Covenant contain no option of withdrawal. But all three WMD treaties 'prohibiting' biological, chemical and nuclear weapons contain the standard withdrawal article:

Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of the Treaty have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to the Depositary. Such notice shall include a statement of the extraordinary events that it regards as having jeopardized its supreme interests.

The withdrawal article in each treaty stands in direct contradiction with the preambular pronouncements and the substantive obligation.

It has been contended that if such a Treaty contains a withdrawal clause, then that Treaty falls short of a universal proscription. It is not logically possible to completely eliminate a weapon in a treaty which allows the option for a State party to withdraw, renounce the obligation – and proceed to violate the norm through the acquisition of the weapon.⁸

⁷ The Preamble declares:

- the urgency of achieving and maintaining a nuclear-weapon-free world, which is a 'global public good of the highest order', serving both national and collective security interests; and \
- the role of 'public conscience' in the furthering of the 'principles of humanity' as evidenced by the call for the total elimination of nuclear weapons.

⁸ If a treaty 'prohibition' falls short of a peremptory norm, and treaty withdrawal is an option, then the relationship between international enforcement and national sovereignty remains fraught, as the interaction between North Korea and the UN Security Council in the 1990s illustrates. Following the advice from North Korea to the Security Council in March 1993 that it was withdrawing from the NPT (S/25405), the depositary States (Russia, UK, USA) questioned whether the DPRK's stated reasons for withdrawing did, in fact, constitute extraordinary events, on the basis of which the Council called upon it to reconsider its announcement and reaffirm its commitment to the Treaty (S/RES/825, 1993). Negotiations on the matter lasted until 2006 when North Korea issued a second announcement of withdrawal (which the Security Council demanded be rescinded), and proceeded to test and build nuclear weapons.

It is contended, in response, that national sovereignty must always be respected in international treaty-making. But as a majority of jurists have noted and as the existence of peremptory norms attests, the sovereignty of the nation-state is not unlimited.⁹

In domestic law, some constitutional rights and responsibilities are entrenched. Even in the absence of entrenchment, no national legislature contemplates the possibility of rescinding the criminal nature of murder, notwithstanding that in many juridical systems including New Zealand's, each parliament is sovereign. But no 'sovereign parliament' will rescind the criminal prohibition on murder. It may rescind a prohibition on alcohol. In each case, the parliament, or congress, remains sovereign, but in the former case the intrinsic nature of the norm determines the unlimited duration of the legislation. The same holds for certain international norms, as has been shown above.

In fact, the South Pacific Nuclear-free Zone Treaty (1985) has a more restrictive option for States Parties. It provides that the Treaty is of a 'permanent nature', and each Party has the 'right to withdraw' only in the event of a violation by another Party of a provision in the Treaty.¹⁰ Under the Rarotonga Treaty (in the drafting of which New Zealand played a major part), New Zealand, Australia and the 11 island States Parties have surrendered the traditional sovereign right of withdrawal deriving from discretionary judgement ('supreme national interests'). This has profound implications for how New Zealand, and other States, might perceive the 2017 Nuclear Weapons Prohibition Treaty, and the other WMD conventions.

Ratification of the 2017 Treaty accords signatory States, and in due course States Parties, an historic opportunity to 'close the legal gap' with respect to non-possession and non-use of nuclear weapons, following the biological and chemical precedents. The 'legal gap' was foreshadowed in the Advisory Opinion of the International Court of Justice in 1996 (see Appendix).

Ratification affords opportunity for imputing the status of a peremptory norm to the non-possession of nuclear weapons, and concomitantly engage in an act of declaratory self-restraint over the option of withdrawal.

Such an action would not, in the foreseeable future, be endorsed by nuclear weapon and nuclear-allied states which, as noted earlier, opposed the negotiations of the Treaty.¹¹ Support for the Treaty by NATO allies would require a renunciation of nuclear deterrence, consistent with non-use / non-threat and non-deployment obligations in Article 1 (d) and 1 (g).¹² New Zealand led in this respect with its unilateral statement to that

⁹ This widely-held view is succinctly stated by the UN Secretary-General Boutros-Ghali: "It is undeniable that the centuries-old doctrine of absolute and exclusive sovereignty no longer stands and was in fact never so absolute as it was conceived to be in theory." Cited in Steven Lee, 'A Puzzle of Sovereignty' (California Western International Law Journal Vol 27 No. 2; 1993). See also S. Lee, *Morality, Prudence, and Nuclear Weapons* (Cambridge UP; 1993) and Louis Henkin *et al*, *International Law: Cases and Materials* (International Law 18, 3rd ed., 1993).

¹⁰ South Pacific Nuclear-free Zone Treaty, Article 13 (1)

¹¹ See NATO Council Statement (July 2016): "Seeking to ban nuclear weapons through a treaty that will not engage any state actually possessing nuclear weapons will not be effective, will not reduce nuclear arsenals, and will neither enhance any country's security nor international peace and stability. Indeed it risks doing the opposite by creating divisions and divergences at a time when a unified approach to proliferation and security threats is required more than ever. The ban treaty is at odds with the existing non-proliferation and disarmament architecture. This risks undermining the NPT ... Therefore there will be no change in the legal obligations on our countries with respect to nuclear weapons. Thus we would not accept any argument that this treaty reflects or in any way contributes to the development of customary international law."

https://www.nato.int/cps/ua/natohq/news_146954.htm See also 'The Nuclear Ban Treaty: A Legal Analysis', N Highsmith & M Stewart (*Survival: Global Politics and Strategy*; Feb.. 2018, Vol. 60 (1), pp. 129-152)

¹² On 7 June '18, Harvard Law School's International Human Rights Clinic released a jointly-authored paper on the relationship between 'nuclear-umbrella states' and the obligations of the Treaty. It finds that once a country is party to the TPNW, it may no longer remain under the protection of a nuclear umbrella, i.e., rely on an ally's nuclear weapons for defense. In most cases, however, a country may sign and ratify the TPNW without violating its legal obligations under a security agreement with a nuclear armed state. The TPNW would

effect in 1985.¹³ But reliance on nuclear weapons by a minority was taken as a given during the negotiations, and it does not prevent a majority which supports the Treaty from proceeding along these lines, whose outcome would be a natural corollary of the Treaty's purpose.

3. Cooperation

A loose alliance could be formed by New Zealand and other signatory States (e.g. Austria, Ireland, Liechtenstein; Costa Rica, Mexico, Brazil; South Africa and Ghana) for ratification/accession to the Treaty.

Universality: New Zealand could focus on universal adherence across the Pacific working with the six island States that have already signed to persuade the other six which voted for the text, to do so.¹⁴

Irreversibility: New Zealand could also consider developing a collaborative initiative with other signatory States to explore ways in which, through declaratory action, non-possession of all WMDs is collectively regarded as a preemptory norm in international law, and that withdrawal from all three WMD treaties is forever renounced.

also allow it to continue participate in joint military operations with nuclear armed states as long as it does not assist with prohibited acts, such as possessing, threatening to use, or using nuclear weapons. A NATO member state that joined the TPNW would therefore have to renounce its nuclear umbrella status, but from a legal perspective, it could remain a part of the existing alliance.

<http://hrp.law.harvard.edu/staff/clinic-calls-on-nato-members-sweden-to-join-nuclear-weapon-ban-treaty/>

¹³ "When we exclude nuclear weapons from New Zealand, we exclude the possibility of a nuclear defence of New Zealand. We do not ask to be defended by the nuclear weapons we exclude, and we do not ask any nuclear power to deter any enemy of New Zealand by the threatened use of nuclear weapons against that enemy." Prime Minister David Lange, Address to the Conference on Disarmament, Geneva, CD/PV.296, 5 March 1985, p. 12.

¹⁴ Marshall Is., Micronesia FS, Nauru, PNG, Solomon Is., Tonga.

Appendix:

The 'legal gap' regarding nuclear weapons

In 1996 the International Court of Justice delivered an Advisory Opinion on the question, submitted by the UN General Assembly:

Is the threat or use of nuclear weapons in any circumstances permitted under international law?

The Court passed six opinions on the question, which together acknowledge what came to be regarded as the 'legal gap' with respect to nuclear weapons.¹⁵ The three most pertinent to question of a peremptory norm are the following:

- The Court was unanimous (14-0) that there exists an obligation to pursue in good faith and bring to a conclusion, negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.
- A significant majority (11-3), however, were of the view that:
There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such.
- The Court narrowly formed the opinion (7-7; the President's affirmative vote carrying the motion), that:
The threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.

A minority view, expressed in separate dissenting opinions, was that there was no exception under any circumstances (including that of ensuring the survival of a State) to the general principle that use of nuclear weapons is illegal.

This acknowledgement by the Court, together with widespread concern at the lack of progress in nuclear arms control negotiations under the NPT, comprises the legal-political foundation for the 2017 Treaty. It draws from the stated intention of the Humanitarian Initiative to close 'the legal gap' – to make it clear henceforth, that there is treaty law stating explicitly and categorically that the threat or use of nuclear weapons, indeed their very possession, is illegal.

In the words of the Joint Statement of 2015: "Affirming that it is in the interest of the very survival of humanity that nuclear weapons are never used again, under any circumstances."¹⁶

¹⁵ <http://www.icj-cij.org/files/case-related/95/7497.pdf>

¹⁶ Joint Statement of the Humanitarian Initiative, signed by 159 States and submitted to the NPT Review Conference (2015) including New Zealand, all five Nordic states, Austria, Ireland, Liechtenstein, Switzerland.