



**New Zealand Centre
for Global Studies**

Te Pokapū Akoranga Aorere o Aotearoa

GLOBAL STUDIES RESEARCH SERIES

Research Report 16

AUGUST 2023

**The Nuclear Prohibition Treaty:
*Where to from here?***

Tuiloma Neroni Slade

Copyright:

First published in New Zealand 2023 by:
NZ Centre for Global Studies Publications
New Zealand

© NZCGS Publications

All rights reserved
National Library of New Zealand
ISBN 978-1-99-118755-0

Author:

H.E. Tuiloma Neroni Slade was a judge on the International Criminal Court (2003-6), and Secretary-General of the Pacific Islands Forum (2008-14). He served in the Commonwealth Secretariat, and was Samoa's Attorney-General, acting Chief Justice, ambassador to USA and Permanent Representative to the UN. He led Samoan delegations in UN Law of the Sea meetings, chaired the Alliance of Small Islands States (AOSIS), co-chaired the UN Consultative Process on Oceans & Law of the Sea, and has been international adviser on climate change issues and on the legality of nuclear weapons.

Disclaimer:

The NZ Centre for Global Studies undertakes, as its trusteeship responsibility, to encourage and facilitate informed interdisciplinary research into global affairs in the 21st century, and publish and circulate research reports for the purpose of education and benefit of the international and domestic community. While the Centre ensures that the subject of a report lies within its area of focus before endorsing publication in its Research Report Series, responsibility for the content of a report remains exclusively with the author(s).

Acknowledgement:

The report was financed through grant funding from the NZ Disarmament Education United Nations Implementation Fund (DEUNIF). The report benefitted from consultations with a list of experts and authorities on the subject. The content of the report, however, remains exclusively with the author in an individual capacity.

Contents

1. **World Peace**
2. **Regional Nuclear-Free Zones and Universalisation**
3. **Vienna Declaration and Action Plan 2022**
4. **General Prohibition: The TPNW**
5. **Nuclear Deterrence**
6. **Where to from Here?**

The clear sense of our Symposium is that *Where to from here?* is a question which needs to be placed in the context of the '1945 moment' – the creation of a rules-based order.¹

The foundations of that rules-based order are now under real threat. What we see of the situation in Ukraine underscores the vital importance of the *Prohibition Treaty* – and also the responsibility which lies with each of us to act in its defence.

The possibility of new beginnings following the end of the Cold War has not been realised. Humanity is now confronted by multiple problems of demanding urgency and complexity. Division among nations is a major concern, marked by open tensions in the contest of the major powers even in our own Pacific – and made more difficult by raging conflicts around the world and, more seriously, the re-emerging fears of the threatened use of nuclear weapons.

Pacific Leaders in their *Boe Declaration on Regional Security* of 2019 have framed their concerns around an increasingly complex security environment driven by multifaceted forces and quite firmly reaffirmed, first priority, to *climate change* as the single greatest threat to Pacific livelihoods and security.

1. World Peace

The Secretary General of the United Nations has warned of the current dangers and their eroding effects on fundamental Charter principles and the ability of member countries to work together – and has now proposed a *New Agenda for Peace* with emphasis on a new multilateralism in an increasingly fragmented and unequal world.

United Nations

At the adoption of the *Prohibition Treaty* in 2017, UN Secretary General Guterres called it the “culmination of a worldwide movement ... and commitment towards the total elimination of nuclear weapons, which remains the highest disarmament priority of the UN.”

The re-affirmation of total elimination as the ‘highest priority’ focus is critical.

A primary objective of the UN Charter was disarmament, without which the founders believed the UN’s system of collective security could not work. It was a system based on a concert of the powerful and the victorious in war. Whether, in reality, such a concert existed or, indeed, a viable possibility became submerged in the Cold War arms race.

And so, the world is now faced with evident peril in situations where, by accident or possibly, in the context of appalling aggression as in Ukraine, by design, given the repeated insinuations or outright threats, there is high risk of nuclear arms being used.

Or worse, with political instability unchecked, the risk of sabotage and illicit activity by non-State actors.

The United Nations is unique in its universality and legitimacy. As was true during the Cold War, the UN remains in the 21st century an essential venue for great-power coordination and cooperation. As long as the UN remains the primary institution for global governance, it continues to be the most effective for the achievement of a rules-based international order. Those who dominate it will find compelling reason to preserve it, though they will continue to set the rules – where they can.

The Pacific experience

Where to from here? is a situation not unfamiliar to this region, oceanic home to the diversity of all Pacific people, indigenous communities and the major navigator-cultures of the region.

Pacific only in name, this region has been an active theatre of war in just the past century – a war not of our making, and in a century when, as the *Rome Statute* of the *International Criminal Court (ICC)* will remind us, “millions ... have been victims of unimaginable atrocities that deeply shock the conscience of humanity”.

This region has also been the testing ground of weapons of mass destruction, more than three hundred and ten nuclear tests. In fact, intensive and prolonged atmospheric and underground weapons testing, over fifty years from 1946 to 1996, by

¹ I am grateful to Philippe Sands for his words of inspiration for part of this address. Professor Sands and Professor James Crawford were advisers and close colleagues in ICJ proceedings on nuclear weapons in 1995/1996; and they also provided background papers in the world of the *Canberra Commission on the Elimination of Nuclear Weapons 1996*.

three different colonial governments, over ten different sites across the Pacific. Sixty-seven atomic and hydrogen bomb tests were exploded in the Marshall Islands alone.²

You will also know that common danger and deeply shared concerns over nuclear testing was a high priority in the establishment and first meeting in Wellington in 1971 of what we know today as the Pacific Islands Forum, the paramount political institution of our region and for high policy-making for Pacific leaders.

From then on, there has been, I believe, conscientious effort by the Forum and individual Pacific small island countries, often alongside Australia and New Zealand, to speak out against nuclear weapons: before the *International Court of Justice* at the UN and in the development and promotion of the *Treaty of Rarotonga*.

A number of Pacific island States participated in the negotiations on the *Prohibition Treaty* and recounted some of the Pacific experience in their formal submissions on possible elements for the *Treaty*.³ This Pacific experience requires that we in this region continue to sustain the struggle to address the dangers of nuclear weapons.

2. Regional nuclear-free zones and universalisation

So, as to *Where to from here?* Often, I think there is sense in starting from home.

I would note that the first line of the *Treaty of Rarotonga*⁴ declares the united commitment of the Pacific region to *a world at peace*. With our admiration, I acknowledge the key role that Dr Kennedy Graham and Ambassador John Tilemann played from 1983 as members of the Working Group responsible in the creation of the *Treaty of Rarotonga*.

The *Prohibition Treaty* reaffirms, as do the proposals for the UN *New Agenda for Peace*, the importance of internationally recognised regional arrangements for enhancing global and regional peace, the non-proliferation regime and, ultimately, for the achievement of total disarmament.

There is significant emphasis in the *Vienna Declaration and Action Plan* on the need for operational linkages between the implementation activities of the *Treaty* and the nuclear-free zone arrangements. It would seem essential that the States Parties to the *Treaty of Rarotonga*, which had its first ever review meeting in December 2020 (a meeting attended by representatives of other regional arrangements), should act to establish and to strengthen such links.

3. Vienna Declaration and Action Plan 2022

As to the next steps, there cannot be any question as to the need for the fullest support of the *Vienna Declaration* and implementation of its *Action Plan*.

The *Vienna Declaration* is a carefully thought-out and detailed political statement by States Parties on the commitment to the *Treaty* and emphasised determination for the full and effective implementation of the *Prohibition Treaty* – and the complete elimination of nuclear weapons. It is a highly principled commitment to the legal and ethical imperatives underpinning the *Prohibition Treaty*, as it is to international cooperation between governments, the UN and international society, accompanied by an *Action Plan* of some 50 points outlining practical ways to facilitate effective and timely implementation of the *Treaty*.

Civil society and democratisation

The *Prohibition Treaty* highlights the essential and humanitarian character of the *Treaty* underscoring the informed and instrumental role of the coalition of civil society and non-governmental organisations.

The emergence of non-state entities as subjects of international law, not only in terms of rights but also in terms of accountability, has transformed the State-centric idea and understanding of international law. In the ICJ proceedings on the *Illegality of Nuclear Weapons*, we witnessed the mobilising force of civil society, the influential role of NGOs and public participation through the millions of signatures received from across the world.

² See, generally, Professor Roger S. Clark on *Pacific Island States and International Humanitarian Law*, in *Asia-Pacific Perspectives on International Humanitarian Law*, p. 199

³ Submissions by Fiji, Nauru, Palau, Samoa and Tuvalu on Elements for a treaty banning nuclear weapons, Geneva, 2016; by Papua New Guinea, New York, 2017.

⁴ *South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga) 1985*

This is a welcome trend in the making of international law, which was also evident and of sustained effectiveness in the negotiations of the *Rome Statute* of the ICC and since in the operations of the Court.

Of particular significance before the ICJ, I thought, was the first-hand testimony of witnesses, like the mayors of Hiroshima and Nagasaki on *hibakusha* and of Mrs Lijon Eknilang from the Marshall Islands who, as a child, had witnessed the Bravo hydrogen test on Bikini Atoll and the horrific consequences of harm and suffering for their country and communities – both moving testimonies that would have registered for a Court of law and Judges representing the major systems of justice of the world, a true humanitarian vision of the ‘dictates of public conscience’.

It seems to me that Japan and the Marshall Islands stand as testament to the totally indiscriminate and widespread destructive power of nuclear weapons – vastly more so now since 1945.

Some twenty years on from the ICJ *Advisory Opinion* and its findings, based almost solely on international humanitarian law principles, we now have the *Paris Agreement* of 2015, the principal instrument of global response to a “common concern of humanity” over global climate change, as well as the growing international movement, again driven by civil society, for *ecocide* as the fifth international crime under the *Rome Statute*, over concerns for the wanton and widespread human and biological destruction to the environment globally. I would observe that the *Paris Agreement* and its international environmental law underpinnings, soft law or not, shares equally with international humanitarian law the same fundamental humanitarian concerns.

4. General prohibition: The TPNW

The essence of the *Prohibition Treaty* would be the undertakings under *Article 1, paras. (a) and (d)*, provisions which, of course, echo the ICJ *Advisory Opinion* and which reinforce the prohibition norm against the unacceptability and illegality of threats to use nuclear weapons. These are critical provisions extensively and expertly dealt with in the symposium discussions, and I need hardly spend more time on them.

This is a *Treaty* of humanitarian and human rights significance, drawing particular attention to women and girls and to the grossly disproportionate suffering and harm, which continue, to victims and indigenous people.

These are notable, and increasingly necessary initiatives in international treaty-making; and, again, I would point to the *Rome Statute* of the ICC which contains advanced norms and standards on women and girls and on victims, devoted to their protection, participation and reparations.

Use or threat to use

The prohibition under Article 1 (d) against the use or threat to use nuclear weapons is probably the key and critical provision. We now have clear and explicit prohibition against use or threat of these weapons, unlike other earlier treaties and their prohibition on other similar weapons.

The prohibition is unrestricted and would seem to cover use or threats of use against non-Parties, or even non-State actors of rebel groups or terrorists.

With increased ratification of the *Prohibition Treaty*, and broader State and public participation in its strengthening and implementation, coupled with its non-reservation provisions, there is, in my view, a real basis and potential for the establishment, perhaps the confirmation, of a customary norm of ‘absolute’ prohibition under international law.

But, of course, as canvassed in our symposium discussions, there are obstacles to be dealt with, in particular the right to *withdraw* under Article 17 in the exercise of national sovereignty, and keeping in mind the sustained objection of nuclear-weapon States to the *Treaty*.

Sovereignty

Article 17 of the *Treaty* seems contradictory in purpose and may be seen as undermining the *irreversibility* under Article 1. However, it is a provision in line with other similar treaties on, for example, *Biological Weapons* and *Chemical Weapons*, and also the *Vienna Convention on the Law of Treaties*.

The conditions for withdrawal are stipulated, namely, ‘extraordinary events’ jeopardising the ‘supreme interests’ as decided by the State Party withdrawing in exercise of its national sovereignty; and, I should think, would also need to be read

together with Article 43 of the *Vienna Convention on the Law of Treaties* which preserves obligations imposed by international law independently of, in this case, the *Prohibition Treaty*.

There is also the matter of the *sovereignty* of the nation-state in the United Nations era which many jurists of authority would consider more limited than hitherto claimed.

As noted by one such authority,⁵ the UN Charter, contrary to an assertion commonly made, does *not* include State sovereignty within its purposes and principles. Rather its first principle is that the organisation is based on the principle of sovereign equality of all its members (as elaborated in the *Friendly Relations Declaration* adopted by the UN General Assembly in 1970).

In particular, sovereign equality is accompanied by, among others, the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

Position of nuclear-weapon States (NWS)

It would seem generally accepted that the *Treaty* would only be a first step towards the ultimate objective of a world free of nuclear weapons. In that sense Article 4 of the *Prohibition Treaty*, a lengthy rather complex provision, might be seen as laying down a process in time and manner to allow and encourage NWS to join the *Treaty* and to work ‘[Towards] the total elimination of nuclear weapons’. Article 4 is closely linked to and would need to be read together with Article 2 on ‘declarations’ and Article 3 on ‘safeguards’

In any event, at this stage, because of the position taken by the NWS and their reaction to the *Treaty* there appears to be no certainty that any NWS will, in the near future, accept the *Prohibition Treaty*. NWS did not participate in the *Treaty* negotiations, as we know. There is a formal statement, at least by some of those States that they *do not intend to sign, ratify or ever become party to the Treaty*, that the *Treaty* does not reflect customary international law, and that the *Treaty* disregards realities and incompatible with the policy of nuclear deterrence so essential, they say, to keeping the peace in Europe and North Asia for over 70 years. NWS non-participation in the *Treaty* preparatory and ongoing processes, together with the tone of this type of statement, would seem to raise serious questions about their “good faith” in the sense of Article VI of the *Non Proliferation Treaty (NPT)* as interpreted by the ICJ.

5. Nuclear Deterrence

For those 70 years and more, the world community has allowed the idea of mass destruction to be normalised as a necessary component of the international security architecture; an idea fashioned and projected by the very few with the full might of the economic, military and political power arrangements of our world.

And the claimed critical deterrence of nuclear weapons has become the subject of continuing wide-ranging and divisive debate among nations.

In the ICJ proceedings, while the Court declined to pronounce on the ‘policy of deterrence’, its analysis,⁶ along with the Court’s holding that a threat of a use of force that violates humanitarian and other law or the requirement of proportionality is itself illegal, would seem to effectively undermine the doctrine of deterrence.

On this aspect, the States Parties to the *Prohibition Treaty* in the *Vienna Declaration*, as well as the *Canberra Commission*⁷ and other supporters of the *Treaty* are emphatic: possession of nuclear weapons has not prevented wars, and the central reality is that nuclear weapons diminish the security of *all* States; the risks of retaining nuclear arsenals in perpetuity far outweighing any possible benefit imputed to deterrence.

⁵ Rt. Hon. Sir Kenneth Keith, *Sovereignty at the Beginning of the 21st Century: Fundamental or Outmoded*, Cambridge Law Journal 63 (3), November 2022, p. 581

⁶ *ICJ Advisory Opinion*, paras. 48 and 67.

⁷ *Canberra Commission Report*, pp. 7, 23

6. Where to from here?

So, *where to from here* for the *Treaty* is perhaps not so straightforward.

The whole point of the proceedings before the ICJ was to delegitimise nuclear weapons, a near-impossible task for any judicial body.

There are major political stakes in play with high security interests as well as moral values inextricably linked to any legal reasoning on critical and sensitive issues – and perhaps not entirely surprising that interpretation of international law governing the use of nuclear weapons can lead to different outcomes, as clear from the many Separate and Dissenting opinions of all the ICJ Judges.

The reality, of course, was that, even a unanimous decision that the threat or use of nuclear weapons is illegal under any circumstances would not have magically waved away existing stockpiles and freed the world of nuclear weapons.⁸ Indeed, it was clear to all that after the *Advisory Opinions* there was no question of the need to complete the disarmament negotiations.

These are weapons of last resort, but also the ultimate expression of the irrationality of our world. The prescient observation of the *Canberra Commission* that a ‘world ready to eliminate nuclear weapons would be very different from today’s world’ comes to mind.

It would seem that in building the environment for a nuclear weapon free world, the world itself needs to change, no doubt in deep reform and fundamental ways, not only of the inter-State system but within domestic systems as well.

How all this might work out in practical terms would require careful investigation. A regional arrangement like the *Treaty of Rarotonga* might offer a possible setting for the consideration of the idea of such reform and likely further development and promotion, even as possible ‘small steps’ in establishing some level of confidence and goodwill between the parties.

In closing, I would observe that the opposition of NWS to the *Prohibition Treaty* seems needlessly antagonistic and at odds not only with the far greater majority of States support for the *Treaty*, but also with their own duty of care and special Security Council responsibility for the international rules-based order.

The ICJ *Advisory Opinion* opened the way to achieving total disarmament through good faith negotiations under Article VI of the *NPT*, by which the Court would seem to recognise State obligation to work towards ‘nuclear disarmament’ and ‘general and complete disarmament’. The achievement of *nuclear disarmament* would not need to await the achievement of *general and complete disarmament*.

As has been noted in the Symposium, the *NPT* is indispensable, and its Article VI remains the one legal hold we have over nuclear-weapon States. Non-proliferation treaty norms must be defended and upheld, as we must defend the moment of 1945 and the creation of rules-based order.

In the interim, if the required confidence could be developed among the respective parties, and in good faith, opportunities within the framework of the *Prohibition Treaty* might be explored, and agreed upon, for example, on verification issues and on activities, even voluntary steps under Article 6 of the *Prohibition Treaty* to address ongoing human and environmental harm from past nuclear testing.

In that connection, the ‘immediate steps’ proposals of the *Canberra Commission*⁹ on the possibility of NWS commitment at highest political level unequivocally to the elimination of nuclear weapons and to their agreement to start work immediately on the practical steps and negotiations required for its achievement might commend themselves to this symposium for careful study with a view to a possible ‘*where to from here*’ way forward.

⁸ Professor Roger S. Clark, *The Case Against the Bomb*, 1996, p. 29

⁹ *Canberra Commission*, report, p.11