The TPNW Conference of Parties: What Is to Be Discussed?

Kennedy Graham

New Zealand Centre for Global Studies, Auckland, New Zealand

ABSTRACT
The Treaty on the Prohibition of Nuclear Weapons (TPNW) is one of the most important developments of the modern era. This paper addresses the question posed, of what issues are to be discussed at the 1st Conference of the States Parties to the Treaty, which will occur one year after entry-into-force with fifty ratifications. In summary four main issues are identified: – The legal status of the Treaty, in the short-term – An issue of logic: irreversibility of the prohibition and the right of withdrawal – The legal status of the Treaty, in the long-term – Political division over the Treaty and the law: the persistent objector rule. Scope exists for further political initiative at the appropriate time regarding the Treaty itself, pertaining to the two central concepts of the Treaty – irreversibility and universality. Such initiative draws from an assessment of the contemporary state of customary international law, and whether the non-possession of all weapons of mass destruction, including nuclear weapons, might be attaining, or have the potential to attain, the status of an emerging peremptory norm. The minority of States opposing, irrespective of military power, may come to be regarded as persistent objectors to the norm. It is open for ratifying States to lead in such initiatives, consistent with the binding article in the Treaty to ensure universal adherence through encouraging non-state Parties to join. Such an initiative would serve the strengthening of the multilateral rules-based order.

Introduction

The Treaty on the Prohibition of Nuclear Weapons (TPNW) is one of the most important diplomatic developments of the modern era. Beyond its intrinsic importance, it raises important issues pertaining to the relationship between the political and legal dimensions of multilateral disarmament – in particular, the dynamic between political initiative, its subsequent affirmation in law, followed by further initiative (Camilleri, Hamel-Green, and Yoshida 2020; Casey-Maslen 2019; Nystuen, Casey-Maslen, and Bersagel 2014).

Notwithstanding significant opposition, the Treaty has attracted considerable support and momentum. Three years after completion it has attracted, by October 2020, the required 50 ratifications to enter into force.

CONTACT
Kennedy Graham  director@nzcgs.org.nz  New Zealand Centre for Global Studies, Auckland, New Zealand

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The first meeting of the States Parties is to occur within one year of entering into force, i.e. before 22 January 2022. At that important event, what might usefully be discussed?

The Conference could focus primarily on two major areas: broadly, the fundamental distinction between non-proliferation and disarmament; and more specifically, the central concepts contained in the Treaty itself. The two central concepts (irreversibility, universality) are closely inter-related, and they address the underlying related dimension: the relationship between political aspiration and legal status.

Reflecting these areas of focus, this article:

- Notes the fundamental, and under-acknowledged, distinction between non-proliferation and disarmament;
- Identifies the two central concepts of the Treaty: irreversibility and universality;
- Explores the potential issues for discussion at the 1st Assembly of the States Parties, namely:
  (a) the legal status of the Treaty in the short-term (2021–25);
  (b) a logical contradiction that exists in the Treaty and a possible resolution of this;
  (c) the legal status of the Treaty over the long-term (2026–30);
  (d) the political division underlying the Treaty, and the legal rule of the “persistent objector”;
- Draws conclusions on the significance of the Treaty, and issues to be discussed.

**The Fundamental Distinction: Non-proliferation and Disarmament**

A fundamental distinction is, to this day, left obscure by the international community in its political stances and negotiating process, namely, that between non-proliferation and disarmament.

These two aspirations are usually run together as ancient wisdom and canon, to the point where they transcend objective analysis and reasoning. Yet, they are fundamentally different:

- The former acknowledges the *de facto* possession of a weapon by some States Parties while other Parties commit to permanent non-possession. A non-proliferation instrument may envisage universal disarmament by all States Parties at some unspecified future date, but there is, in the perception of some, an implicit *de jure* possession of the partially-banned weapon, which is strengthened by the passage of time, as the *status quo* continues indefinitely.
- The latter makes no exceptions to the “irreversible elimination” of the weapon, with an undertaking on all Parties “never, under any circumstances”, to possess it.

There is thus a qualitative difference between the non-proliferation instruments (NPT, CTBT) on the one hand, and the three disarmament instruments on weapons of mass destruction (WMD; biological, chemical, nuclear) on the other. In the diplomatic world, this is purposefully obfuscated through “constructive ambiguity”. Non-proliferation is embraced, politically, as a continuing path towards disarmament. But once disarmament

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1 Subject to any withdrawal provision in the instrument.
is embraced in law, the distinction becomes undeniable, and uncomfortable to those seeking to preserve the *status quo*.

This distinction does not need to be an explicit item for discussion at the 1st Assembly of States Parties, but it is important that clarity of thinking underlies the judgements made, and the conclusions and recommendations reached, in discussion of the four main issues identified in the Introduction and explored in another section of this paper.

**Central Concepts**

The TPNW prohibits possession of nuclear weapons by any State Party. Other aspects of the Treaty – procedural affirmation, safeguards, implementation and verification, victim assistance, meetings of the Parties – are all necessary, but they are supportive of the central purpose which is prohibition. And, in order for prohibition to be meaningful, the obligation of non-possession must be irreversible and universal.

**Irreversibility**

Under Article 1, each State Party undertakes “never under any circumstances” to possess nuclear weapons. This requires that each State Party assumes an irreversible obligation. Indeed, the Preamble to the Treaty explicitly recognises that a legally-binding prohibition of nuclear weapons constitutes an important contribution towards the “irreversible .... elimination of nuclear weapons” (Preambular para. 15). The issues for discussion at the 1st Assembly that arise from this far-reaching obligation are explored in (b) of the next section.

**Universality**

The Treaty (Art. 12) speaks of “universal adherence of all States” to the Treaty – an ambitious phrase implying, strictly, 193 UN Member States and other non-member States.

States may choose to become party to a treaty under international law, or not, in their sovereign discretion. Universal or near-universal adherence is the hallmark of expression by the international community of States. It is also the primary determinant of influence with regard to that particular aspect of law. This is the other main political challenge facing the Treaty.

The above distinction and concepts provide the framework for an identification of potential issues for discussion at the 1st Assembly of States Parties.

**Issues for Discussion**

What, then, might be the issues for discussion at the 1st meeting of the States Parties? Four are suggested below, presumably to be raised by States Parties in general debate,

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2 Treaty on the Prohibition of Nuclear Weapons, Article 1. The Article also prohibits associated activities: testing, production, manufacture, acquisition, stockpiling, transferring, receiving, using, threatening to use, encouraging others, seeking assistance from others, stationing, installing or deploying.
explored through a committee process, with any consensus being expressed in a Final Document that will emerge from the Conference. They are:

- the short-term legal status of the Treaty, immediately upon it coming into force;
- a particular problem of logic contained in the Treaty;
- the long-term legal status of the Treaty; and
- the political division underpinning the broader context of the Treaty.

Legal Status of the Treaty: Short-term

Once the Treaty comes into force, it will, *ipsa facto*, have entered into formal international law under the ICJ Statute, Article 38.1 (a), as an international convention that establishes “rules expressly recognized by the contesting states”.

A fundamental aspect of international relations needs to be recalled: that treaty law, essentially the central component of international law, is transactional rather than constitutional – it is contractually based; it traditionally allows for withdrawal, and it does not bind non-Parties.

While entry-into-force accords the Treaty considerable legal significance, not all treaties, binding the ratifying Parties as they do, are regarded as possessing the same political status. To cite two extreme examples in law:

- The Moon Treaty (1984) has only 18 States Parties, and is unlikely to attract more in the current version; testifying to the absurdity of requiring only five ratifications for entry-into-force.
- The Comprehensive Nuclear Test Ban Treaty (CTBT), having attracted 168 States Parties, is still not in force because of the requirement for 44 identified States to become Parties, of which eight have not done so after a quarter of a century.

The Outer Space Treaty (1967), in contrast, has 100 States Parties and, while not without continuing controversy, is accepted as a significant element of international law. The same cannot be said of the Moon Treaty, which has been described as a ‘failed treaty’.

The TPNW, with 50 ratifying States and 34 more signatories as of November 2020, will not be seen as a “failure” But how much of a “success” will it prove to be? The question is raised of what the likely extent of the Treaty’s ratification is likely to be, and how this may compare with other WMD treaties. That is addressed in subsection (c); it is sufficient here to note that States Parties at the 1st Assembly should make a formal

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3The Moon Treaty: failed international law or waiting in the shadows? M. Listner (Space Review, 24 October 2011). Listner, in fact, does not agree with that view: “... the three major spacefaring nations (the Big Three) are non-parties to the Moon Treaty, which has led to the opinion that the Moon Treaty is a failure as a treaty and international law. However, even though the Moon Treaty is technically not binding on the Big Three, it is technically valid international law. Even with only six nations ratifying the Moon Treaty, the fact that eleven other nations, including Australia, France, and India, have acceded to or become signatories to the Moon Treaty creates a shadow of customary law that could grow such that non-parties could find themselves overshadowed by the penumbra of the Moon Treaty, especially if those non-parties take no action to refute its legitimacy.”.
and positive affirmation, albeit perhaps of the obvious, pertaining to the legal status of the Treaty.

**Discussion Item 1**

States Parties could discuss and reach agreement on a Statement acknowledging the entry into international law of the universal non-possession of nuclear weapons, effective *de jure* from the Treaty’s entry-into-force. Such a Statement could refer to the universal non-possession of the other two WMDs already outlawed, draw a political nexus between them and this third WMD, and explore the implications for the *de facto* possession of nuclear weapons in the future.

**An Issue of Logic: Irreversibility and Withdrawal**

An issue that is, perhaps tangentially but meaningfully, related to the legal status of the Treaty concerns a problem of logic that exists in the TPNW, and indeed in the two earlier WMD instruments from which the TPNW drew. This concerns the incompatibility of permanency of non-possession with a withdrawal right. The irreversibility of the obligation never to possess nuclear weapons in any circumstances is logically challenged, and politically undermined, within the Treaty itself through the option of withdrawal.

Article 17 allows a State Party, in “exercising its national sovereignty”, to withdraw if it decides that “extraordinary events” have jeopardised its “supreme interests”. The withdrawing State is obliged simply to convey a statement of such events to the depositary. The Treaty’s withdrawal article is identical to that of the other two WMD disarmament texts – the Biological Weapons Convention (1972) and the Chemical Weapons Convention (1993). The problem of withdrawal therefore attends to WMD disarmament law, generically.

It has traditionally been a central part of positivist law that a state may withdraw from a treaty according to its own judgement. The major treaties of contemporary times have, if anything, weaker withdrawal obligations. The difference, however, between them and the WMD disarmament treaties is that the former reflect transactional agreement for broad common goals (atmosphere, oceans, trade) whereas the latter are transformational in that the central tenet is an irreversible prohibition of a specifically-identified “thing” (a weapon).

Irreversibility and withdrawal comprise, essentially, a contradiction in terms. The phrase “never under any circumstances” means there are no conceivable circumstances in which an obligation terminates. The phrase “right of withdrawal” means that there are such circumstances. The two phrases in the same document are irreconcilable in pure logic.

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4 See, for example, the 1982 UN Convention on the Law of the Sea (Art. 317), the UN Framework Convention on Climate Change (Art. 25), the 1994 WTO Statute (Art. XV), the 1998 Rome Statute (Art. 127), and 2015 Paris Agreement (Art. 28).

5 The WMD conventions drew upon their arms control predecessor, the nuclear Non-Proliferation Treaty (1968). And the politically subjective dimension has proven to be strong: when North Korea withdrew from the NPT, the effort of the three depositaries (US, UK, Russia) and the Security Council to reject the stated reasons did not prevent withdrawal, even in law. Yet the regional Treaty of Rarotonga (1986) contains what is possibly a uniquely different withdrawal mechanism; Article 13 allows withdrawal only in the event of a Treaty violation by another State Party.
This problem illustrates the tension between the legal and political dimensions of treaty law, and it is addressed, albeit obliquely, in the Vienna Convention. It is contended, by some, that Article 31 allows for an interpretation that the phrase “never under any circumstances” is limited by a standard withdrawal clause in a treaty, and that there is thus no “legal contradiction”. But Art. 31(1) stipulates that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The TPNW’s Preamble makes the object and purpose entirely clear:

- the catastrophic humanitarian consequences that would result from any use of nuclear weapons, and recognizing the consequent need to completely eliminate such weapons, which remains the only way to guarantee that nuclear weapons are never used again under any circumstances;
- any use of nuclear weapons would also be abhorrent to the principles of humanity and the dictates of public conscience;
- a legally binding prohibition of nuclear weapons constitutes an important contribution towards the achievement and maintenance of a world free of nuclear weapons, including the irreversible, verifiable and transparent elimination of nuclear weapons, with Parties determined to act towards that end.

This simply reflects, in turn, the natural tension in the late-Westphalian era between global obligation and national sovereignty. It is frequently contended that national sovereignty, including the right of withdrawal, must always be respected in international treaty-making. But as a majority of jurists have noted, the sovereignty of the nation-state in the UN era is, in fact, limited. This widely-held view has been succinctly stated by the UN Secretary-General: “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.” (Lee 1997, 243) And the notion of “limited sovereignty” is compelling when regard is given to Article 32 of the Vienna Convention, which provides that:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.”

It may be that judicial opinion, acknowledged under Article 38.1 (d) of the ICJ Statute, will come to regard a commitment “never under any circumstances” to possess a “thing” and the right to change one’s mind and possess it, leads to “a result that is manifestly absurd”.

The tension between global obligation and national sovereignty is best approached and resolved through political initiative. Such initiative will necessarily draw upon customary international law. It is therefore directly related to the other central concept in the Treaty, namely, universality.


**Discussion Item 2**

States Parties may deem it relevant to consider nullifying the withdrawal article through a joint declaratory statement that, in their judgement, the non-possession of nuclear weapons has a normative quality in international law above the treaty prohibition alone and that, accordingly, States Parties renounce for themselves forever the possibility of withdrawing from the Treaty.

**Legal Status of the Treaty: Long-term**

Arguably, the major area for discussion at the 1st Assembly might concern the extent of political aspiration of the States Parties to fulfil the challenge of Article 12 – “universality” – and the implications this holds for the legal status of the Treaty over the long-term.

**The Treaty and Universality**

The decision by the UN General Assembly (2016) to commence negotiations for the Treaty was adopted by 113 votes for, with 35 opposing and 13 (including China) abstaining. The decision to adopt the draft Treaty (2017) in the negotiating conference was taken by 122 votes, with 1 opposing and 1 abstaining, with 69 States not voting.

A deep uncertainty thus surrounds the fate of the nuclear Treaty in terms of future universality. The nuclear-weapon States plus the nuclear-dependent States opposed the negotiations for the Treaty. They opposed its adoption, and continue to oppose it now that it exists. The questions therefore arise:

- What prospect is there of the Treaty attaining, in the foreseeable future, genuine universality?
- If it lacks that status, does this make a meaningful difference in political or legal terms?

The table below shows the current situation regarding ratifications/signatures of the TPNW, in the context of the two other WMD disarmament instruments and the two main non-proliferation instruments.

**Ratification and Signatures of WMD Treaties (May 2020)**

| Non-Proliferation | Test Ban (CTBT) | Biological (BWC) | Chemical (CWC) | Nuclear (TPNW) |
|-------------------|-----------------|------------------|----------------|----------------|
| Signature; Entry  | 1968; 1970      | 1996; 1975       | 1972; 1975     | 1972; 1975     |
| States Parties    | 191             | 168              | 183            | 192; 1997      |
| Other signatories | 0               | 16               | 5              | 193            |
| Major non-parties | DPRK, India, Israel, Pakistan | 6 NWS | 0 | 1972; 1975 |
|                    |                 |                  | Egypt, DPRK    | 2017; 2021     |
|                    |                 |                  | 0              | 9 NWS; NATO states, Australia, Japan, ROK |

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6Hereafter, “nuclear-weapon States” and “nuclear-dependent States” may be referred to as NWS and NDS respectively. The latter are the non-nuclear-weapon States that have an alliance with a NWS under which the NWS is prepared to use nuclear weapons in its defence.
Of the three disarmament treaties on WMD, both the biological and chemical weapons conventions have attracted what might be termed “effective universality” – commitment from virtually all UN Member States, with no major power objecting. The recent nuclear treaty (TPNW, 2017) has not had sufficient time to attract “effective universality”, but once the Treaty enters-into-force, that will become the main political question before it.

For heuristic purposes, four broad futures for the TPNW “pace of ratification” might be envisaged:

(a) *Inadequate*: Ratification by the requisite fifty States, then a “slow pace” over ensuing years to perhaps 60 or 70 States Parties, followed by stasis;
(b) *Expected*: Continuing accession at “modest pace” to equate with the 122 States that voted for its adoption in the General Assembly in 2017;
(c) *Optimistic*: An “increasing pace” of accession, with successful political influence from the existing States Parties acting under Article 12, in achieving “universal adherence”, largely as a result of intensifying dissatisfaction with the failure of the NPT to transform non-proliferation into disarmament; perhaps 155 States, comprising all 193 UN members minus the “nuclear group” of 38 nuclear weapon and non-nuclear-dependent States (9 NWS, 27 NATO NDS; Japan, South Korea, Australia).
(d) *Complete*: At least 190 UN Member States, with no major power objecting

**Discussion Item 3**

For effective pragmatism at the 1<sup>st</sup> Assembly, the discussion might address the meaning of “universal adherence” over particular time-frames – and a political strategy for States Parties to make their actions under Article 12 effective (expected) and successful (optimistic, and ultimately “complete”).

**WMD Non-possession as an Emerging Norm**

As the ICJ Statute makes clear, one of the three principal means of determining what the body of international law that the Court will apply is “international custom, as evidence of a general practice accepted as law” (Article 38.1(b)).

Over the long-term, once ratifications exceed about 100 States, the question will arise of the non-possession of nuclear weapons, and indeed all WMD in customary international law.

What comprises customary international law is a fraught area of study. The most authoritative report on the matter is that completed recently by the International Law Commission (2016–18) which adopted the following four conclusions, among others:

**Conclusion 2** Two constituent elements

To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).

**Conclusion 9** Requirement of acceptance as law (*opinio juris*)

Report of ILC to the General Assembly (A/73/10, chap. IV, sect. E; 2018), pp. 124, 138, 143, 154:
(1) The requirement, as a constituent element of customary international law, that the general practice be accepted as law (opinio juris) means that the practice in question must be undertaken with a sense of legal right or obligation.

(2) A general practice that is accepted as law (opinio juris) is to be distinguished from mere usage or habit.

Conclusion 11 Treaties

(1) A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule:

(a) codified a rule of customary international law existing at the time when the treaty was concluded;

(b) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty;

(c) has given rise to general practice that is accepted as law (opinio juris), thus generating a new rule of customary international law;

2. The fact that a rule set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law.

Conclusion 16 Particular customary international law:

(1) A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.

(2) To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (opinio juris) among themselves.

At its 73rd Session in January 2019, the UN General Assembly welcomed the conclusion of the ILC's work on the identification of customary international law and its adoption of the draft conclusions and commentaries", encouraging their widest possible dissemination.

The question then arises whether the non-possession of weapons of mass destruction (biological, chemical, nuclear), either as a generic group or each specifically, is illegal under such custom. What might these different scenarios of ratification, identified in the table above, mean for the legal status of the Treaty, over the long-term? For this, it is necessary to assess the influence of so-called “soft law” on customary international law.

“Soft Law”: UN and IPU Declarations

Both branches of government – the Executive acting through the United Nations, and the legislatures acting through the Inter-Parliamentary Union, have condemned the possession of nuclear weapons.

UNGA res. A/RES/73/203 (20 December 2018): Identification of Customary International Law. Since then, the ILC has turned its attention to completion of the first reading of the draft conclusions on peremptory norms of general international law (jus cogens) (see UNGA res. A/RES/74/186; 18 December 2019).
The UN General Assembly has made the following far-reaching declaratory statements:

- **1946**: The first resolution adopted by the General Assembly established a Disarmament Commission which was to proceed “with the utmost despatch” for, inter alia, the “elimination from national armaments of atomic weapons and all other major weapons adaptable to mass destruction”. That determination, moreover, was shared at the time by the two major powers. The US Baruch Plan of 1946 proposed to “eliminate from national armaments atomic weapons and all other major weapons adaptable to mass destruction” through international inspection and verification. The USSR, apprehensive over potential US control even through international management, made a counter-proposal. Both plans were left in abeyance.

- **1954**: The Assembly resolved that a further effort should be made to reach agreement on “the total prohibition of the use and manufacture of nuclear weapons and weapons of mass destruction of every type” (A/RES/808 (IX)).

- **1961**: The Assembly regarded the use of nuclear weapons as “contrary to the rules of international law and to the laws of humanity”, and believed that “precautionary measures” were required;

- **1978**: The Assembly noted the “unprecedented threat to the very survival of mankind” posed by nuclear weapons, which constitute more of a threat than protection to humanity;

- **1994**: The General Assembly, in its request to the ICJ for an advisory opinion on the use of nuclear weapons, reflected the history of the concern it had expressed.

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**Declaration on the Prohibition of Nuclear and Thermo-nuclear Weapons, 1961 (A/RES/1653 (XVI))**: 
"... the armaments race ... has reached a dangerous stage requiring all possible precautionary measures to protect humanity and civilization from nuclear and thermo-nuclear catastrophe.

Recalling that the use of weapons of mass destruction, causing unnecessary human suffering, was in the past prohibited, as being contrary to the laws of humanity and the principles of international law; and declared that:

The use of nuclear and thermo-nuclear weapons would exceed even the scope of war and cause indiscriminate suffering and destruction to mankind and civilizations and, as such, is contrary to the rules of international law and to the laws of humanity;

Any State using nuclear and thermo-nuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization".

In 1978, the Assembly’s 1st Special Session on Disarmament referred to the:

"... unprecedented threat to the very survival of mankind posed by the existence of nuclear weapons ... [the] unprecedented threat of self-extinction arising from the massive and competitive accumulation of the most destructive weapons ever produced ... [the] accumulation of weapons, particularly nuclear weapons, constitutes much more a threat than a protection to the future of mankind ... Nuclear weapons pose the greatest danger to mankind and to the survival of civilization."

Recalling its resolutions 1653 (XVI) of 24 November 1961, 33/71 B of 14 December 1978, 34/83 G of 11 December 1979, 35/152 D of 12 December 1980, 36/92 I of 9 December 1981, 45/59 B of 4 December 1990 and 46/37 D of 6 December 1991, in which it declared that the use of nuclear weapons would be a violation of the Charter and a crime against humanity,

Welcoming the progress made on the prohibition and elimination of weapons of mass destruction, including the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction,

Convinced that the complete elimination of nuclear weapons is the only guarantee against the threat of nuclear war.
• 2010: The Non-Proliferation Treaty Review Conference made the following statement:

“The Conference expresses its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons and reaffirms the need for all States at all times to comply with applicable international law, including international humanitarian law.”

For its part, the Inter-Parliamentary Union has recently stated the following:

• 2014: The IPU’s resolution Towards a nuclear-weapon-free world: The contribution of parliaments (130th Assembly; March 2014) in which all member parliaments agreed to work with their governments on eliminating the role of nuclear weapons in security doctrines and to urge their governments to start negotiations on a nuclear weapons convention or package of agreements to achieve a nuclear-weapon-free world12

• 2017: On completion of the TPNW, the IPU circulated a Parliamentary Action Plan for a Nuclear-Weapon-Free World 2017–20.

Legal Advice: ICJ Advisory Opinion

In 1996 the ICJ 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? In approaching the question, the Court observed that: “[Their] characteristics render the nuclear weapon potentially catastrophic. The destructive power of nuclear weapons cannot be contained in either time or space. They have the potential to destroy all civilizations and the entire ecosystem of the planet.”13

The Court then proceeded to consider, in systematic and rigorous manner, the “applicable law” of the time, namely: the UN Charter, the law of armed conflict, customary international law, and international humanitarian law. Its reasoning on each issue is set out in the Appendix.

The Court adopted six opinions on the question, which together acknowledge what came to be regarded as the “legal gap” with respect to nuclear weapons14 Three are noted here:

• 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), that15

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12Reservations entered by Cuba, India, Iran and Pakistan.

13ICJ Advisory Opinion on the Threat or Use of Nuclear Weapons (1996), p. 35

14http://www.icj-cij.org/files/case-related/95/7497.pdf.

15Three dissenting judges, however, wrote 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 was illegal.
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.

The Court also concluded, however, that 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.

**Legal Expectation: ICJ and the “Legal Gap”**

The Court’s Advisory Opinion reflected the state of international law a quarter-century ago. Two decades of continued expression of concern together now with a binding treaty banning nuclear weapons possession indicate that global opinion has moved since 1996. While it is clear that such change in “opinion” is of a political character, it remains to be seen whether it reflects, in the early 2020s, a shift in *opinio juris*.

It therefore depends upon political initiative in the 2020s whether nuclear weapon non-possession becomes accepted as a customary norm. In delivering its Opinion, the Court wrote the following, in *obiter dictum*:

Need for liberation from the existence of nuclear weapons:

*In the last two decades, a great many negotiations have been conducted regarding nuclear weapons; they have not resulted in a treaty of general prohibition of the same kind as for bacteriological and chemical weapons. However, a number of specific treaties have been concluded in order to limit various aspects of the possession, deployment or use or threat of use of nuclear weapons (ICJ opinion, para 58).*

*These two treaties*,16 *the security assurances given in 1995 by the nuclear-weapon States and the fact that the Security Council took note of them with satisfaction, testify to a growing awareness of the need to liberate the community of States and the international public from the dangers resulting from the existence of nuclear weapons. . . . It does not, however, view these elements*17 *as amounting to a comprehensive and universal conventional prohibition on the use, or the threat of use, of those weapons as such (ICJ opinion, para 63).*

Foreshadowing a future general prohibition:

*The Court notes that the treaties dealing exclusively with acquisition, manufacture, possession, deployment and testing of nuclear weapons, without specifically addressing their threat or use, certainly point to an increasing concern in the international community with these weapons; the Court concludes from this that these treaties could therefore be seen as foreshadowing a future general prohibition of the use of such weapons, but they do not constitute such a prohibition by themselves (ICJ opinion, para 62).*

*In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons. It is consequently important to put*

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16Tlatelolco Treaty (Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, 1968) and Rarotonga Treaty (South Pacific Nuclear-Free Zone Treaty, 1986).

17Other emerging treaties on nuclear disarmament.
an end to this state of affairs: the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result (ICJ opinion, para 98).

Political Initiative: Filling the “legal gap”

- On that basis, the Humanitarian Initiative was formed, commencing in 2012 with a “Joint Statement on the Humanitarian Dimension of Nuclear Disarmament”, delivered by Switzerland to the Preparatory Committee for the NPT Review Conference. In 2013, Norway convened the first Conference on the Humanitarian Impact of Nuclear Weapons, and South Africa delivered the Joint Statement to the NPTRC, repeated by New Zealand to the General Assembly later that year. Follow-up conferences in Mexico (Feb. 2014) and Austria (Dec. 2014) resulted in the Austrian Pledge, subsequently renamed the Humanitarian Pledge.
- The Pledge, delivered by Austria on behalf of 159 States at the 2015 NPT Review conference, spoke of filling the “legal gap for the prohibition and elimination of nuclear weapons”. The group pledged to “cooperate with all relevant stakeholders, States, international organisations, the International Red Cross and Red Crescent Movements, parliamentarians and civil society, in efforts to stigmatise, prohibit and eliminate nuclear weapons in light of their unacceptable humanitarian consequences and associated risks.”

The Treaty’s preamble duly reflects the ‘soft-law’ basis that has been built for over 70 years, and effectively realises its expression in the form of ‘hard law’. The Preamble cites the relevant expressions and concepts in the UN resolutions, the ICJ Opinion, and the Humanitarian Pledge. It speaks of the ‘catastrophic humanitarian consequences’ of nuclear weapon use which would be ‘abhorrent to the principles of humanity’ and ‘the dictates public conscience’, and of the ‘ethical imperatives’ for nuclear disarmament which would be a ‘global public good of the highest order’. On the basis of such a declaratory foundation, the Treaty makes illegal the possession of nuclear weapons in positive law, thereby filling the ‘legal gap’ the Court had identified in 1996.

Future Trends: An Emerging Peremptory Norm

Thus, in 1996 the Court judged that the use or threat of nuclear weapons was not illegal under customary international law. At the same time, it indicated that the matter was subject to a natural evolution in political thinking that could well impact on the law – a case of nascent opinio juris (drawing upon Art. 38.1 (b) of the ICJ Statute). Informed commentary on the concept of nascent opinio juris is found, since then, among various scholars (Stürchler 2009, 86; Lepard 2010, 113; Bröllmann and Radi 2016, 138).

Such a natural evolution has indeed occurred since 1996, reflecting conclusion 11.1 (b) of the ILC study that a “treaty rule has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty”. What remains perhaps to be settled, definitively, is whether this conclusion is compatible with the ILC Report’s Conclusion 8.1 that “the relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent”.

It should be noted that weapons of mass destruction are not the only “things” currently being debated as emerging norms of customary international law. Other

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18Report of ILC to the General Assembly (A/73/10, chap. IV, sect. E; 2018), p. 120.
examples include the precautionary principle in environmental law and the principle of “responsibility to protect” in the area of civilian protection.

The Treaty on the Prohibition of Nuclear Weapons is essentially the fulfilment of the Court’s expectation, expressed in 1996. Its negotiating mandate lies in the ICJ judgement that the use of nuclear weapons would generally be contrary to the principles and rules of humanitarian law.

The legal foundation for the non-possession of nuclear weapons, therefore, lies in two related facts: first, the expectation of the World Court in 1996 regarding future trends and the likelihood of a complete prohibition; and secondly, the fulfilment of that expectation in 2017 through a treaty to that effect.

It now remains for the General Assembly to recognise that the Treaty has laid the basis for it to acknowledge nuclear weapon non-possession as an emerging norm (nascent opinio juris). In this respect, it may be most appropriate for the 1st Assembly of the States Parties to recommend to the General Assembly that it call for a study by the ILC on the relationship between WMD non-possession, as a generic group or as specific weapons, and customary international law.

**Discussion Item 4**

States Parties could discuss the possible “emergence of non-possession of all weapons of mass destruction (including nuclear weapons) as an emerging norm (nascent opinio juris) in customary international law”.

**Political Division and the Law: The “Persistent Objector” Rule**

International law recognises the concept of a “persistent objector” to a customary norm, if a State has consistently objected to its emergence and makes it publicly clear that it does not considers itself to be bound.

The NWS and NDS have done precisely this with respect to the TPNW. NATO States have made clear their strong opposition to the Treaty.

> “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.*

19NATO Statement of 2016: [https://www.nato.int/cps/en/natohq/news_146954.htm](https://www.nato.int/cps/en/natohq/news_146954.htm)
This, effectively, places them in the category of “persistent objector”, a concept recognised in customary international law. Of what legal status, then, is this carefully-recorded opposition?

The ILC study cited earlier advanced the following conclusion about the subject of ‘persistent objector’:

“1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.

2. The objection must be clearly expressed, made known to other States, and maintained persistently.

3. The present conclusion is without prejudice to any question concerning peremptory norms of general international law (jus cogens).”

An understanding of the “persistent objector rule” is critical to determining the legal status of the Treaty over the long-term. Some 26 expert studies are identified by the ILC Working Group. It should be noted, however, that of the 26 studies cited, 17 are from the USA and UK, six from EU countries (France, Germany, Italy), two from Japan and one from Scandinavia. No study is cited from Asia (except Japan) or Africa, that would reflect Sinitic or Islamic jurisprudence on the subject.

**Discussion Item 5**

In assessing the long-term status of the Treaty, States Parties could discuss the legal status of the “persistent objector rule”, agreeing on an approach towards the political division over the possession/non-possession of nuclear weapons, with a view to gaining consensus over this decade that reflects genuine global opinion.

**Conclusions**

This article draws the following conclusions.

1. The political dimension of the Treaty is rooted in the division of opinion over the prohibition of nuclear weapon possession, with two-thirds of UN member states in favour, a fifth opposed, and the remainder with no recorded view.

2. The entry-into-force of the Treaty will mean that there is treaty law, in accordance with the Statute of the ICJ (Article 38 (1.a), on a prohibition of all three weapons of mass destruction.

3. The inclusion of a withdrawal clause in all three WMD conventions whose central concept is the “irreversible elimination of nuclear weapons” and whose States Parties undertake “never under any circumstances” to possess them, amounts to a logical contradiction.

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20Report of the ILC on the work of its 70th Session (UNGA doc. A/73/556; 18 November 2018, p. 19);
21See Fourth Report on the Identification of Customary international Law (A/CN.4/695, 8 March 2016); Fourth Report on Identification of Customary International Law, Special Rapporteur (A/CN.4/695, Add. 1, 25 May 2016, pp. 19–20) and Report of ILC to the General Assembly (A/73/10, chap. IV, sect. E; 2018), p. 152.
4. TPNW States Parties could make the non-possession obligation in the Treaty genuinely irreversible by declaring that they will never withdraw from the Treaty and they regard the withdrawal article as illogical, and therefore null and void.

5. Whether the non-possession of nuclear weapons becomes binding on all UN member states, including non-parties to the Treaty, depends on whether it is accepted, in due course, as a new norm in customary international law and, perhaps ultimately, as a peremptory norm.

6. In recent decades, at least one such new norm has emerged – the precautionary principle governing environmental protection, while the responsibility to protect civilians against atrocity crimes might be seen today as an emerging norm.

7. The non-possession of biological and chemical weapons may perhaps be accepted as a new norm because of the “complete universality” in adherence to the respective conventions, but the presently limited adherence to the TPNW makes this is unlikely in the case of nuclear weapons, at least for the foreseeable future.

8. While the ICJ judged (1996) that the use of nuclear weapons was not at that stage illegal under customary international law, it noted a growing awareness of the need to liberate humankind from the existence of nuclear weapons, and that treaty law already then existing foreshadowed a future prohibition on the use of such weapons.

9. The Treaty comprises that “future prohibition” foreshadowed in the Court’s Advisory Opinion, and is the fulfilment of the NPT’s Article VI which imposes a binding legal obligation on all NPT States Parties, not only those possessing nuclear weapons, to pursue negotiations relating to nuclear disarmament at an early date.

10. If and when the Treaty attains universal adherence, it may credibly be regarded as a new norm in customary international law; until then, States Parties may credibly describe it as an emerging norm (nascent opinio Juris).

Disclosure Statement

No potential conflict of interest was reported by the author.

Notes on Contributor

Kennedy Graham (B. Com; MA; PhD) is Director of the NZ Centre for Global Studies. He is also a Senior Associate in the Institute for Governance and Policy Studies, Victoria University of Wellington, Vice-President of the UN Association of New Zealand, and a member of the NZ Public Advisory Committee on Disarmament & Arms Control. He studied at Auckland University and Victoria University in New Zealand and Cambridge University (UK) and was Visiting Professor at the College of Europe. Dr Graham has also been a NZ diplomat, a UN official, and a Member of Parliament.

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Appendix

Applicable Law considered by the ICJ in the Advisory Opinion of 1996

In applying applicable law, the Court considered several major treaties, namely the non-derogable right to life (specified in the ICCPR) and the prohibition of genocide as a rule of customary international law (specified in the Genocide Convention). It was also asked to consider the argument that any use of nuclear weapons would be unlawful by reference to “existing norms” relating to the safeguarding and protection of the environment.

The Court was not persuaded, however, that any of these legal provisions expressly rendered the threat or use of nuclear weapons illegal. It concluded that the most directly relevant applicable law related to the provisions governing the use of force in the UN Charter; and the law applicable in armed conflict.

Nuclear weapons and the UN Charter
According to the ICJ:

The Charter neither expressly prohibits, nor permits, the use of any specific weapon, including nuclear weapons. A weapon that is already unlawful per se, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the Charter. (para. 39)

The law of armed conflict and nuclear weapons
The Court noted that

“.... international customary and treaty law does not contain any specific prescription authorizing the threat or use of nuclear weapons or any other weapon in general or in certain circumstances, in particular those of the exercise of legitimate self-defence. Nor, however, is there any principle or rule of international law which would make the legality of the threat or use of nuclear weapons or of any other weapons dependent on a specific authorization. State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition.” (para 52)

Self-defence and customary international law
The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. (para 41)

.... it suffices for the Court to note that the very nature of all nuclear weapons and the profound risks associated therewith are further considerations to be borne in mind by States believing they can exercise a nuclear response in self-defence in accordance with the requirements of proportionality. (para 42)

.... in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by
a State in an extreme circumstance of self-defence, in which its very survival would be at stake. (para 97)

Customary international law and nuclear weapons
The Court examined whether the use of nuclear weapons was contrary to customary international law.

States which hold the view that the use of nuclear weapons is illegal have endeavoured to demonstrate the existence of a customary rule prohibiting this use. They refer to a consistent practice of non-utilization of nuclear weapons by States since 1945 and they would see in that practice the expression of an opinio juris on the part of those who possess such weapons. (para 65)

Some other States, which assert the legality of the threat and use of nuclear weapons in certain circumstances, invoked the doctrine and practice of deterrence in support of their argument. They recall that they have always, in concert with certain other States, reserved the right to use those weapons in the exercise of the right to self-defence against an armed attack threatening their vital security interests. In their view, if nuclear weapons have not been used since 1945, it is not on account of an existing or nascent custom but merely because circumstances that might justify their use have fortunately not arisen. (para 66)

... the members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past 50 years constitutes the expression of an opinio juris. Under these circumstances the Court does not consider itself able to find that there is such an opinio juris. (para 67)

Examined in their totality, the General Assembly resolutions put before the Court declare that the use of nuclear weapons would be "a direct violation of the Charter of the United Nations"; and in certain formulations that such use "should be prohibited". The focus of these resolutions has sometimes shifted to diverse related matters; however, several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an opinio juris on the illegality of the use of such weapons. (para 71)

The Court further notes that the first of the resolutions of the General Assembly expressly proclaiming the illegality of the use of nuclear weapons, resolution 1653 (XVI) of 24 November 1961 (mentioned in subsequent resolutions), after referring to certain international declarations and binding agreements, from the Declaration of St. Petersburg of 1868 to the Geneva Protocol of 1925, proceeded to qualify the legal nature of nuclear weapons, determine their effects, and apply general rules of customary international law to nuclear weapons in particular. That application by the General Assembly of general rules of customary law to the particular case of nuclear weapons indicates that, in its view, there was no specific rule of customary law which prohibited the use of nuclear weapons; if such a rule had existed, the General Assembly could simply have referred to it and would not have needed to undertake such an exercise of legal qualification. (para 72)

Having said this, the Court points out that the adoption each year by the General Assembly, by a large majority, of resolutions recalling the content of resolution 1653 (XVI), and requesting the member States to conclude a convention prohibiting the use of nuclear weapons in any circumstance, reveals the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament. The emergence, as lex lata, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent opinio juris on the one hand, and the still strong adherence to the practice of deterrence on the other. (para 73)
International Humanitarian Law

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.