

Treaty on the Prohibition of Nuclear Weapons: Establishing the Legal Framework for a Nuclear Weapon-Free World

H.E Dell Higgle, Ambassador for Disarmament
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The topic for this part of the Beeby Colloquium is the Treaty on the Prohibition of Nuclear Weapons. I think it's been selected in the main because it is the world's *newest* Treaty: the negotiations for it took place throughout this year and it was opened for signature at the UN on 20 September - just a couple of months ago.

But it also happens to be a topic which Chris Beeby was very passionate about. This was again made clear to me in an email I received just earlier this week from Tim Caughley who was reminiscing about his early days in MFAT. He said he could vividly remember "the day Chris led us, with his contagious enthusiasm, down Lambton Quay to march against nuclear testing - an activity that was not then commonplace under the public service neutrality ethos (even when popular support for an issue was strong)".

So I have no doubt at all that Chris would be a very strong advocate for this new Treaty were he still with us today.

The Treaty on the Prohibition of Nuclear Weapons is so new that right now it only has 3 States Parties. But it does have 50 other signatories - 50 others who have taken that first step to becoming a party to it. New Zealand is one of these - we signed the Treaty in New York on its opening day.

Much of the publicity which the Treaty has attracted since then has been as a result of the Nobel Committee's decision last month to award this year's Nobel Peace Prize to ICAN - the International Campaign to Abolish Nuclear Weapons - which is the civil society movement instrumental in bringing about the Treaty. ICAN will be receiving its Nobel Prize in a week or so's time - and I take this opportunity to warmly congratulate them again - and to emphasise how important civil society leadership always is in any effort to establish a new rules-based framework. That's particularly so when, as in the case of this Treaty, its advent is not supported by all members of the international community.

Treasa, my co-speaker today - and I think Campbell too - are somewhat concerned that because I have lived and slept this Treaty for quite a long while now, I might overlook the fact that some of you here today won't be as steeped in it as an enthusiast like myself.

So they're keen that I start with some basics about it. I'm proposing to do this by focusing on three questions about this Treaty - why did we need it, what does it do, what does it *not* do.

And then, finally, I'm going to take a brief look at it against the more general backdrop of the strengths and weaknesses of the global rules-based system.

So - ***why did we need a Treaty?***

Every New Zealander, well, certainly those of a *certain* vintage, but I'd actually hope even *youthful* kiwis - students - know that New Zealand is a nuclear-free zone. And very probably know, too, that this was put in place via legislation which the NZ Parliament adopted in 1987 - the New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act.

An important part of that legislation - now 30 years old - was its enactment of a prohibition on the production or possession of nuclear weapons within New Zealand.

We are not the only country to have adopted legislation like this: quite a number of *other* countries have put in place similar prohibitions - many as a result of the regional nuclear-weapon free zones of which they are a part, or because of their obligations under the 1968 Nuclear Non-Proliferation Treaty - the 'NPT'.

But until the adoption of this new Treaty there has not been a *global* prohibition - a treaty-based international ban across the board - on nuclear weapons. Yes, we have had the NPT in place since the late 1960s - but it was drafted originally only as an interim measure and while its effect has been to put in place a ban on the possession of nuclear weapons in most countries, it never purported to be a global ban, one potentially **applicable to all states** - a ban *erga omnes*.

This we do now have in the new Treaty. The Treaty, as adopted, provides a clear rejection of nuclear weapons at the global level - at the level of international law (and this notwithstanding the fact that the current possessors of nuclear weapons and their allies opposed it from the outset and almost all of them did not take any part in its negotiation).

The rationale for the Treaty's comprehensive *prohibition* against nuclear weapons is very fully spelt out in its Preamble and includes reference to the consideration that "any use of

nuclear weapons would be contrary to the rules of international law applicable in armed conflict, in particular the principles and rules of international humanitarian law”.

What does the Treaty do?

The core obligation - or ‘rule’ - set by the Treaty is in its first Article which lists a range of prohibited activities which together ensure that any State Party to the Treaty can “never under any circumstances” develop or acquire nuclear weapons.

For states without nuclear weapons, such as NZ, the **verification** of these prohibitions is on the basis of the same standard and process already applicable to us pursuant to our obligations under the NPT and the bilateral arrangements we have in place with the International Atomic Energy Agency (IAEA). However, a higher standard of safeguards will apply to the removal or destruction of nuclear weapons by any state joining the Treaty which possesses nuclear weapons or hosts them on its territory. The need for a higher standard of verification for those who have developed and possessed nuclear weapons - and who therefore have had access both to the expertise and the infrastructure relevant to these weapons - would seem to me to be self-evident - but I note that this issue has been the subject of criticism from some quarters.

The point about a higher standard of verification applicable to possessors of nuclear weapons, will already have served to make it clear that the Treaty is entirely open to states possessing or hosting nuclear weapons becoming a party to it, if and when they choose. It provides two pathways whereby states that *possess* nuclear weapons can sign on - they can either first destroy their weapons and then join the Treaty, or join and afterwards destroy them (pursuant to a timeframe and a verified plan established with other States Parties.) The Treaty also spells out how it is that states *hosting* nuclear weapons owned by another state (as is the case for several NATO members) can become a party to it.

The Treaty includes provisions dealing with assistance to victims from the use or testing of nuclear weapons, and for the environmental remediation of contaminated areas. It will enter into force after 50 states have ratified it. Meetings of States Parties are to take place every second year, and Review Conferences every six years.

What does the Treaty not do?

There are currently nearly 15,000 nuclear weapons in existence. Perhaps the most obvious thing that this Treaty does *not* do is actually eliminate any of these. The Treaty could

potentially have done so - it could have included a framework for a process of reducing warhead numbers - *if* some of the current nuclear weapon possessors had chosen to take part in its negotiation. None of them did - and so, realistically, there was little point in tilting at windmills and having the Treaty outline procedures and timeframes for the elimination of these weapons. Instead, it stays with what we might call a *first step* towards their elimination: the establishment of a global rule.

This leaves the prospect of any reduction to the actual number of nuclear weapons still within the hands of their possessors - although we should not forget that those five Nuclear Weapon States who are also parties to the NPT - the five Permanent Members of the Security Council - *do* get some pressure applied to them on the basis of the NPT's disarmament undertaking (Article VI).

Even with that pressure, realistically, there seems little likelihood of any significant reduction in the current number of nuclear weapons anytime soon - particularly given the present state of the bilateral relationship between the US and Russia. But the key point I want to make on this issue is that while the Treaty does not provide a process for reductions, there is nothing in it which places any impediment in their pathway - and I think we can take it that any such reductions would be warmly welcomed by all the Treaty's supporters.

Finally, a few comments on the Treaty in the context of the broader rules-based system

As you all know, there has been a ban in place on biological weapons since the 70s and, ever since the 90s, we have had a fully elaborated ban on chemical weapons. The missing piece in International Humanitarian Law has been the lack of a ban on *nuclear* weapons - the *third* type of weapon of mass destruction.

The new Treaty has now closed this gap and we now have the legal framing for a nuclear weapon-free world. That's a very important *legal* development, I think - but it's not one that results in any sudden change to the disarmament landscape and to the ongoing existence of nuclear weapons.

Instead, we're exactly where you'd expect us to be at a similar point in pretty much any *international standard-setting process* - including one in the context of International Humanitarian Law.

As we all know, the history of IHL for well over a century now is a history of setting rules and standards - many at the outset only partial and most, if not all, having a gradual and evolutionary effect.

The analogy I have been using when trying to chart the value of the rule set in the Prohibition Treaty is with the evolution of the ban on chemical weapons. The first step in that process came about not long after the First World War with the introduction in the Geneva Protocol of 1925 of a prohibition broadly akin to what our new Treaty does for nuclear weapons. A comprehensive treaty providing for the actual *elimination* of chemical weapons came about only much later.

Of course, I hope that we don't have to wait *that long* before we see a comprehensive approach to the abolition and elimination of nuclear weapons; and I certainly hope we never have to face the issues of **compliance** with the ban which the international community is continuing to face vis-à-vis chemical weapons, most recently in Syria.

We also face a significantly greater hurdle in the nuclear context than that which has applied to chemical weapons in terms of securing the support of possessors of the weapon to join the ban and relinquish their weapons. The process of securing their support for the nuclear ban is going to be complex and, I fear, slow.

But - and I'm determined to end on a positive note - in the meantime we can remind ourselves of what we have done: we have taken the first step in the establishment of a normative rule, we have put in place a meaningful contribution to the body of International Humanitarian Law; bolstered the arguments against the further spread of nuclear weapons to other states; and pushed for progress toward a nuclear weapon-free world.

Ambassador Higginson's speech is available online at www.icanw.org.nz