

# Challenging Nuclearism

*The UN Treaty on the Prohibition of Nuclear Weapons*

*Richard Falk*

*Richard Falk is professor emeritus of international law at Princeton University and was Professor of Global Law, Queen Mary University of London. He served a six-year term as United Nations Special Rapporteur on the situation of human rights in Palestinian territories. He is the author or co-author of numerous books about global governance, human rights, and the idea of world order. He is Senior Vice President at the Nuclear Age Peace Foundation and has acted as counsel before the International Court of Justice.*

On 7 July 2017, 122 countries at the UN voted to approve the text of a proposed international treaty entitled ‘Draft Treaty on the Prohibition of Nuclear Weapons.’ (TPNW) The treaty was formally opened for signature that September, but it only became a binding legal instrument according to its own provisions on January 21, 2021, which is 90 days after the 50<sup>th</sup> country deposited with the UN Secretary General its certification that the treaty has been ratified in accordance with their various constitutional processes. This is a major accomplishment, not least because all of the major nuclear weapons states refused to participate in the negotiating process, and the United States, France, and UK issued a formal statement denouncing the treaty and refusing to alter their reliance on nuclear weapons in carrying out their foreign policy

In an important sense, it is incredible that it took 76 years after the attacks on Hiroshima and Nagasaki to reach this point of setting forth an unconditional prohibition of any use or threat of nuclear weapons [Article 1(e)] within the framework of a multilateral treaty negotiated under UN auspices. The core obligation of states that choose to become parties to the treaty is very sweeping. It prohibits any connection whatsoever with the weaponry by way of possession, deployment, testing, transfer, storage, and production [Article 1(a)].

The TPNW is significant beyond the prohibition. It can and should be interpreted as a frontal rejection of the geopolitical approach to nuclearism, and its contention that the retention and development of nuclear weapons is a proven necessity for

global security given the way international society is organized. It is a healthy development that the TPNW shows an impatience toward and a distrust of the elaborate geopolitical rationalizations of the nuclear status quo that have ignored the profound objections to nuclearism of many governments and the anti-nuclear views that have long dominated world public opinion and animated civil society activists. The old reassurances of the nuclear weapons states about being committed to nuclear disarmament as soon as an opportune moment arrives increasingly lack credibility as the nuclear weapons states, led by the United States, make continuing huge investments in the modernization and further development of their nuclear arsenals, with the US even proposing to deploy nuclear weapons in space, despite the risks and expense.

Despite this justifiable sense of achievement, it must be admitted that there is a near fatal weakness, or at best, a gaping hole in this newly cast net of prohibition established by way of the TPNW process. True, 122 signatures, and even more, the formal entry into force of the treaty, lends weight to the claim that the international community, by taking such a significant stand has signalled in an obligatory way the repudiation of nuclear weapons for any and all purposes, and formalized the prohibition of any action to the contrary. The enormous fly in this healing ointment arises from the refusal of any of the nine nuclear weapons states to join in the TPNW process even to the legitimating extent of participating in the negotiating conference with the opportunity to express their objections and influence the outcome. As well, most of the chief allies of these states that are part of the global security network of states relying directly and indirectly on nuclear weaponry also boycotted the entire process. It is also discouraging to appreciate that several countries in the past that had lobbied against nuclear weapons with great passion such as India, Japan, and China were notably absent, and also opposed the prohibition. This posture of undisguised opposition to this UN sponsored undertaking to delegitimize nuclearism, while reflecting the views of a minority of governments, must be taken extremely seriously. It includes all five permanent members of the Security Council that have sophisticated nuclear weapons programs of their own, and such important international actors as Germany and Japan that have long taken shelter under the US nuclear umbrella.

The NATO triangle of France, United Kingdom, and the United States, three of the five veto powers in the Security Council, angered by its inability to prevent the whole TPNW venture, went to the extreme of issuing a Joint Statement of denunciation in 2017, the tone of which was

disclosed by its defiant assertion removing any doubt as to the abiding commitment to a nuclearized world order: ‘We do not intend to sign, ratify or ever become party to it. Therefore, there will be no change in the legal obligations on our countries with respect to nuclear weapons.’ The body of the statement contended that global security depended upon maintaining the nuclear status quo, as bolstered by the Non-proliferation Treaty (NPT) of 1968 and by the claim that it was ‘the policy of nuclear deterrence, which has been essential to keeping the peace in Europe and North Asia for over 70 years’. It is relevant to take note of the geographic limits associated with the claimed peace-maintaining benefits of nuclear weaponry, which ignores the ugly reality that devastating warfare has raged throughout this period outside the feared mutual destruction of the heartlands of geopolitical rivals, a central shared forbearance by the two nuclear superpowers throughout the entire Cold War. During these decades of rivalry, the violent dimensions of geopolitical rivalry were effectively outsourced to the non-Western regions of the world, and subsequently, causing massive suffering and widespread devastation for many vulnerable peoples inhabiting Asia, Africa, and the Middle East. Such a conclusion suggests that even if we were to accept the claim that nuclear weapons deserve credit for avoiding a major war, specifically World War III, that ‘achievement’ was accomplished at the cost of millions, probably tens of millions, of civilian lives in non-Western societies. Beyond this, the achievement involved a colossally irresponsible gamble with the human future, succeeded as much due to good luck as to the rationality attributed to deterrence theory and practice, an assessment confirmed in Martin Sherwin’s definitive historical study, *Gambling with Armageddon: Nuclear Roulette from Hiroshima to the Cuban Missile Crisis* (2020).

TPNW itself does not challenge the Westphalian framework of state-centrism by setting forth a framework of global legality that is issued under the authority of ‘the international community’ or the UN as the authoritative representative of the peoples of the world. Its provisions are carefully formulated as imposing obligation only with respect to ‘State parties,’ that is, governments that have deposited the prescribed ratification and thereby become formal adherents of the treaty. Even Article 4, which hypothetically details how nuclear weapons states should divest themselves of all connections with the weaponry limits its claims to State parties, and offers no guidance whatsoever in the event of suspected or alleged non-compliance. Reliance is placed in Article 5 on a commitment to secure compliance by way of the procedures of ‘national implementation.’

The treaty does aspire to gain eventual universality through the adherence of all states over time, but in the interim the obligations imposed are of minimal substantive relevance beyond the agreement of the non-nuclear parties not to accept deployment or other connections with the weaponry. It is for another occasion, but I believe a strong case can be made under present customary international law, emerging global law, and abiding principle of natural law that the prohibitions in the TPNW are binding universally independent of whether a state chooses or not to become a party to the treaty.

Taking an unnecessary further step to reaffirm statism, and specifically, ‘national sovereignty’ as the foundation of world order, Article 17 gives parties to the TPNW a right of withdrawal. All that state parties have to do is give notice, accompanied by a statement of ‘extraordinary circumstances’ that have ‘jeopardized the supreme interests of its country.’ The withdrawal will take effect twelve months after the notice and statement are submitted. There is no procedure in the treaty by which the contention of ‘extraordinary circumstances’ can be challenged as unreasonable or made in bad faith. It is an acknowledgement that even for these non-nuclear states adhering to the treaty, nothing in law or morality or human wellbeing takes precedence over the exercise of sovereign rights. Article 17 is not likely to be invoked in the foreseeable future. This provision reminds us of this strong residual unwillingness to supersede *national* interests by deference to *global* and *human* interests. The withdrawal option is also important because it confirms that national security continues to take precedence over international law, even with respect to genocidal weaponry of mass destruction. As such the obligation undertaken by parties to the TPNW are reversible in ways that are not present in multilateral conventions outlawing genocide, apartheid, and torture, or in *jus cogens* domains.

Given these shortcomings, is it nevertheless reasonable for nuclear abolitionists to claim a major victory by virtue of tabling such a treaty? Considering that the nuclear weapons states and their allies have all rejected the process and even those within the circle of the intended legal prohibition reserve a right of withdrawal, the TPNW is likely to be brushed aside by realists and cynics as mere wishful thinking and even by some dedicated anti-nuclearists as more of an occasion for hemlock than champagne. The cleavage between the nuclear weapons states and the rest of the world has never been starker, and there are absent any signs on either side of the divide to make the slightest effort to find common ground, and there may be none. As of now, it is a standoff between two

forms of asymmetry. The nuclear states enjoy a preponderance of hard power, while the anti-nuclear states have the upper hand when it comes to soft power, including solid roots in ‘substantive democracy,’ ‘global law,’ ‘natural law,’ and ‘global ethics.’

The hard power solution to nuclearism has essentially been reflexive, that is, relying on nuclearism as shaped by the leading nuclear weapons states. What this has meant in practice is some degree of self-restraint on the battlefield and crisis situations (there is an existential nuclear taboo without doubt, although it has never been seriously tested), and, above all, a delegitimizing one-sided implementation of the Non-proliferation Treaty regime. This one-sidedness manifests itself in two ways: (1) discriminatory administration of the underlying non-proliferation norm, most unreservedly in the case of Israel; as well, the excessive enforcement of the non-proliferation norm beyond the limits of either the NPT itself or the UN Charter, as with Iraq (2003), and currently by way of threats of military attack against North Korea and Iran. Any such uses of military force would be non-defensive and unlawful unless authorized by a Security Council resolution supported by all five permanent members, and at least four other states, which fortunately remains unlikely. [UN Charter, Article 27(3)] More likely is recourse to unilateral coercion led by the countries that issued the infamous joint declaration denouncing the TPNW as was the case for the US and the UK with regard to recourse to the war against Iraq, principally rationalized as a counter-proliferation undertaking, which turned out itself to be a rather crude pretext for mounting an aggressive war with other goals, showcasing ‘shock and awe’ tactics.

(2) The failure to respect the obligations imposed on the nuclear weapons states to negotiate in good faith an agreement to eliminate these weapons by verified and prudent means, and beyond this to seek agreement on general and complete disarmament. It should have been evident, almost 50 years after the NPT came into force in 1970 that nuclear weapons states have breached their material obligations under the treaty, which were validated by an Advisory Opinion of the International Court of Justice in 1996 that included a unanimous call for the implementation of these Article VI legal commitments. Drawing this conclusion from deeds as well as words, it is evident for all with eyes that want to see, that the nuclear weapons states as a group have opted for deterrence plus counter-proliferation as their *permanent* security regime.

One contribution of the TPNW is to convey to the world the crucial awareness of these 122 countries as reinforced by global public opinion

that the deterrence/NPT approach to global peace and security is neither prudent nor legitimate nor a credible pathway leading over time to the end of nuclearism.

In its place, the TPNW offers its own two-step approach—first, an unconditional stigmatizing of the use or threat of nuclear weapons to be followed by a negotiated process seeking nuclear disarmament. Although the TPNW is silent about demilitarizing geopolitics and conventional disarmament, it is widely assumed that latter stages of denuclearization would not be implemented unless they involved an ambitious downsizing of the war system. The TPNW is also silent about the relevance of nuclear power capabilities, which inevitably over time entail a weapons option given widely available current technological knowhow. The relevance of nuclear energy technology would have to be addressed at some stage of nuclear disarmament.

Having suggested these major shortcomings of treaty coverage and orientation, can we, should we cast aside these limitations, and join in the celebrations and renewed hopes of civil society activists to rid the world of nuclear weapons? My esteemed friend and colleague, David Krieger, who has dedicated his life to keeping the flame of discontent about nuclear weapons burning and serves as the longtime and founding President of the Nuclear Age Peace Foundation, concludes his informed critique of the Joint Statement by NATO leaders with this heartening thought: “Despite the resistance of the US, UK and France, the nuclear ban treaty marks the beginning of the end of the nuclear age.” [Krieger, “U.S., UK and France Denounce the Nuclear Ban Treaty”]. I am not at all sure about this, although Krieger’s statement leaves open the haunting uncertainty of how long it might take to move from this ‘beginning’ to the desired ‘end.’ Is it as some self-styled ‘nuclear realists’ like to point out, no more than an *ultimate* goal, which is polite coding for the outright dismissal of the nuclear disarmament option as ‘utopian’ or ‘unattainable’?

We should realize that there have been many past ‘beginnings of the end’ since 1945 that have not led us any closer to the goal of the eliminating the scourge of nuclearism from the face of the earth. It is a long and somewhat arbitrary list, including the immediate horrified reactions of world leaders to the atomic bomb attacks at the end of World War II, and what these attacks suggested about the future of warfare; the massive anti-nuclear civil disobedience campaigns that briefly grabbed mass attention in several nuclear weapons states; tabled disarmament proposals by the United States and the Soviet Union in the 1960s; the UN General Assembly Resolution 1653 (XVI) that in 1961 declared threat or use of

nuclear weapons to be unconditionally unlawful under the UN Charter and viewed any perpetrator as guilty of a crime against humanity; the Cuban Missile Crisis of 1962 that scared many at the momentary realization that it was not tolerable to coexist with nuclear weapons; the International Court of Justice majority Advisory Opinion in 1996 responding to the General Assembly's formal inquiry about the legality of nuclear weapons, limiting the possibility of legality of use to the narrow circumstance of responding to imminent threats to the survival of a sovereign state; the apparent proximity to historic disarmament arrangements agreed to by Ronald Reagan and Mikhail Gorbachev at a summit meeting in Reykjavik, Iceland in 1986; the extraordinary opening provided by the ending of the Cold War and the collapse of the Soviet Union, which offered world leaders the best possible 'beginning of the end,' and yet nothing happened; and finally, Barack Obama's Prague speech in 2009 (echoing sentiments expressed less dramatically by Jimmy Carter in 1977, also early in his presidency) in which he advocated to great acclaim dedicated efforts to advance toward the elimination of nuclear weapons if not in his lifetime, at least as soon as possible; it was a good enough beginning for a Nobel Peace Prize, but then one more fizzle, presumably discouraged by the pushback of the formidable nuclear weapons establishment.

Each of these occasions briefly raised the hopes of humanity for a future freed from a threat of nuclear war, and its assured accompanying catastrophe, and yet there was few, if any, signs of progress flowing from each of these beginnings greeted so hopefully toward the ending posited as a goal. Soon disillusionment, denial, and distraction overwhelmed the hopes raised by these earlier initiatives, with the atmosphere of hope in each instance replaced by an aura of nuclear complacency, typified by indifference, ignorance, and denial. It is important to acknowledge that the national bureaucratic and ideological *structures* supporting nuclearism are extremely resilient, and have proved adept at outwaiting and outwitting the flighty politics of periodic flurries of anti-nuclear activism.

And after a lapse of years, yet another new beginning is now being proclaimed. We need to summon and sustain greater energy than in the past if we are to avoid this fate of earlier new beginnings in relation to the TPNW. We need to do our best to let this latest beginning start a process that moves steadily toward the end that has been affirmed. We know that the TPNW would not itself have moved forward without civil society militancy and perseverance at every stage. The challenge now is to discern and then take the next steps, and not follow the precedents of the past that followed the celebration of a seeming promising beginning with a

misplaced reliance on the powers that be to handle the situation, and act accordingly. In the past, the earlier beginnings were soon buried, acute concerns eventually resurfaced, and yet another new beginning was announced with fanfare while the earlier failed beginnings were purged from collective memory.

Here, we can at least thank the Joint Statement of leading NATO allies for sending a clear signal to civil society and the 122 governments voting their approval of the TPNW text that if they are truly serious about ending nuclearism, they will have to carry on the political fight, gathering further momentum, and seeking to reach tipping points where these beginnings of the end start to gain enough traction to become a genuine political project, and not just another harmless daydream or well-intended, soon to be forgotten empty gesture.

As of now the TPNW is a treaty text that courteously mandates the end of nuclearism, but to convert this text into an effective regime of control will require the kind of deep commitments, sacrifices, and perseverance that eventually achieved the impossible, recalling the movements that ending such entrenched evils as slavery, apartheid, and colonialism, but only after long struggles.

