

The TPNW: Setting the record straight

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ACRONYMS AND ABBREVIATIONS

AP	IAEA Additional Protocol
APMBC	Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction
BWC	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction
CD	Conference on Disarmament
CFE	Treaty on Conventional Armed Forces in Europe
CCM	Convention on Cluster Munitions
CTBT	Comprehensive Nuclear-Test-Ban Treaty
CCW	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects
CWC	Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction
IAEA	International Atomic Energy Agency
IHL	International humanitarian law
IHRL	International human rights law
IPNDV	International Partnership for Nuclear Disarmament Verification
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
PrepCom	Preparatory Committee for the Review Conference of the NPT
PTBT	Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water
TPNW	Treaty on the Prohibition of Nuclear Weapons

1 Introduction

The Treaty on the Prohibition of Nuclear Weapons (TPNW) is steadily attracting new adherents and is likely to enter into force in the next few years. Numerous states, NGOs, and scholars have praised the adoption of the treaty as a welcome addition to the nuclear non-proliferation and disarmament regime. But the treaty continues to face vocal resistance, including from a number of UN member states. Reviewing the main objections raised by sceptics, we suggest that the debate over the TPNW text and negotiating process in some ways constitutes a sideshow that masks the real source of opposition: profound differences over the acceptability of nuclear weapons. The most fundamental objection to the TPNW is that it delegitimizes the policy of nuclear deterrence.

The TPNW is not the final word on the nuclear predicament. As outlined in a New Agenda Coalition (NAC) working paper prepared for the 2013 open-ended working group on multilateral nuclear disarmament, the creation and maintenance of a world without nuclear weapons is likely to require a number of diplomatic initiatives and agreements. Nuclear stockpile reductions, universalization of the Nuclear Non-Proliferation Treaty (NPT), and the negotiation of a fissile material (cut-off) treaty could all help *attain* a world without nuclear weapons. Efforts to *maintain* a nuclear-weapon-free world will require verification provisions and “end state” prohibitions against the development, possession, and use of nuclear weapons.

Some have assumed that a prohibition on nuclear weapons should only be instituted *after* the completion, or near the completion, of the nuclear disarmament process. However, the NAC noted that there is no persuasive reason why the “end state” prohibition could not be adopted immediately.¹ Indeed, it can be argued that a treaty banning nuclear weapons could further stigmatize nuclear weapons and, by extension, energize the pursuit of interim disarmament measures. The TPNW could facilitate nuclear disarmament by promoting a normative environment less accepting of nuclear threats and vulnerabilities. The adoption of the TPNW should also be seen as an initiative to help implement Article VI of the NPT, which obliges all NPT parties to “pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament”.²

This report is divided into four main parts. In the first, we discuss objections raised against the TPNW process. Critics have charged that the process should have included the nuclear-armed states, that the negotiations were exclusionary, and that the treaty should have been negotiated under consensus rules in the Conference on Disarmament (CD). Second, we discuss substantive critiques of the TPNW text. Some commentators have argued, for example, that the TPNW lacks

1 New Agenda Coalition, Working Paper submitted to the Open-Ended Working Group on Taking Forward Multilateral Nuclear Disarmament Negotiations. UN doc. A/AC.281./WP.10 (2013). <http://reachingcriticalwill.org/images/documents/Disarmament-fora/OEWG/Documents/WP10.pdf>.

2 Treaty on the Non-Proliferation of Nuclear Weapons (signed 1 July 1968, in force 5 March 1970), Article VI. See also Treasa Dunworth, “Pursuing ‘effective measures’ relating to nuclear disarmament”, *International Review of the Red Cross* 97, no. 899 (2015).

verification provisions, contains insoluble contradictions, and fails to plug loopholes in the NPT. Third, we analyse the assertions that the TPNW could disrupt the international order, undermine existing agreements, or make war more likely. In the last part, we investigate the claim that the TPNW's lack of support from the nuclear-armed states and their allies renders the treaty irrelevant. TPNW-sceptics have argued that the treaty will fail to promote nuclear disarmament and will have no legal consequences for states that reject the treaty.



2 Process

Several critics of the TPNW have criticized the manner in which the treaty came about. Sceptics have charged that certain states were *de facto* excluded, that the process should have been governed by the rule of consensus, and that the treaty negotiations ought to have been carried out in the CD.

2.1 Exclusion of the nuclear-armed states?

In October 2017, a group of 29 (“aligned”) states delivered a joint statement to the UNGA First Committee, noting that the only way to achieve the complete elimination of nuclear weapons “is through effective, verifiable and irreversible nuclear disarmament. This can only be achieved through the constructive engagement of all relevant parties.”³ In this view, any treaty aiming to promote the elimination of nuclear weapons must have the nuclear-armed states involved from the start.

Ban supporters are, of course, fully aware that disarmament requires the engagement of the nuclear-armed states. The International Campaign to Abolish Nuclear Weapons (ICAN), which started out in 2007 by promoting a “model nuclear weapons convention” that would require the ratification of all the nuclear-armed states to enter into force,⁴ would be the first to agree that a nuclear disarmament treaty with all the nuclear-armed states on board would have been a significantly bigger step forward than what the TPNW is today. That is also why supporters of the TPNW consistently encouraged the nuclear-armed states and their allies to attend the TPNW negotiations and contribute constructively to a positive outcome. The open-ended working group that preceded the negotiation of the TPNW, as well as the negotiation of the TPNW itself, were open to all UN member and observer states. And at no point were the nuclear-armed states prevented from participating – they voluntarily chose not to attend. The UN General Assembly is surely the most inclusive forum for disarmament negotiations in the world.

The question for the ban supporters was not whether a treaty with all the nuclear-armed states on board would be better than a treaty without any of them involved – it clearly would. The question disarmament advocates were asking themselves was whether it would be worthwhile negotiating a ban on nuclear weapons even if none of the nuclear-armed states supported it (initially). A large number of states and experts concluded that it would.

One key reason why a nuclear ban treaty was believed to have merit even without the support of the nuclear-armed states (and their allies) was that such an agreement could advance international humanitarian law and disarmament law – fill a legal gap – by placing nuclear weapons in the

3 Australia on behalf of 29 states, statement to the UNGA First Committee (11 October 2017). http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com17/statements/11Oct_Groupof29.pdf.

4 The updated version of the Model Nuclear Weapons Convention is available from <http://www.inesap.org/book/securing-our-survival>.

same legal category as other weapons of mass destruction, that is, as fundamentally unacceptable means of war. The ban treaty also came to be seen as a tool for delegitimizing and stigmatizing nuclear weapons. The ban was conceptualized as a normative instrument that could translate the growing impatience of the non-nuclear-armed states – the vast majority of the UN membership – into political and normative pressure for progress. The inspiration for this approach was drawn, in large part, from the successful campaigns to ban anti-personnel landmines and cluster munitions.

2.2 Rules of procedure

A second criticism against the TPNW process concerns the decision-making rules of the negotiating conference. As stipulated by the mandating resolution, the TPNW negotiations were convened “under the rules of procedure of the General Assembly unless otherwise agreed by the conference.”⁵ This meant that while every effort should be made to achieve consensus, substantive decisions – including the adoption of the final text – could be made by a two-thirds majority. In fact, the decision-making rules for the TPNW negotiations differed somewhat from those of the UNGA. For instance, the rules of procedure for the TPNW negotiation state that the Conference “shall make its best endeavours to ensure that the work of the Conference is accomplished by consensus”.⁶ No comparable language can be found in the rules of procedure for the UNGA. Instead, the prohibition negotiations followed the template provided by the Vienna Convention on the Law of Treaties, “[t]he adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.”⁷ As it turned out, consensus on the final TPNW text was blocked by the Netherlands, which forced the conference to adopt the treaty by voting. The result was 122 to 1 in favour of adoption, with 1 abstention (Singapore).

Certain TPNW critics have framed the adoption of the TPNW through voting as a critical flaw of the process. In a statement to the UNGA First Committee in October 2017, France asserted that the TPNW “deepens political divisions and tends to undermine the very foundations of multilateralism, namely dialogue and cooperation with a view to reaching consensus.”⁸ The United States voiced similar concerns, as did the Russian delegation: “On the whole a constructive and result-oriented dialogue on issues of nuclear disarmament is only possible when we take into account security considerations of each other and *comply strictly with the rule of consensus* that secures

5 UNGA, “Taking forward multilateral nuclear disarmament negotiations”. Doc. A/71/258 (11 January 2017), para. 10.

6 See UNGA, “Provisional rules of procedure of the United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination”. Doc. A/CONF.229/2017/L.1 (7 March 2017), Rule 33.

7 Vienna Convention on the Law of Treaties (adopted 23 May 1969, in force 27 January 1980), Article 9.

8 France, statement to the UNGA First Committee (16 October 2017). http://reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com17/statements/16Oct_France.pdf.

Critics have framed the adoption of the TPNW through voting as a critical flaw of the process

the balance of interests.”⁹ It is worth noting, though, that, for instance, the NPT and CTBT texts were both eventually adopted through voting at the UNGA, despite an aspiration for consensus during the negotiations.

The debate over the consensus principle is not new, and a considerable number of UN member states, including many ban-treaty supporters, in principle favour the application of consensus rules. Understandably, most states are keen to maintain control over decisions that are vital to their national interests. It can also be argued that decisions made by consensus carry more weight than decisions made through voting, and that treaties adopted by consensus are more likely to be implemented in good faith and accepted as new norms.

From an international law point of view, however, each state decides whether to be bound by an instrument, regardless of the manner in which that instrument was adopted. Moreover, a consensus requirement tends to lower the level of ambition, reducing international negotiations to a search for the lowest common denominator. It also tends to make progress painstakingly slow. This is why most multilateral negotiating conferences adopt rules of procedure specifying that the participants shall endeavour to reach consensus, but that if, in exceptional circumstances, a conference fails to reach consensus, votes can be requested. Two prominent exceptions to this rule are the CD and the Convention on Certain Conventional Weapons (CCW). In practice, those forums demand consensus for the adoption of legally binding instruments and offer no possibility to vote if consensus fails. Thus, a single state can “veto” a text all others are prepared to accept.

For many states, the drawbacks of the consensus requirement were vividly demonstrated during the negotiation of the 2013 Arms Trade Treaty (ATT). The ATT negotiating conference adopted and applied the consensus rule, and when the draft came out after two failed attempts to reach agreement on a final text, the provisions contained in the treaty were considerably watered down compared to what they might have looked like had the negotiators negotiated in the expectation that the text could be adopted through a two-thirds majority vote. Reaching consensus when voting is an option is very different from reaching consensus when one or a few states can block adoption.

It is important to bear in mind, as well, that decision-making rules are not ends in themselves. They are means to achieve a purpose, and, in the context of the TPNW, the purpose of the process was to enable the majority of the UN membership to adopt a legally binding instrument prohibiting nuclear weapons. Given the shape of the political landscape, with a small minority staunchly opposed to prohibiting nuclear weapons, the best way to achieve this objective was to use the standard two-thirds majority rule for decision-making.

9 Russia, statement to the UNGA First Committee (16 October 2017). http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com17/statements/16Oct_Russia.pdf. Emphasis added.

2.3 The Conference on Disarmament

A third critique of the TPNW process is that it did not take place in the Conference on Disarmament. In the words of the Pakistani delegation to the UNGA First Committee in 2017,

this [ban treaty] initiative faltered by ignoring the fundamental security considerations that underpin nuclear disarmament. While we empathise with the sense of disappointment that propelled its proponents, it only led us to the conclusion that the launch of such initiatives outside the CD, on a non-consensus basis and without all the key stakeholders on board, no matter how well intentioned and justified, would not lead to any real change on ground.¹⁰

The CD and its predecessor institutions were the negotiating forum for several landmark agreements, including the NPT, the BWC, the CWC, and the CTBT.¹¹ And even today, despite two decades of deadlock, several states view the CD as the preferred negotiating body for disarmament treaties. However, in addition to the fact that the CD has for years been unable to carry out any multilateral negotiation, the negotiation of the TPNW by the CD was deemed unsuitable for at least two reasons. First, the forum operates by consensus, and, as mentioned above, it would have been a non-starter to apply the consensus requirement even to the initiation of negotiations on a ban treaty, let alone to the negotiating conference itself. Second, the membership of the CD is limited to 65 states. Part of the purpose of the TPNW and the humanitarian initiative from which it emerged was to empower non-nuclear-weapon states to articulate their shared views and understandings of the importance of nuclear disarmament. Consequently, it was important to ensure that any political process engendered by the humanitarian initiative would be open to all interested states. The TPNW negotiations were thus made as inclusive as possible.

2.4 Sequencing of disarmament measures

It has been argued that the NPT requires a specific sequencing of arms control and disarmament negotiations. Certain observers have maintained that Article VI demands that the three objects of negotiation mentioned in the article (cessation of the nuclear arms race; nuclear disarmament; and a treaty on general and complete disarmament) must be pursued in the order of their appearance in Article VI. Along these lines, some have contended that the prohibition of nuclear weapons should be pursued only after the completion of the nuclear disarmament process. According to the Russian delegation to the UNGA First Committee,

[Russia] do[es] not question the possibility of and even the need for a ban on nuclear weapons as an effective nuclear disarmament measure under the NPT Article VI at a final stage of multilateral nuclear

10 Pakistan, statement to the UNGA First Committee (13 October 2017). http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com17/statements/13Oct_Pakistan.pdf.

11 The adoption of the CTBT was blocked in the CD and had to be "transferred" to the General Assembly for approval.

An approach whereby the prohibition of a weapon could only be adopted after the elimination of all such weapons would be inconsistent with the history of other disarmament processes

disarmament process so as to make it irreversible. Under the current circumstances such a step is clearly premature.¹²

The Russian view finds little support in the text of the NPT. Any mandatory sequencing of specific effective measures would have had to be specified in the treaty text. This follows from the ordinary rules for the interpretation of legal documents. It has also been suggested that the NPT demands a step-by-step approach to nuclear disarmament, and that the international community may only proceed to the next step (e.g. the negotiation of a fissile material (cut-off) treaty) once the preceding step (e.g. the entry-into-force of the CTBT) is completed. But this view is equally unsupported by the text of the NPT. It should also be noted that an approach whereby the prohibition of a weapon could only be adopted after the elimination of all such weapons would be inconsistent with the history of other disarmament processes. The CWC, the BWC, the APMBC, and the CCM were all adopted prior to the elimination of the relevant category of arms. Indeed, the act of prohibition usually precedes the elimination of the relevant activity or object. One would not enact a prohibition on smoking in restaurants after everyone had stopped smoking in restaurants. Prohibiting nuclear weapons was intended to lay down a comprehensive prohibition on use and stimulate progress towards elimination, not to codify an existing state of affairs.¹³

12 Russia, statement to the UNGA First Committee (16 October 2017).

13 For a more detailed discussion of Article VI and the sequencing of disarmament measures, see Kjølvi Egeland, Torbjørn G. Hugo, Magnus Løvold, and Gro Nystuen, "The nuclear weapons ban treaty and the non-proliferation regime", *Medicine, Conflict and Survival* 34, no. 2 (2018).

3 Substance

A second cluster of objections against the TPNW concerns the substance of the treaty text. In the following, we discuss critiques of the TPNW's provisions on verification, withdrawal, assistance, nuclear-weapon research, transfer of key components, implementation disputes, reservations, and the relationship between the TPNW and NPT.

3.1 Verification

One of the chief objections against the TPNW is that it does not contain vigorous verification arrangements. Explaining its vote against the adoption of the TPNW draft on 7 July 2017, the Dutch delegation held that the new treaty was “not verifiable” and “will certainly not provide the kind of assurances needed towards a nuclear free world.”¹⁴ One commentator points to the Biological Weapons Convention (BWC) as an example of how a lack of verification procedures can cause difficulties, noting that, in the context of the BWC, “verification [...] comes back as a problem all the time”.¹⁵

At least two observations are pertinent. First, most observers would probably agree that the BWC, despite its lack of verification provisions, has “been vital for reinforcing the norm against the use of disease as a weapon”.¹⁶ Second, while the BWC contains no verification provisions, the TPNW does.¹⁷ The TPNW provides both for non-proliferation verification (safeguards) and for disarmament verification, though the latter is limited to a broad outline that leaves most of the details to be sorted out at a later stage. Negotiating detailed verification provisions without the participation of the nuclear-armed states – and for disarmament processes that are unlikely to take place any time soon – was deemed impractical. The TPNW thus left it to future meetings of states parties and negotiations with nuclear-armed states to work out the details of how the elimination of nuclear-weapon programmes should be verified.

The establishment of a detailed verification regime was not an immediate purpose of the TPNW. Instead, the purpose of the TPNW was to establish the legal framing for a nuclear-weapon-free world and create positive pressure for further negotiations. The remainder of this section reviews specific critiques of the TPNW's verification system. However, before proceeding, it should be stressed that the degree to which states find treaties “verifiable” depends not only on the provisions of the treaties or available verification techniques, but also on political assumptions and

14 The Netherlands, explanation of vote at the TPNW negotiating conference (7 July 2017). http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nuclear-weapon-ban/statements/7July_Netherlands.pdf.

15 Michael Onderco, “Why nuclear weapon ban treaty is unlikely to fulfil its promise”, *Global Affairs* 3, nos 4–5 (2017), p. 394.

16 Gregory D. Koblentz, *Living Weapons: Biological Warfare and International Security* (Ithaca: Cornell University Press, 2009), p. 63.

17 For thorough reviews, see Tamara Patton, “An International Monitoring System for Verification to Support both the Treaty on the Prohibition of Nuclear Weapons and the Nonproliferation Treaty”, *Global Change, Peace & Security* 30, no. 2 (2018); Jürgen Scheffran, “Verification and Security Transformation to a nuclear-weapon Free World”, *Global Change, Peace & Security* 30, no. 2 (2018).

States that view nuclear weapons as useful and acceptable are unlikely to find almost any conceivable disarmament verification system sufficiently robust

requirements.¹⁸ States that view nuclear weapons as useful and acceptable are unlikely at present to find almost any conceivable disarmament verification system sufficiently robust. Correspondingly, certain nuclear-armed states long resisted the negotiation of a comprehensive nuclear-test-ban treaty on the grounds that the technical means to verify such an agreement supposedly did not exist. The CTBT could only be adopted once perceptions about the utility and acceptability of nuclear testing shifted. The verification measures incorporated in the CTBT build on techniques and equipment that predate the adoption of the CTBT by several decades.¹⁹

NON-PROLIFERATION SAFEGUARDS AND THE ADDITIONAL PROTOCOL

Non-proliferation safeguards are technical measures designed to verify that states are not using nuclear material and technology to manufacture nuclear weapons. Through a system of inspections and audits, the International Atomic Energy Agency (IAEA) has administered safeguards of varying degrees of robustness since the 1950s. The 1967 Treaty of Tlatelolco, a treaty establishing Latin America and the Caribbean as a nuclear-weapon-free zone, was the first international agreement to oblige its parties to conclude safeguards agreements with the IAEA. Obligations to conclude safeguards agreements are also enshrined in the NPT, the TPNW, and the nuclear-weapon-free zone treaties covering the South Pacific, Africa, Southeast Asia, and Central Asia.

Before the adoption of the TPNW, several commentators warned against the prospect that the new agreement might be given less stringent safeguards requirements than the NPT. Were that to happen, it was argued, states with ambitions to covertly acquire nuclear weapons could withdraw from the NPT and its safeguards regime, join the TPNW as a cover-up, and proceed to develop nuclear weapons. As could be expected, the TPNW negotiators did not make this mistake. The TPNW text contains safeguards provisions that are in some respects equal to and in other respects stronger than those of the NPT. Nevertheless, some have continued to allege that the TPNW allows its parties to forego non-proliferation safeguards.

For example, more than three months after the adoption of the TPNW text, the French delegation to the UNGA First Committee asserted that the TPNW provides states with an opportunity to “leave the NPT, while outwardly and without verification displaying commitment to disarmament and non-proliferation”.²⁰ This assertion is incorrect. First, ratification of the TPNW by no means alters the requirements for withdrawal from the NPT. Accession to the TPNW does not offer states a legal pretext to exit from the NPT. Second, the TPNW commits any party that has not yet done so to bring into force a comprehensive safeguards agreement with the IAEA based on IAEA document INFCIRC/153 (Corrected). This makes the TPNW considerably more pre-

18 Jürgen Scheffran, “Verification and Security Transformation to a nuclear-weapon Free World”, *Global Change, Peace & Security* 30, no. 2 (2018), p. 143.

19 Paul G. Richards and John Zavales, “Seismological Methods for Monitoring a CTBT”, in E.S. Huseby and A.M. Dainty (eds), *Monitoring a Comprehensive Test Ban Treaty* (Dordrecht: Kluwer Academic, 1996).

20 France, statement to the UNGA First Committee (16 October 2017).

cise than the NPT, which only obliges its parties to “accept safeguards” set forth in an unspecified agreement to be negotiated with the IAEA.²¹ At the time of the NPT’s adoption, the IAEA applied safeguards under the considerably less robust INFCIRC/66/Rev. 2. The stronger model agreement INFCIRC/153 was adopted by the IAEA Board of Governors in March 1971 – more than three years after the adoption of the NPT – and is today, in its corrected form, the basis for all comprehensive IAEA safeguards applied in NPT non-nuclear-weapon states. One commentator has asserted that the TPNW should not have mentioned INFCIRC/153 (Corrected) specifically, as that agreement “will likely become outdated and thereby prejudices what new safeguards standards the IAEA may decide upon”,²² but the TPNW explicitly provides that the mention of INFCIRC/153 (Corrected) is without prejudice to additional instruments a state may adopt in the future. According to one of the TPNW negotiators, this caveat was added “not only to implicitly encourage states to upgrade their Safeguards standards by adopting an AP, but also to accommodate any new, higher standards that might be elaborated in the future in the context of the IAEA and beyond”.²³

As well as obliging any party that has not yet done so to bring into force a comprehensive safeguards agreement based on the model comprehensive safeguards agreement, the TPNW advances the existing safeguards regime by legally obliging its parties to keep in place any additional safeguards arrangements they have voluntarily agreed to implement (and they may, of course, add new ones). Thus, states that at the time of their accession to the TPNW had accepted safeguards arrangements that go beyond the requirements of the NPT will be prohibited from withdrawing from those arrangements. This means that the 132 states that have voluntarily accepted the IAEA Additional Protocol (AP)²⁴ – an addition to the comprehensive safeguards agreement that allows the IAEA to inspect undeclared nuclear facilities – will be legally committed not to renounce that agreement.²⁵ By contrast, parties to the NPT would seem to be able to withdraw from the AP and still be in compliance with their NPT obligations.

Some have nevertheless insisted that the TPNW weakens the safeguards regime because, as they see it, the AP is “the international verification standard”.²⁶ According to one set of observers, “NPT states have spent 25 years promoting the Additional Protocol [...] The ban treaty risks undoing that work.”²⁷ For another commentator, it was “appalling” that the TPNW negotiators

21 NPT, Article III.

22 John Carlson, “Nuclear weapon prohibition treaty: A safeguards debacle”, *Trust & Verify* 158 (Autumn 2017), p. 1.

23 Eirini Giorgou, “Safeguards Provisions in the Treaty on the Prohibition of Nuclear Weapons”, *Arms Control Law* (11 April 2018). <https://armscontrolaw.com/2018/04/11/safeguards-provisions-in-the-treaty-on-the-prohibition-of-nuclear-weapons/>.

24 IAEA Annual Report (2017), p. 16. <https://www.iaea.org/sites/default/files/publications/reports/2017/gc62-3.pdf>.

25 For a full list of states that have an Additional Protocol in force, see IAEA, “Status of the Additional Protocol” (last updated 24 September 2018). <https://www.iaea.org/topics/additional-protocol/status>.

26 France, statement to the UNGA First Committee (16 October 2017).

27 Newell Highsmith and Mallory Stewart, “The Nuclear Ban Treaty: A Legal Analysis”, *Survival* 60, no. 1 (2018), p. 136.

The TPNW advances the existing safeguards regime by legally obliging its parties to keep in place any additional safeguards arrangements they have voluntarily agreed to implement

had opted not to tie the TPNW to “the existing verification standard”.²⁸ It is true that the TPNW does not require all parties to bring into force an AP. However, it is *not* the case that the AP is a universally accepted standard. On the contrary, attempts at making the AP mandatory for all states have consistently failed. At the TPNW negotiating conference, efforts to make the AP a universal requirement were rejected by the same group of states that have consistently opposed such moves in the context of the NPT.

UN Security Council resolution 1887, adopted in 2009, “called on” all states to “sign, ratify and implement” an AP.²⁹ But the Security Council was not operating under Chapter VII of the UN Charter when adopting UNSCR 1887, and the call to conclude an AP can thus not be considered legally binding. In 2010, the NPT review conference “encouraged” all NPT parties to conclude an AP, but simultaneously maintained that “it is the sovereign decision of any State to conclude an additional protocol”.³⁰ This wording, as well as the text in UNSCR 1887, supports the view – held by a large majority of NPT parties – that the AP is *not* mandatory under the NPT.³¹ Had the intention of the NPT parties been to either create or confirm a mandatory requirement to ratify the AP, they would have had to use different words. The review conference did agree that the AP becomes “a legal obligation” once in force.³² Yet the fact that an in-force AP is to be regarded as binding law does not mean either that it is illegal to withdraw from such an agreement or that such withdrawal would constitute a violation of the NPT. Moreover, representatives of permanent members of the UN Security Council have often argued that NPT review conference final documents are not binding.³³ One legal scholar concludes that the AP remains “optional” under the NPT: “As far as the universalization of the additional protocol is concerned, the [2010] Final Document does not seem to deserve high appreciation”.³⁴ The draft final document of the 2015 NPT review conference – which was ultimately not adopted – contained even weaker language on safeguards than did the final document adopted in 2010.³⁵

The claim that the TPNW constitutes a step back on safeguards is thus false. Instead, the TPNW specifically adopts the minimum requirement accepted as necessary under the NPT and locks down additional, voluntary safeguards arrangements in a legally binding, multilateral treaty. This

28 Christopher Ford, “Briefing on Nuclear Ban Treaty by NSC Senior Director Christopher Ford”, Carnegie Endowment for International Peace (22 August 2017).

29 UNSC, Resolution 1887 (2009) (adopted 24 September 2009), para. 15(b).

30 2010 NPT Review Conference, Final Document, Vol. I. Doc. NPT/CONF.2010/50 (Vol. I), p. 4. [http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2010/50%20\(VOL.I\)](http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2010/50%20(VOL.I)).

31 Masahiko Asada, “The NPT and the IAEA Additional Protocol”, in Jonathan L. Black-Branch and Dieter Fleck (eds), *Nuclear Non-Proliferation in International Law. Volume II: Verification and Compliance* (Heidelberg: Springer, 2016), pp. 103, 127.

32 2010 NPT Review Conference, Final Document, p. 4.

33 Harald Müller, “A Treaty in Troubled Waters”, *The International Spectator* 40, no. 3 (2005), pp. 34–5.

34 Asada, “The NPT and the IAEA Additional Protocol”, p. 127.

35 William C. Potter, “The Unfulfilled Promise of the 2016 NPT Review Conference”, *Survival* 58, no. 1 (2016), p. 160.

is not to say, however, that parties to the TPNW and/or the NPT in favour of a robust non-proliferation and disarmament regime should be satisfied. Most observers agree that comprehensive safeguards are not sufficient to detect clandestine nuclear-weapon programmes. Making the AP or an equivalent verification arrangement mandatory should therefore be a goal for all those in favour of the creation of a world without nuclear weapons. This could be done either in the context of, or separate from, the TPNW.

DISCRIMINATORY SAFEGUARDS STANDARDS?

It has been suggested that the verification provisions of the TPNW are discriminatory because they specifically commit the states that possessed nuclear weapons after the adoption of the treaty (7 July 2017) to commit to safeguards provisions that enable the IAEA to verify absence of undeclared nuclear material and facilities (an implicit reference to the AP or an equivalent instrument).³⁶ However, given the nuclear-armed states' histories of nuclear armament and large nuclear infrastructures, it seems justified to hold the nuclear-armed states to a higher standard than non-nuclear-armed states. Considering how much easier it would be for a state having possessed nuclear weapons to "conceal or re-acquire nuclear weapon-grade material and relevant technology, or to divert material to non-peaceful uses and/or to convert nuclear facilities, compared to a state that was not previously in possession of such weapons", one could certainly argue that differentiated standards are warranted.³⁷ The fairness of differentiated standards can, of course, be debated, but in practice it is worth remembering that six of the nine nuclear-armed states have already accepted some of the measures contained in the Model Additional Protocol. It is also worth recalling that the inspection regime applicable to state parties to the CWC is also differentiated, obliging parties with a greater capacity to produce chemical weapons to accept more frequent inspections.³⁸ Similarly, the state-level approach to international safeguards currently applied by the IAEA is designed to take account of different specific circumstances in different countries. Moreover, if the nuclear-armed states were to join the TPNW or disarm through another framework, it is highly likely that the TPNW parties would be prepared to accept the AP as mandatory for all.

John Carlson argues that the TPNW undercuts the idea, endorsed by NPT review conferences, that the maintenance of a world without nuclear weapons requires the application of full-scope safeguards and APs in all states.³⁹ According to NPT review conference final documents adopted in 2000 and 2010, "comprehensive safeguards and additional protocols should be universally

36 Highsmith and Stewart, "The Nuclear Ban Treaty", p. 136; Carlson, "Nuclear weapon prohibition treaty", pp. 1–2.

37 Giorgou, "Safeguards Provisions in the Treaty on the Prohibition of Nuclear Weapons".

38 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (signed 13 January 1993, in force 29 April 1997). Annex II (Verification), Part VI, paras 18, 20.

39 Carlson, "Nuclear weapon prohibition treaty", p. 1.

applied once the complete elimination of nuclear weapons has been achieved.”⁴⁰ Carlson reads this injunction to mean that such safeguards should be adopted by the nuclear-armed states following the completion of the nuclear disarmament process, but “should already apply” in the non-nuclear-weapon states. But as discussed above, the view that the non-nuclear-weapon states parties to the NPT are already under a legally binding obligation to bring into force an AP is not accepted either by legal scholars or the majority of states. This, of course, does not mean that non-nuclear-weapon states should wait for the complete elimination of nuclear weapons before bringing into force an AP. Progress towards the universalization of the AP could help disarmament efforts and improve the non-proliferation regime.

NO SAFEGUARDS DURING THE DISARMAMENT PROCESS

According to Article 4(3) of the TPNW, a state party that possesses nuclear weapons “shall conclude a safeguards agreement” equivalent to the AP with the IAEA. This safeguards agreement shall be negotiated “no later than the date upon which implementation of the [disarmament] plan referred to in paragraph 2 is completed” and must enter into force “no later than 18 months after the date of initiation of negotiations.” Critics have correctly pointed out that the TPNW thus leaves open the possibility that an acceding nuclear-armed state can avoid the application of safeguards on its civilian nuclear installations and material until after the completion of the disarmament process, a process that could potentially take years.⁴¹ This, presumably, could give the state in question an opportunity to hide away weapons-grade nuclear material. But a key term in Article 4(3) is “no later”. There is nothing that prevents the verification authority or TPNW parties from insisting on the application of safeguards as an element of the disarmament plan.⁴² One should also keep in mind that verification is a confidence-building tool, not an end in and of itself. If a pair or group of nuclear-armed states are disinclined to join the TPNW unless the other nuclear-armed state(s) place their civilian nuclear installations under safeguards before the completion of the disarmament process, or even before accession to the TPNW, there is nothing in the TPNW that prevents them from doing that. It should also be noted that the temporal gap between the entry into force of the TPNW for a state and the mandatory application of safeguards to that state’s nuclear infrastructure is not unique to parties in possession (for the moment) of nuclear weapons. There is a gap between entry into force and the mandatory application of safeguards also for non-nuclear-weapon states parties to the TPNW (Article 3) – and indeed for non-nuclear-weapon states parties to the NPT (Article III).

40 2000 NPT Review Conference, Final Document, Vol. I. Doc. NPT/CONF.2000/28 (Parts I and II), p. 4. <https://www.un.org/disarmament/wmd/nuclear/npt2000/final-documents>; 2010 NPT Review Conference, Final Document, p. 25 (Action 30).

41 Carlson, “Nuclear weapon prohibition treaty”, p. 1.

42 Giorgou, “Safeguards Provisions in the Treaty on the Prohibition of Nuclear Weapons”.

Critics have contended that the TPNW does not provide either robust disarmament verification provisions or a workable framework for the establishment of such provisions

NUCLEAR DISARMAMENT VERIFICATION

Lastly, critics have contended that the TPNW does not provide either robust disarmament verification provisions or a workable framework for the establishment of such provisions.⁴³ In reality, the TPNW offers two basic approaches to disarmament, both of which would require verification. The first of these approaches applies to nuclear-armed states that declare to have disarmed prior to acceding to the TPNW (Article 4(1)). Any such state would be obliged to cooperate with a competent international authority – a permanent or provisional institution mandated by the TPNW state parties – to verify that it has, in fact, eliminated its nuclear-weapon programme. This was the model applied to and by South Africa when the South African government announced in 1993 that it had developed nuclear weapons during the 1980s, but dismantled the stockpile prior to joining the NPT.⁴⁴

The second approach to disarmament verification applies to nuclear-armed states that opt to join the TPNW while still in possession of nuclear weapons (Article 4(2)). Such states would be obliged to complete three steps: First, they would have to “immediately remove” their nuclear weapons “from operational status”. Second, they would have to “destroy” their weapons “as soon as possible but not later than a deadline to be determined by the first meeting of States Parties”. Lastly, they would have to eliminate their entire nuclear-weapon programmes, “including the elimination or irreversible conversion of all nuclear-weapons-related facilities”. The two last steps – destruction of weapons and elimination of the full programme – should be accomplished in accordance with “a legally binding, time-bound plan” containing provisions for verification. This plan should be negotiated with one or more competent international authorities and approved by the TPNW state parties. The destruction of nuclear weapons under step two should be accomplished within a deadline specified in the time-bound plan. This deadline may be equal to or shorter than the maximum deadline to be determined by the first meeting of states parties. The “authority” – team(s) or institution(s) – could be permanent or ad hoc.

It has been suggested that Article 1 of the TPNW prevents the current nuclear-armed states, should they join the TPNW, from verifying nuclear warhead dismantlement.⁴⁵ Presumably, this argument rests on the prohibition in Article 1(1)(b) against the transfer of any “control” over nuclear weapons directly or indirectly. Under the NPT, “nuclear-weapon states” are not prohibited from taking control of and dismantling another state’s nuclear weapons. For example, should the DPRK agree to dismantle its nuclear arsenal, it would be permissible for China, France, Russia, the United Kingdom, and/or the United States to take control of those weapons and dismantle them. In contrast, the TPNW does not allow any transfer of nuclear weapons. But transferring nuclear weapons to another state for the purposes of dismantlement is not the only way of en-

43 Highsmith and Stewart, “The Nuclear Ban Treaty”, p. 132; Ford, “Briefing on Nuclear Ban Treaty”.

44 See Hassan Elbahtimy and Christopher Eldridge, “Verifying the nuclear ban: Lessons from South Africa”, *Bulletin of the Atomic Scientists* (13 September 2017), <https://thebulletin.org/2017/09/verifying-the-nuclear-ban-lessons-from-south-africa/>.

45 Ford, “Briefing on Nuclear Ban Treaty”.

surings verified disarmament. Some have argued that, given the safety risks involved, warheads should be disassembled by the people who assembled them.⁴⁶

Alternatively, the argument is that inspectors involved in verification could be exposed to sensitive information about the development of nuclear weapons and thus receive “assistance” to violate Article 1(1)(a). Under the standard interpretation of the NPT, nuclear-weapon states are permitted to take a more hands-on approach to nuclear disarmament verification than are non-nuclear-weapon states (the latter being prohibited, as are TPNW parties, from receiving “assistance” to manufacture nuclear weapons). However, several experts contend that it would be possible for international inspectors to verify nuclear warhead dismantlement by taking appropriate measures to protect sensitive information and manage access to relevant sites and facilities. One of the key challenges identified is to come up with a means of verifying that a disarming state is dismantling actual nuclear warheads – not just dummies – without giving inspectors access to information about the manufacturing of nuclear warheads. Techniques based on engineered information barriers provide one option, but are liable to spoofing, snooping, and tampering in the absence of a trusted third party supplying both software and hardware equipment. To address this problem, recent research efforts have focused on the development of measurement techniques and methods leveraging cryptographic protocols such as zero-knowledge proofs.⁴⁷ Two methods based on neutron differential radiography and nuclear resonance fluorescence have so far been demonstrated.⁴⁸ These techniques would allow inspectors to confirm the authenticity of nuclear warheads without learning information about their geometry and composition. This means that non-nuclear weapon state inspectors could first confirm the authenticity of containerized warheads, without learning any secret, and then track the containers as they are processed through secure and monitored facilities. Following the disarming state’s completion of the dismantlement process, inspectors could eventually confirm the absence of nuclear warheads within all the facilities involved.

There is no doubt that the establishment of an effective nuclear disarmament verification regime is a challenge. By adopting the TPNW, the majority of UN members have signalled their desire for greater urgency in the development of both verification techniques and other instruments required to attain and maintain a world without nuclear weapons. Existing institutions, such as

46 Sigfried S. Hecker, Robert L. Carlin, and Elliot A. Serbin, “A technically-informed roadmap for North Korea’s denuclearization”, Center for International Security and Cooperation, Stanford University (28 May 2018). https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/hecker_carlin-serbin_denuc_rlrc.pdf.

47 Alexander Glaser, Boaz Barak, and Robert J. Goldston, “A zero-knowledge protocol for nuclear warhead verification”, *Nature* 510, no. 7506 (2014).

48 Sébastien Philippe et al., “A physical zero-knowledge object-comparison system for nuclear warhead verification”, *Nature Communications* 7 (2016); Jayson R. Vavrek, Brian S. Henderson, and Areg Danagoulian, “Experimental demonstration of an isotope-sensitive warhead verification technique using nuclear resonance fluorescence”, *Proceedings of the National Academy of Sciences of the United States of America* 115, no. 17 (2018).

the IAEA, could play a role in this process.⁴⁹ But ultimately, nuclear disarmament verification may well require new multilateral avenues and processes. And “[d]istinct from the deadlocked Conference on Disarmament, this new [TPNW] forum will have an opportunity to examine and elaborate disarmament verification concepts” – something well beyond the scope of the NPT’s five-yearly review conference.⁵⁰

3.2 Withdrawal

The TPNW provides that each party has “the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of the Treaty have jeopardized the supreme interests of its country” (Article 17(2)). The withdrawal takes effect 12 months after the date of the receipt of the notification of withdrawal by the depositary (Article 17(3)). Scholars Newell Highsmith and Mallory Stewart have argued that the length of the withdrawal period is likely to deter the United States from signing the treaty.⁵¹ The TPNW’s withdrawal period is longer than those of the NPT and BWC (three months), the CWC (90 days), and the CCM and APMBC (six months). “Equally problematic”, Highsmith and Stewart hold, “is the inability of a party to withdraw as long as it is involved in an armed conflict. Thus, long-running conflicts like those in Vietnam and Afghanistan could prevent withdrawal for far longer than the 12-month waiting period.”⁵²

The model for not permitting withdrawal during engagement in armed conflict is APMBC (Article 20(3)) and CCM (Article 20(3)). Central to the TPNW is the prohibition of use of nuclear weapons, due to its catastrophic humanitarian impact and incompatibility with international humanitarian law (IHL). It is argued that involvement in armed conflict raises the risk of a nuclear weapons use, and excluding withdrawal from the TPNW in such a situation therefore makes good sense.

During the TPNW negotiations, many argued that the TPNW should not permit withdrawal at all – that the development and use of nuclear weapons is unacceptable in all circumstances, and that changing one’s position on this, as signalled by withdrawal, should not be envisaged. This, it could be argued, would have been consistent with the treaty’s overall purpose of creating an *unconditional* norm against nuclear weapons. Others stressed that withdrawal should be permitted for democratic reasons – i.e. that it was indefensible for one generation to bind following generations in perpetuity. In the end, the notice period of 12 months came about partly

49 Thomas E. Shea and Laura Rockwood, *Nuclear disarmament: The legacy of the Trilateral Initiative* (Institut für Friedensforschung und Sicherheitspolitik an der Universität Hamburg, 2015).

50 Patton, “An International Monitoring System for Verification to Support both the Treaty on the Prohibition of Nuclear Weapons and the Nonproliferation Treaty”, p. 187.

51 Highsmith and Stewart, “The Nuclear Ban Treaty”, p. 137.

52 *Ibid.*

Some commentators have suggested that the TPNW’s prohibition on “assistance” is difficult to operationalize and could mean any number of things

in recognition of the withdrawal from the NPT by the DPRK, which some negotiators believed had been too easy.

Many supporters of the TPNW believe the nuclear-armed states will only accede to the TPNW once they have acknowledged that the use of nuclear weapons is unacceptable, and that proliferation threats – for example withdrawals from the TPNW by other states – should be dealt with in other (preferably peaceful) ways. Christopher Ford has suggested that because withdrawal can only take place in the face of “extraordinary events” that are “related to the subject matter of the treaty”, it “is not clear that withdrawal would be permitted if a State Party were *not* attacked with nuclear weapons.”⁵³ This reading rests on an extremely narrow understanding of the phrase “related to the subject matter of the treaty”. The subject matter of the TPNW is not exclusively related to the *use* of nuclear weapons, but also to the development of nuclear weapons and international security more generally. Moreover, the TPNW’s formulation is near identical to the ones used in the NPT, PTBT, CTBT, CWC, CFE, and the BWC. It seems strange, then, that this critique is aimed uniquely at the TPNW.

3.3 Definitions

Like the NPT and BWC, but unlike for example the CWC, the TPNW does not contain a separate article with definitions of terms. But any treaty, including those with definitions of key terms, contains numerous words with potentially unclear or diffuse meanings. However, the fact that the TPNW and other international instruments contain words that may be subject to interpretation does not mean that all interpretations of specific terms are equally valid from a legal point of view. Many terms have more or less agreed meanings under relevant international law, even if they are not explicitly defined in each treaty.

Some commentators have suggested that the TPNW’s prohibition on “assistance” is difficult to operationalize and could mean any number of things. However, “assistance” is a well-known legal concept in numerous domestic legal systems and is prohibited in several international instruments, including the NPT, the CWC, the APMBC, and the CCM. Governments have generally been able to work out what assistance means in these contexts. It should thus not be too difficult to interpret the prohibition on assistance in the TPNW. It should be noted, however, that the concept of “assistance” in arms control and disarmament treaties is usually more far reaching than the concept of “assistance” under international law in general.

According to Article 16 of the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts – which, according to the International Court of Justice, codifies customary international law⁵⁴ – a state is internationally responsible for unlawful assistance when (A) it has assisted another state “with knowledge of the circumstances of the in-

⁵³ Ford, “Briefing on Nuclear Ban Treaty”.

⁵⁴ ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina/Serbia and Montenegro) (Judgment of 26 February 2007), para. 420.

ternationally wrongful act” and (B) that act “would be internationally wrongful if committed by that State”.⁵⁵ According to the International Law Commission’s commentary on the Articles on State Responsibility, a state may only be held responsible for unlawful assistance if the assistance made a “significant” contribution to the commission of the unlawful act by the assisted state.⁵⁶ Some have argued that assistance is only unlawful if the assisting state carried out the assistance with the *intention* of enabling the unlawful act (*mens rea*), but it has also been argued that a state can have “knowledge” of the circumstances of the internationally wrongful act without having subjectively willed the commission of the unlawful act.⁵⁷ In *Application of the Genocide Convention*, the ICJ suggested that the most crucial criterion was that the assistor had knowledge of the *assisted* actor’s intention.⁵⁸ The TPNW explicitly prohibits each of its parties to “[a]ssist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Treaty” (Article 1(1)(e)). The TPNW thus goes beyond the text of the Articles on State Responsibility by prohibiting its parties from assisting non-state actors.

The discussion above implies that trade in dual-use nuclear technology and materials is permissible under the TPNW as long as the exporting state is unaware of any intention by the importer to use said technology in breach of the TPNW’s prohibitions. That said, knowledge of an importing state’s intention to use transferred nuclear material or dual-use technology for purposes prohibited by the TPNW would of course proscribe future transfers. Allowing foreign naval vessels to transit through one’s territory, including refuelling docked ships, would not constitute unlawful assistance unless the transited state was assisting in an act prohibited by the TPNW, for instance the transfer of nuclear weapons to another state.

Transit was discussed during the negotiations, but an explicit mention of the term was ultimately omitted. Some have taken this to mean that it is unclear whether transit is in fact prohibited under the TPNW. It is possible that this sense of uncertainty is linked to the fact that some of the nuclear-weapon-free zone treaties include language explicitly specifying that it is up to each state party to decide whether to allow transit.⁵⁹ However, the fact that the TPNW does not *explicitly* grant states parties the right to decide whether to allow transit does not mean that the states parties do not have that right, even if other treaties are more specific on the matter. It is quite clear that nothing in the text of the TPNW prevents states parties from deciding for themselves whether to allow the transit passage of foreign ships and aircraft or to require visiting ships to actively declare whether or not they are carrying nuclear weapons.

55 International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001*. United Nations (2008), pp. 65–66.

56 *Ibid.*, p. 65.

57 See e.g. Nina H.B. Jørgensen, “State Responsibility for Aiding or Assisting International Crimes in the Context of the Arms Trade Treaty”, *The American Journal of International Law* 108, no. 4 (2014).

58 ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, paras 421–22.

59 See e.g. Bangkok Treaty, Article 7; Treaty of Rarotonga, Article 5(2).

The TPNW also does not prohibit military cooperation between states parties and nuclear-armed states, as long as this cooperation does not involve specific activities in breach of the TPNW and in particular the core prohibitions of Article 1. For instance, TPNW membership would not stand in the way of military cooperation with nuclear-armed states as currently practiced within NATO. However, the current practice of some NATO states to allow stationing of nuclear weapons on their territory would constitute a violation of TPNW Article 1(1)(g), should the states concerned accede to the treaty. The resulting situation would be similar to the APMBC and the CCM, both of which have states parties that are also members of NATO.

3.4 Plugging gaps in the NPT

Harald Müller argues that the TPNW “fails to fill NPT gaps” by not explicitly prohibiting “nuclear weapons research” and failing to mention “transfer of arms parts, materials and technology in addition to nuclear weapons”. The TPNW also lacks “any clause on export controls beyond the transfer of full weapons”.⁶⁰ The following paragraphs delve into these criticisms.

NUCLEAR-WEAPON RESEARCH

First, Müller argues that the TPNW perpetuates a loophole in the NPT by failing to prohibit nuclear-weapon research. In Müller’s view, parties to the TPNW will be permitted to develop extensive plans and infrastructure for the production of nuclear weapons so long as these plans are not put into action. This is inaccurate. While Müller is correct that the NPT fails to prohibit its parties from engaging in preparations to produce nuclear weapons, the TPNW does not.

Article II of the NPT obliges “non-nuclear-weapon States” (1) not to “receive the transfer” of nuclear weapons, (2) not to “manufacture or otherwise acquire nuclear weapons”, and (3) not to “seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.” Several commentators have argued over the years that the term “manufacture” must be understood to include “preparations” for manufacture, including research. However, others have pointed out that the wording of the NPT fails to explicitly foreclose preparations to produce nuclear weapons.⁶¹

The TPNW, by contrast, obliges its parties (1) not to “[d]evelop, test, produce, manufacture, otherwise acquire, possess or stockpile nuclear weapons or other nuclear explosive devices”, (2) not to “[r]eceive the transfer of or control over nuclear weapons or other nuclear explosive devices directly or indirectly”, and (3) not to “[s]eek or receive any assistance, in any way, from anyone to engage in any activity prohibited to a State Party under this Treaty”. The verbs listed

60 Harald Müller, “The Future of the Non-proliferation Treaty”, in L. Maiani et al. (eds), *International Cooperation for Enhancing Nuclear Safety, Security, Safeguards and Non-proliferation* (Cham: Springer, 2018), p. 144.

61 See e.g. Julian Borger, “Mohamed ElBaradei warns of new nuclear age”, *The Guardian* (14 May 2009). <https://www.theguardian.com/world/2009/may/14/elbaradei-nuclear-weapons-states-un>.

TPNW's prohibition on development should be understood to encompass nuclear-weapon research

in Article 1 of the TPNW and Article II of the NPT overlap significantly, but there are important differences. Crucially, the TPNW includes the verb “develop”.

In arms control and disarmament law, “development” is generally understood to refer, *inter alia*, to “preparations for production”. Under the 1993 Chemical Weapons Convention (CWC), for example, the term “develop” is understood to encompass “a number of steps for creating a functioning weapon ready for production, stockpiling, and use, as distinct from permitted research”.⁶² The CWC’s prohibition on “development”, in other words, covers research, planning, and preparations to produce chemical weapons. The distinction between permitted and prohibited research activities is of course not always obvious or easy to verify. However, as a general rule, research activities become problematic once they are directed towards “a clearly defined and recognizable purpose” incompatible with the treaty. Basic research – where “future applications of the research results cannot be determined” – is permitted.⁶³ The Biological Weapons Convention’s ban on development has similarly been interpreted to permit research “only on defensive measures such as immunization”.⁶⁴

The TPNW’s prohibition on development, then, should be understood to encompass nuclear-weapon research (unless for purposes e.g. of radiation protection and disarmament verification), sub-critical testing, and other steps for creating a functioning weapon ready for production. The lack of a reference to “nuclear-weapon research”, then, is made up for by the general prohibition on “development”.

TRANSFER OF PARTS OR MATERIALS FOR NUCLEAR WEAPONS

The second and third gaps supposedly left unaddressed by the TPNW are the lack of an explicit prohibition on the transfer of “weapons parts, materials and technology” and the lack of “any clause on export controls beyond the transfer of full weapons.”⁶⁵ However, transferring nuclear-weapon parts or materials would appear to constitute a relatively clear-cut example of unlawful assistance to “[d]evelop, test, produce, manufacture, otherwise acquire, possess or stockpile nuclear weapons or other nuclear explosive devices” (Article 1(1)(a)).⁶⁶

62 Walter Krutzsch, “Article 1: General Obligations”, in Walter Krutzsch, Eric Myjer, and Ralf Trapp (eds), *A Commentary on the Chemical Weapons Convention* (Oxford: Oxford University Press, 2014), p. 65.

63 *Ibid.* See also John C. Yoo, “The New Sovereignty and the Old Constitution”, *Constitutional Commentary* 15, no. 87 (1998), p. 88.

64 Elizabeth A. Smith, “International Regulation of Chemical and Biological Weapons”, *University of Illinois Law Review*, no. 4 (1984), p. 1042.

65 Müller, “The Future of the Non-proliferation Treaty”, p. 144.

66 Furthermore, Article 1(1)(b) of the TPNW prohibits states from transferring nuclear weapons both “directly” and “indirectly”. It could be argued that the word “indirectly” covers both transfers via third parties and transfers of nuclear-weapon parts. The latter has been argued in the context of the NPT, which also prohibits the direct and indirect transfer of nuclear weapons. See Norman Dombey, “Article I of the Non-Proliferation Treaty and the United Kingdom–United States Nuclear Weapon Cooperation”, *Arms Control* 5, no. 2 (1984).

While the TPNW prohibits the transfer of nuclear-weapon parts, it does not prevent its parties from engaging in trade in nuclear technology. Nuclear material and dual-use technology could, of course, be used for unlawful purposes. In such cases, a TPNW party would be obliged to cease engaging in such trade once it became clear that the importing state was using the transferred objects for purposes prohibited by the treaty.

3.5 Implementation and enforcement

The TPNW has also been criticized for lacking enforcement mechanisms, containing “only a toothless dispute settlement imperative”.⁶⁷ This criticism is not without foundation. The TPNW and its parties’ ability to directly enforce compliance with the agreement is limited. But the problem of enforcement is hardly unique to the TPNW. Indeed, the criticism applies to most arms related treaties, including the APMBC, the CCM and the NPT. The CWC (Article XII) and BWC (Article VI) stipulate that parties may bring violations of the conventions to the attention of the UN Security Council. Yet the absence of similar provisions in other arms control and disarmament instruments does not preclude the parties to such agreements from bringing serious disputes or matters of international peace and security to the Security Council’s attention (the NPT is a prominent case in point). Any UN member state has the right to do so under the UN Charter.⁶⁸ That said, there is of course no guarantee that the Security Council will be able to resolve the matter. It might be, for example, that one of the parties to the dispute holds a permanent seat on the Council. This is precisely why norms are so important in international affairs. In the absence of a central authority that can enforce laws effectively, social mores and norms of restraint become all the more important.⁶⁹ The TPNW, then, is perhaps not best understood either as a coercive instrument or as the final answer to the challenge of nuclear disarmament. The proponents of the TPNW have been clear that the treaty’s main purpose is to advance international humanitarian law, help build a stronger norm against nuclear weapons, and energize the pursuit of further measures needed to attain and maintain a world without nuclear weapons.

3.6 Reservations

Another criticism of the TPNW text is that the treaty does not allow reservations.⁷⁰ Article 16 of the TPNW provides that “[t]he Articles of this Treaty shall not be subject to reservations.” This formulation is identical to the ones contained in APMBC and the CCM, and is to similar effect as the one in the NPT. The CWC and the CTBT, however, which in contrast to the APMBC and the CCM envisage annexes and protocols, do not permit reservations on the articles of the treaty proper, but allow reservations on additional protocols and annexes provided that they are consistent with the object and purpose of the treaty. For the TPNW, which explicitly envisages

67 Müller, “The Future of the Non-proliferation Treaty”, p. 144.

68 Charter of the United Nations (signed 26 June 1945, in force 24 October 1945), Articles 34 and 35.

69 Ian Hurd, “Legitimacy and authority in international politics”, *International Organization* 53, no. 2 (1999).

70 Ford, “Briefing on Nuclear Ban Treaty”.

future protocols, this could become an issue at some point in the future, as it is unclear whether the provision on reservations would apply to those protocols. Before adopting any additional protocols to the TPNW, states parties should therefore seek to clarify this issue, e.g. by a specific provision in any protocol.

3.7 Superseding the NPT?

Critics have alleged that the TPNW will supersede, and thus “weaken”, the NPT.⁷¹ This is not correct. Article 18 of the TPNW provides that the implementation of the treaty “shall not prejudice obligations undertaken by States Parties with regard to existing international agreements, to which they are party, where those obligations are consistent with the Treaty.” This could be taken to mean that states parties would be exempt from their obligations under the NPT where those are inconsistent with the TPNW. In practice however, it is difficult to see precisely what those inconsistencies would be. TPNW negotiators did a thorough job in making sure that the two treaties would be perfectly compatible with each other.

Article 18 does not prevent a state from joining or continuing to adhere to any other nuclear non-proliferation and disarmament treaty. As one analyst points out, the meaning of Article 18 is that parties to the TPNW cannot use adherence to other treaties as an excuse for non-compliance with the TPNW:

a state party to another legally binding agreement on nuclear weapons cannot use its adherence to that agreement as an argument, much less a legal basis, to undercut the obligations it accepts by ratifying or acceding to the TPNW. Of course, “consistent with” does not imply “identical to”. A state party to the TPNW could therefore ratify and respect the NPT, the 1963 Partial Test-Ban Treaty, and the 1996 Comprehensive Nuclear-Test-Ban Treaty (CTBT). None of these requires action that would contravene the 2017 Treaty. [...] In many ways, therefore, Article 18 is little more than a statement of common sense.⁷²

It is also worth pointing out that the relationship between states that have ratified both the TPNW and the NPT and those that have ratified only the NPT will be governed by the latter treaty. “[T]he treaty to which both States are parties governs their mutual rights and obligations.”⁷³

71 The Netherlands, statement to the TPNW negotiating conference (27 June 2017).

72 Stuart Casey-Maslen, “The Treaty on the Prohibition of Nuclear Weapons: Implications for Sweden’s Imports and Exports of Nuclear Material”, SLMK (August 2018), p. 4. <https://slmk.org/wp-content/uploads/Implications-for-Swedens-imports-and-exports-of-nuclear-material-and-items-Stuart-Casey-Maslen.pdf>.

73 Vienna Convention on the Law of Treaties (adopted 23 May 1969, in force 27 January 1980), Article 30(4).

4 Implications

A third class of objections against the TPNW concerns the intended or unintended consequences of the treaty's adoption. Opponents of the TPNW – and, in many cases, of nuclear disarmament more generally – have argued that the TPNW could upset the NPT process, discredit international law, promote disarmament in liberal states while leaving “rogue states” to retain their weapons, and undermine nuclear deterrence and, by extension, international order. These claims are sometimes presented as legal arguments, but are in reality hypotheses about future political dynamics.

4.1 Undermining nuclear deterrence

First, a number of states and commentators have criticized the TPNW for being at odds with the policy of nuclear deterrence. In a joint press statement released immediately after the adoption of the treaty, France, the United Kingdom, and the United States declared accession to the TPNW to be “incompatible with the policy of nuclear deterrence, which has been essential to keeping the peace in Europe and North Asia for over 70 years.”⁷⁴ Similar sentiments were expressed by Christopher Ford, special assistant to the US president, in a briefing at the Carnegie Endowment for International Peace on 22 August 2017. He warned that if the TPNW ends up damaging extended nuclear deterrence relationships, it would “work against international peace and security, making conflict and aggression more likely, degrading existing security relationships, and thus actually undermining stability and increasing the risk of escalation and nuclear conflict.”⁷⁵

It should come as no surprise that the TPNW is deemed to be incompatible with the policy of nuclear deterrence. In fact, it would have been a considerable disappointment to TPNW supporters had this not been the case. The whole point of drafting the TPNW was to establish a comprehensive and unconditional ban on nuclear weapons, including all forms of use, and if the result had been a treaty that permitted states to continue to explicitly endorse the potential use of nuclear weapons, the treaty drafters would essentially have failed in their mission.

This is also where the TPNW provides its most significant supplement to international law. By specifically prohibiting use, the TPNW departs fundamentally from the NPT, which does not address either use or deterrence. Moreover, by including prohibitions on “assistance” and “encouragement and inducement” of prohibited activities, the TPNW precludes its parties from actively requesting or expressly endorsing the continued retention of nuclear weapons by another state.

Where the supporters and the critics of the TPNW disagree, is on the question of whether efforts aimed at undermining nuclear deterrence are good or bad. Objections from the TPNW critics

74 US Mission to the United Nations, “Joint Press Statement by the Permanent Representatives to the United Nations of the United States, United Kingdom, and France Following the Adoption of a Treaty Banning Nuclear Weapons” (7 July 2017). <https://usun.state.gov/remarks/7892>.

75 Ford, “Briefing on Nuclear Ban Treaty”.

Where the supporters and the critics of the TPNW disagree, is on the question of whether efforts aimed at undermining nuclear deterrence are good or bad

can be structured into two main categories, the first of which concerns arguments about merits of the end goal of nuclear abolition.

THE MERITS OF A WORLD WITHOUT NUCLEAR WEAPONS

A number of commentators continue to question the desirability of achieving a world without nuclear weapons. Such a world, it is held, would be more prone to outbreaks of conventional conflicts, potentially even world wars, and since nuclear weapons cannot be “uninvented”, there will always be a risk that someone, at some point, would cheat and secretly develop or redevelop nuclear weapons.⁷⁶ These concerns are not without merit. As Thomas Schelling has pointed out, “considering how much intellectual effort in the past half-century went into the study of the ‘stability’ of a nuclear-deterrence world, it ought to be worthwhile to examine contingencies in a nuclear-free world to verify that it is superior to a world with (some) nuclear weapons.”⁷⁷ Research on the maintenance and stability of a world without nuclear weapons should undoubtedly be encouraged, but for the ongoing debate on the virtues of the TPNW, that issue is currently less pressing. This is because the disagreement between states is not (openly) over the desirability of the end goal, but rather about how to get there. All UN member states officially agree that complete elimination of nuclear weapons is the ultimate objective.

CHOOSING THE RIGHT PATH TO ZERO

The second category of objections to the undermining of nuclear deterrence is focused on *how* to get to zero. Importantly, objections in this category recognize that the elimination of all nuclear weapons is, and should be, the ultimate objective. In broad terms, the argument presented is that disarmament can only be accomplished through careful maintenance of strategic stability, coupled with “negotiated, verified reductions of nuclear forces”.⁷⁸ As the world moves closer to nuclear abolition, stable nuclear deterrence relations must be preserved for as long as possible.

In the eyes of the nuclear-armed states and some of their allies, the TPNW threatens strategic stability for two main reasons. First, delegitimizing nuclear deterrence undermines the credibility of the nuclear threat. For nuclear deterrence to work, state leaders must believe that nuclear weapons could at some point be used. For most nuclear deterrence theorists, credible nuclear deterrence does not require certainty (of a nuclear response), but sufficient doubt. However, if nuclear weapons become less acceptable in the eyes of people and states, the necessary uncertainty is diminished.

76 For a discussion of these arguments, see Benoît Pelopidas, “A Bet Portrayed as a Certainty”, in George P. Schultz and James E. Goodby (eds), *The War That Must Never Be Fought* (Stanford, CA: Hoover Institution Press, 2015).

77 Thomas C. Schelling, “A world without nuclear weapons?”, *Daedalus* 38, no. 4 (2009), p. 125.

78 United States, “Defense Impacts of Potential United Nations General Assembly Nuclear Weapons Ban Treaty”, Non-paper (17 October 2016). http://www.icanw.org/wp-content/uploads/2016/10/NATO_OCT2016.pdf.

The second line of reasoning is that the TPNW could be destabilizing because the normative pressure is likely to affect states differently. As the NATO-official Michael Rühle notes, the TPNW “is meant to be universal, but in practice, it will only affect Western democracies.” This is because, he contends, the “delegitimation of nuclear weapons can only work in places with a vibrant civil society”. In his view, “the mere hope that the groundswell of global public opinion could also lead to changes in closed societies is a convenient myth.”⁷⁹ Similar concerns have also been voiced by others, including Highsmith and Stewart, who contend that “democratic countries such as the NATO allies, Japan and South Korea – and their commercial institutions – are more vulnerable to pressure from civil society than the non-NATO states that possess nuclear weapons.”⁸⁰ A split between Western allies, so goes the argument, could potentially be interpreted as a sign of weakness and invite aggression by certain adversaries. This is perhaps why France, United Kingdom, and the United States have been particularly vocal about the dangers of delegitimizing nuclear deterrence, and why they insist that the road to a world free of nuclear weapons must follow incremental steps that do not upset deterrence relations.

TPNW supporters, by contrast, are convinced that efforts to delegitimize nuclear weapons are necessary in order to achieve elimination.⁸¹ They reject arguments about the strategic importance of nuclear deterrence, either because they believe the risk of nuclear war outweighs any short-term benefit of nuclear deterrence or because they do not accept the basic premise of the deterrence logic, namely that nuclear weapons could at some point be used. For supporters of the TPNW, nuclear weapons are not an acceptable means of warfare and should not be used under any circumstances. It is also difficult to imagine realistic scenarios in which nuclear weapons could be used without violating existing international humanitarian law.⁸² The IHL rules of distinction (civilians must not be the subject of attack), proportionality (attacks must be proportional to the expected military advantage gained), precautions in attacks (civilians must be alerted and secured), and avoiding superfluous injury (it is forbidden to use weapons calculated to cause unnecessary suffering for enemy combatants) leave little room for the lawful use of nuclear weapons.

TPNW supporters point to the inherent contradiction between the nuclear-armed states’s claim that they strive for a world free from nuclear weapons, and their apparent wish to maintain nu-

79 Michael Rühle, “The Nuclear Weapons Ban Treaty: reasons for scepticism”, *NATO Review* (19 May 2017). <https://www.nato.int/docu/review/2017/also-in-2017/nuclear-weapons-ban-treaty-scepticism-abolition/en/index.htm>.

80 Highsmith and Stewart, “The Nuclear Ban Treaty”, p. 144.

81 See e.g. Nick Ritchie, “The real ‘problem’ with a ban treaty? It challenges the status quo”, Carnegie Endowment for International Peace (3 April 2017). <http://carnegieendowment.org/2017/04/03/real-problem-with-ban-treaty-it-challenges-status-quo-pub-68510>.

82 See e.g. Stuart Casey-Maslen, “The use of nuclear weapons under rules governing the conduct of hostilities” and Simon O’Connor, “Nuclear weapons and the unnecessary suffering rule” in Gro Nystuen, Stuart Casey-Maslen and Annie G. Bersagel (eds), *Nuclear Weapons under International Law* (Cambridge: Cambridge University Press, 2014).

clear weapons for deterrence purposes indefinitely. The TPNW's supporters are not blind to concerns over strategic stability and degradation of existing security relationships. But in their view, there is no viable alternative, because as long as nuclear weapons are perceived as symbols of power and prestige, nuclear disarmament will remain a pipe dream. For the TPNW supporters, therefore, delegitimizing nuclear deterrence and a phasing-out of extended nuclear deterrence are necessary steps on the path to zero. It also appears unlikely that increased pressure for nuclear abolition in democratic nuclear-armed states would lead to immediate unilateral disarmament. It would appear much more likely that such pressure would translate into a greater willingness to engage other nuclear-armed states in reciprocal disarmament negotiations.

4.2 The NPT process

In its explanation of vote following the adoption of the TPNW, the Dutch delegation lamented that the text of the treaty places the TPNW “above the NPT and sets up a comprehensive parallel review mechanism, to which it assigns a mandate that at least partially overlaps with that of the NPT.”⁸³ This, it has been suggested, could lead to forum-shopping, and to a disruption of the delicate balance between the three pillars of the NPT.⁸⁴

It has also been suggested that the TPNW could have a negative impact on the political dynamic of nuclear disarmament more generally. As the United States asserted during the UNGA First Committee in 2017, the ban treaty “exacerbates political tensions on disarmament, dividing states into overly-simplified camps of ‘nuclear weapons supporters’ and ‘nuclear weapons banners’, rather than recognizing shared interests”.⁸⁵ This, in turn, could lead to increased polarization and make further progress in frameworks such as the NPT “significantly more difficult”, the US delegation contended.⁸⁶

Warnings about the “polarizing” effect of the TPNW were prevalent even before the mandate for the negotiation of the ban treaty was adopted, and arguments about the negative impact of “polarization” are frequently raised by TPNW-sceptics. Two main responses have been given. First, the TPNW is not the cause of “polarization”, but an expression of the divisions caused by the nuclear-armed states’ unwillingness to fully implement Article VI of the NPT. And second, “polarization” between states that oppose nuclear weapons and those that build their security doctrines around them is not necessarily a bad thing. It would surely be much more worrying if the states championing the TPNW were to go the other way and to adopt the policies of the

83 The Netherlands, explanation of vote (7 July 2017).

84 United States, “Nuclear Weapons Ban Treaty: Outline of Legal Risks for States Contemplating Joining”, Supplement to U.S. Presentation, ASEAN Regional Forum, Seoul (4–6 April 2018); Rühle, “The Nuclear Weapons Ban Treaty”.

85 United States, statement to the UNGA First Committee (12 October 2017). http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com17/statements/12Oct_USA.pdf.

86 *Ibid.*

There is no indication that even a single TPNW supporter is contemplating withdrawing from the NPT

nuclear-armed states (i.e. develop nuclear weapons). Historically, progress in the field of disarmament has always been preceded by “polarization” between those demanding change and those resisting it.

Further, it has been contended that the existence of the TPNW could make it more difficult to achieve progress on nuclear disarmament within the framework of the NPT. This argument is not particularly persuasive. The supporters of the TPNW are likely to continue to push for the implementation of NPT Article VI at NPT review conferences. The two most recent NPT review conference preparatory committee (PrepCom) meetings would appear to corroborate this. The supporters of the TPNW are trying to facilitate disarmament, not obstruct it.⁸⁷ It should also be noted here that the TPNW does not compete with any ongoing or proposed nuclear disarmament initiatives. The TPNW does not make stockpile-reduction negotiations, de-alerting of nuclear weapons, the entry-into-force of the CTBT, or the negotiation of a fissile material (cut-off) treaty less important or valuable.

It has also been suggested that the TPNW could undermine the NPT by forcing states to spread their limited resources more thinly. In Christopher Ford’s words, “the ‘ban’ is likely, in political and diplomatic terms, to create what is in effect a competitor regime to the NPT”.⁸⁸ This, it is held, could diminish the role of the NPT as the cornerstone of the nuclear non-proliferation and disarmament regime, as states might prefer to attend the TPNW meetings instead of NPT meetings.

On the one hand, it would not necessarily be a bad thing for the NPT to have to prove its relevance. But on the other hand, proponents of the TPNW have repeatedly stressed that NPT will continue to play a crucial role, and that the new treaty is in fact an attempt at strengthening the existing regime. The preamble of the TPNW reaffirms that “the full and effective implementation” of the NPT, “which serves as the cornerstone of the nuclear disarmament and non-proliferation regime, has a vital role to play in promoting international peace and security”. At the UNGA First Committee meeting in 2017, several supporters of the TPNW said that the adoption of the new treaty had only strengthened their governments’ resolve to further the NPT.⁸⁹ There is no indication that even a single TPNW supporter is contemplating withdrawing from the NPT, and attendance at NPT meetings has in fact *increased* following the emergence of the TPNW. While the first PrepCom of the 2010–2015 NPT review cycle (in 2012) attracted 632 government representatives from 109 states, the first PrepCom of the 2015–2020 review cycle

87 Egeland, Hugo, Løvold, and Nystuen, “The nuclear weapons ban treaty and the non-proliferation regime”.

88 Ford, “Briefing on Nuclear Ban Treaty”.

89 E.g. Nigeria, statement on behalf of the African Group, UNGA First Committee (2 October 2017). http://reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com17/statements/2Oct_AfricanGroup.pdf; Mexico on behalf of the New Agenda Coalition, UNGA First Committee (2 October 2017). http://reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com17/statements/2Oct_NAC.pdf.

(in 2017) – which ostensibly had to compete with the negotiation of the TPNW – attracted 742 government representatives from 114 states. And while the second PrepCom of the 2010–2015 review cycle (in 2013) attracted 580 government representatives from 106 states, the second PrepCom of the 2015–2020 review cycle (in 2018) – which took place after the adoption of the TPNW – attracted 612 government representatives from 112 states. These numbers are consistent with the hypothesis that far from undermining the NPT, the humanitarian initiative and negotiation of the TPNW have served to *increase* overall interest in nuclear non-proliferation and disarmament issues.

4.3 Weakening international law?

A related concern, expressed by certain commentators, is that the TPNW could end up weakening international law. For example, France has suggested that, “[b]y establishing a less comprehensive norm competing with the CTBT, this Treaty [the TPNW] could compromise the universalization and entry into force of the CTBT.”⁹⁰ It is not clear why the TPNW would make the universalization of the CTBT more difficult. The overall purpose of the TPNW is to advance international humanitarian law and promote norms of nuclear restraint. If this is successful, states will surely be more, not less, likely to join other nuclear arms control and disarmament treaties. The TPNW is not intended as a substitute for the CTBT, but instead serves as another source of “useful pressure”⁹¹ on states to make progress on nuclear non-proliferation and disarmament, including ratification of the CTBT.

Comparing the TPNW to the 1928 Kellogg-Briand Pact and the attempt in the 1920s to prohibit alcohol in the United States, Brad Roberts warns that “[r]ather than strengthen international law, the ban may debase it.”⁹² The parallel with the ban on alcohol is amusing but not particularly persuasive. Producing nuclear weapons requires considerable technical know-how, rare materials, and a huge industrial effort. Producing alcohol, by contrast, requires only the ability to read simple recipes and a trip to the nearest corner shop. The motivations for nuclear armament and drinking are also very different. The parallel with the Kellogg-Briand Pact – an ambitious treaty outlawing war – is somewhat more accurate. But while the Kellogg-Briand Pact was an instrument of *jus ad bellum* (governing the initiation of the use of force), the TPNW is a more modest instrument primarily relating to *jus in bello* (the conduct of hostilities). The Kellogg-Briand Pact was joined by several states that apparently had no intention of honouring the agreement and is often cited as an example of naïve idealism. By contrast, the supporters of the TPNW are under no illusion that the TPNW alone solves the problem of nuclear armament. At the same time, one could argue that the TPNW has a similar aim to that of the Kellogg-Briand Pact in the sense

90 France, statement to the UNGA First Committee (16 October 2017).

91 Kyodo News, “U.N. chief calls for concrete steps toward nuke disarmament” (9 August 2018). <https://english.kyodonews.net/news/2018/08/39db093d43e9-un-chief-calls-for-concrete-steps-toward-nuke-disarmament.html>.

92 Brad Roberts, “Ban the Bomb? Or Bomb the Ban? Next Steps on the Ban Treaty”, European Leadership Network (March 2018).

that both agreements were designed to promote military restraint and a rules-based international order. And as it happens, some have argued that the much-derided Kellogg-Briand Pact was in fact instrumental to the long-term decline of interstate war.⁹³ Proponents of nuclear armament often argue that nuclear deterrence explains the “long peace” between major powers after the end of the Second World War, but this hypothesis is impossible to prove in the presence of other factors that have contributed to the absence of war between great powers since 1945. Also, this hypothesis is hard to square with the fact that the decline of interstate war, including between major powers, has taken place over centuries, not just since the Second World War.⁹⁴

93 Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (New York, NY: Simon & Schuster, 2017).

94 See e.g. Steven Pinker, *The Better Angels of Our Nature* (New York, NY: Penguin, 2011).

5 Relevance

A fourth class of objections to the TPNW concerns the treaty's relevance. Critics have argued, first, that the TPNW is unlikely to make a mark on the nuclear status quo. If only non-nuclear-weapon states that have already committed to non-proliferation (i.e. NPT non-nuclear-weapon states) join the treaty, so goes the argument, the adoption of the TPNW will end up being a punch in the air. A second criticism concerns the legal status of the TPNW for the states that refuse to join it.

5.1 Will the TPNW make an impact?

A key purpose of the TPNW is to foster nuclear non-proliferation and disarmament by delegitimizing nuclear weapons. As the UN Secretary-General stated in August 2018, the TPNW can serve as “useful pressure” for the creation of a world without nuclear weapons.⁹⁵ Few supporters of the TPNW believe the mere existence of the TPNW will guarantee disarmament. However, proponents of the TPNW have argued that the treaty could help build a stronger norm against nuclear weapons and help foster disarmament in the long-term. But some commentators have questioned the effectiveness of normative pressure of the kind described by the UN Secretary General. Taking the example of the APMBC, Michal Onderco argues that “normative pressure – even from a very successful treaty – is limited on non-parties, and not absolute on parties.”⁹⁶

The effectiveness of normative pressure is neither straightforward nor easy to measure. But how did the APMBC become what Onderco himself refers to as “a very successful treaty”? Why did over 100 states sign it in 1997? And why have more than 40 initial holdouts reversed their positions and embraced the treaty in the years since? According to the scholar Adam Bower, the answer is that the APMBC has established “a powerful new international social standard”. This new standard, Bower demonstrates, “has generated widespread behavioral change among treaty members [...] and non-parties including major military powers such as the United States”. These findings contradict the notion that treaties cannot be effective if they are not supported by major powers.⁹⁷ Other scholars have reached the same conclusion.⁹⁸ Looking at the history of social change, advocacy movements and pressure groups have played key roles. From the abolition of the slave trade to the enfranchisement of women and the ban on landmines, change came about through social pressure.

95 Kyodo News, “U.N. chief calls for concrete steps toward nuke disarmament”.

96 Onderco, “Why nuclear weapon ban treaty is unlikely to fulfil its promise”, p. 397.

97 Adam Bower, “Norms Without the Great Powers”, *International Studies Review* 17, no. 3 (2015).

98 See e.g. Denice Garcia, “Humanitarian security regimes”, *International Affairs* 91, no. 1 (2015); Richard Price, “Emerging customary norms and anti-personnel landmines”, in Christian Reus-Smit (ed.), *The Politics of International Law* (Cambridge: Cambridge University Press, 2004); Ramesh Thakur and William Maley, “The Ottawa Convention on Landmines”, *Global Governance* 5, no. 2 (1999).

The supporters of the TPNW are under no illusion that the TPNW alone solves the problem of nuclear armament.

Cognizant of the difficulty of their task, supporters of the TPNW aim to bring about a similar shift of attitudes to the use and possession of nuclear weapons. The NPT has already helped delegitimize nuclear proliferation. It is worth noting that the only four states to have given up nuclear weapons – Belarus, Kazakhstan, South Africa, and the Ukraine – were “non-nuclear-weapon states” from the perspective of the NPT. By developing or otherwise acquiring nuclear weapons, these states were defying, or would have defied, the norm of non-proliferation. As South African Foreign Ministry officials put it at the time, giving up nuclear weapons and joining the non-proliferation regime would help South Africa “becoming a respected member of the international community”.⁹⁹ It should also be noted that most of the non-nuclear-weapon states deemed capable of manufacturing nuclear weapons and delivery vehicles within a relatively short amount of time¹⁰⁰ waited for several years, and even decades, to ratify the NPT. Nuclear-capable states such as Argentina, Australia, Brazil, Chile, Egypt, Italy, Japan, Spain, Switzerland, and West Germany were socialized into the non-proliferation regime over time.

The TPNW has already had an impact. The negotiation of the new treaty has opened a space for renewed public discussion about the nature and acceptability of nuclear weapons, about the policies that perpetuate nuclear risks and vulnerabilities, and about alternative approaches to security.¹⁰¹ The TPNW has also energized the nuclear divestment campaign. For example, within six months of the TPNW’s adoption, the Dutch pension fund ABP, one of the world’s largest funds, announced its decision to divest from companies involved in the production of nuclear weapons. APB explicitly noted that it would not invest in products subject to international legal prohibitions.¹⁰² But arguably the greatest impact of the TPNW is that it fills a gap in existing international law by placing nuclear weapons in the same legal category as other weapons of mass destruction (WMDs). Upon the entry-into-force of the TPNW, nuclear weapons will no longer be the only one of the three classes of WMD not subject to an explicit legal prohibition.¹⁰³ In this view, the TPNW fosters a rules-based international order and contributes to a clarification of IHL and other international law regulating nuclear weapons.¹⁰⁴

99 Jo-Ansie van Wyk, “Atoms, Apartheid, and the Agency”, *Cold War History* 15, no. 3 (2015), p. 408.

100 See Edwin B. Firmage, “The Treaty on the Non-Proliferation of Nuclear Weapons”, *The American Journal of International Law* 63, no. 4 (1969), p. 712.

101 Ray Acheson, “Impacts of the Nuclear Ban”, *Global Change, Peace & Security* 30, no. 2 (2018).

102 Sophie Baker, “Dutch Pension Fund ABP to Divest Tobacco, Nuclear Weapons Investments”, *Pension & Investments* (11 January 2018). <http://www.pionline.com/article/20180111/ONLINE/180119965/dutch-pension-fund-abp-to-divest-tobacco-nuclear-weapons-investments>.

103 See e.g. Swiss Federal Department of Foreign Affairs, “Report of the Working Group to analyse the Treaty on the Prohibition of Nuclear Weapons” (30 June 2018).

104 See New Zealand, statement to the 2nd Preparatory Committee for the 2020 NPT Review Conference (23 April 2018). http://reachingcriticalwill.org/images/documents/Disarmament-fora/npt/prepcom18/statements/23April_NewZealand.pdf.

5.2 The TPNW and customary international law

International law is generally assumed to rest on the principle of state sovereignty; international legal rules are binding only on states that accept them. Consent is given through ratification of or accession to international treaties, but may also be expressed through customary law. According to the Statute of the ICJ, the sources of international law are not only “international conventions”, but also “international custom, as evidence of a general practice accepted as law” and “the general principles of law recognized by civilized nations”.¹⁰⁵ The emergence of customary law demands, first, that the emerging norm is the “general practice” and, second, that the norm is “accepted as law” (*opinio juris*). For a customary norm to emerge, then, states must adhere to it in the belief “that this practice is rendered obligatory by the existence of a rule of law requiring it.”¹⁰⁶ The exception to this rule is “peremptory” norms, such as the prohibition against torture. Such norms bind all states irrespective of their individual views and practices.

Certain nuclear-armed states were quick to declare their view that the TPNW did not codify an emerging customary norm against the possession of nuclear weapons. On the day of the TPNW’s adoption, France, the United Kingdom, and the United States issued a joint statement:

We do not intend to sign, ratify or ever become party to it [the TPNW]. Therefore, there will be no change in the legal obligations on our countries with respect to nuclear weapons. For example, we would not accept any claim that this treaty reflects or in any way contributes to the development of customary international law.¹⁰⁷

This intervention by three nuclear-armed states should be read as invoking the “persistent objector” rule. There have been many cases before the ICJ on issues concerning the development of, and degree to which “objecting” states may be bound by, customary law. Regardless of how the persistent objector rule is interpreted, however, the fact that the nuclear-armed states feel obliged to denounce the existence of a customary norm against the use and possession of nuclear weapons is, if nothing else, a testament to the relevance of the TPNW. It would have been pointless to declare the non-existence of such a customary norm if it were obvious to everyone that the TPNW could not have an impact on how states interpret the legality of nuclear weapons.

It is not out of the question that a customary norm against the possession of nuclear weapons could emerge in the future, even in the near future, but it will hardly be legally binding on the states that do not accept it. And it should also be stressed that the TPNW was not negotiated in an attempt to place legal obligations on states that did not want to become parties to it. The

¹⁰⁵ Statute of the International Court of Justice (enacted 26 June 1945, in force 24 October 1945), Article 38.

¹⁰⁶ ICJ, *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (Judgement of 20 February 1969), para. 77.

¹⁰⁷ United States, statement to the UNGA First Committee (12 October 2017).

The fact that the nuclear-armed states feel obliged to denounce the existence of a customary norm against the use and possession of nuclear weapons is a testament to the relevance of the TPNW

treaty was conceived of and designed primarily as an instrument that would clarify IHL and other international law pertaining to nuclear weapons, and that could generate normative pressure, rather than with a view to establishing customary international law. Consequently, the success of the TPNW is not contingent on the development of such customary rules.

6 Conclusion

The debate over the merits of the TPNW is multifaceted and at times difficult to navigate. In this paper, we have aimed to present a structured overview of the main objections raised by critics, and the responses given by TPNW supporters. We have identified four main categories of objections against the new treaty, relating to (1) process, (2) substance, (3) implications, and (4) relevance. First, objections raised against the TPNW negotiation process – for instance that the process did not include the nuclear-armed states or that it was not negotiated with a consensus requirement – are generally not very convincing. The process was open to all UN member states, and the rules of procedure followed the standard formula for negotiation of multilateral treaties, as codified by the Vienna Convention on the Law of Treaties. Second, objections raised about the substance of the treaty – for instance that the verification provisions are non-existent or that the TPNW legally undermines the NPT – also appear largely misplaced. It should be stressed, however, that a number of TPNW supporters share the view that the safeguards provisions of the treaty could and should have been even stronger. Nevertheless, the claims made by certain critics that the TPNW weakens the international standard for non-proliferation verification is inaccurate.

The third category of objections, concerning the implications of the TPNW, reveals a deeper divergence of views. Critics are profoundly opposed to any measure that could undermine the legitimacy of nuclear deterrence and express concern about the effect the TPNW could have on strategic stability. At the heart of this apprehension is a fear of upsetting the status quo, which TPNW-sceptics credit with having kept the peace in “Europe and North Asia for over 70 years.”¹⁰⁸ In this view, nuclear disarmament must be pursued without upsetting existing security relationships and while preserving, to the extent possible, the current strategic balance. TPNW-supporters are not blind to concerns about strategic stability and the balance of power, and may even submit that upsetting the status quo entails an element of uncertainty, but maintain that nuclear disarmament is unlikely to succeed as long as nuclear weapons are framed as useful, legitimate, and even status-enhancing objects.¹⁰⁹ None of the states defined as “nuclear-weapon states” by the NPT has taken substantive steps aimed at phasing out nuclear deterrence as a security doctrine, let alone given up its nuclear weapons. States under “nuclear umbrellas” equally seem disinclined to push for such steps. The quantitative reductions in warhead numbers that have been carried out over the last several decades are welcome, but do not fulfil the requirements of Article VI of the NPT. The continued existence of nuclear weapons perpetuates an immediate risk of catastrophic nuclear war.

The fourth category of objections concerns arguments about the relevance of the TPNW. Critics have contended that the TPNW will not make a difference and that it will not create international customary law. History will be the judge of these hypotheses. But it is at least interesting

¹⁰⁸ Ibid.

¹⁰⁹ See e.g. Ritchie, “The real ‘problem’ with a ban treaty?”.

to note the contradiction between the claim that the TPNW will not make a difference and the claim that the TPNW will upend the international order. It is also interesting to note that certain states have felt the need to stress that the TPNW does not create international customary law. It would have been pointless to declare the non-existence of a customary norm if it were obvious to everyone that the TPNW could not have an impact on how states interpret the legality of nuclear weapons.

Having reviewed a broad range of criticisms of the TPNW, we find that most of the objections – in particular those pertaining to procedural and substantive issues – are relatively easy to counter. So much so, in fact, that at times the objections appear more of a sideshow, a diversion from the main issue, rather than actual criticisms of the TPNW. Instead of clarifying the debate, such objections end up masking the most important political fault line of the debate, namely a profound disagreement over the acceptability of nuclear weapons and the legitimacy of nuclear deterrence.

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