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## THE NUCLEAR BAN TREATY AND HUMANITARIAN STRATEGIES TO ELIMINATE NUCLEAR THREATS

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### **Introduction**

On 7 July 2017, the Treaty on the Prohibition of Nuclear Weapons (TPNW) was overwhelmingly adopted by the UN General Assembly.<sup>1</sup> It was the culmination of years of campaigning in which nuclear weapons were reframed as a collective humanitarian problem that requires prohibition and elimination, rather than a national military defence asset that needs to be limited and managed. As the Chair of the negotiations, Elayne Whyte Gomez, put the final text forward for adoption on the last day, consensus was denied. The ensuing vote was 122 in favour with one against (the Netherlands) and one abstention (Singapore). This was much higher than opponents had expected, but on a par with the UN General Assembly resolutions and sign-on statements at successive review meetings of the Non-Proliferation Treaty (NPT) since 2012, which had built up progressive support for the nuclear ban treaty as a humanitarian imperative.<sup>2</sup>

The numbers do not tell the whole story, of course. A significant group of nuclear-armed and dependent states<sup>3</sup> had chosen to boycott the negotiations and vote, and so were not counted. Their objections largely rested on claims that their nuclear interests – and extended uses of nuclear weapons – were not being catered for; and that the proposed treaty would undermine strategic stability, nuclear deterrence and the NPT, in which special status had been conferred on China, France, Russia, the UK and the USA. Other nuclear-armed states also failed to show up for the negotiations. Some expressed reservations about the ban, but unlike the NATO (North Atlantic Treaty Organization) nuclear-armed governments, did not publicly announce that they did ‘not intend to sign, ratify or ever become party’ to the new Treaty.<sup>4</sup>

Despite such opposition, the TPNW is entering into international law. It was accomplished through a strategy that recognized, used and promoted the humanitarian-

security shifts that have been taking place in international relations and diplomacy since the 1990s.<sup>5</sup> Frustration with the lack of disarmament progress was a factor,<sup>6</sup> but this does not explain how the nuclear ban approach took root. During the period 2006–10, several other initiatives were also being launched, from the ‘world free of nuclear weapons’ calls by senior US nuclear policymakers to Global Zero.<sup>7</sup> Lauded and richly funded at the time, these sought to interest the nuclear-armed states in incremental steps that were billed as being consistent with nuclear deterrence and strategic stability. Few, if any, of their steps have been implemented.

The International Campaign to Abolish Nuclear Weapons (ICAN) took a different approach, challenging the assumptions and policies of the militarist-patriarchal paradigm, in which nuclear weapons continued to be highly valued for deterrence, status and power projection. Through numerous studies, a series of international ‘humanitarian impact’ conferences in Oslo, Nayarit, and Vienna, and two UN Open-Ended Working Groups from 2013–2016, ICAN worked with a core group of governments to present up-to-date facts, testimonies from survivors and academic studies. These were compelling means to raise awareness. As ICAN’s network grew, so did the number of governments that became convinced that banning nuclear weapons is in the fundamental security interests of their citizens, and within their legal and diplomatic power to accomplish. ICAN was subsequently honoured with the Nobel Peace Prize for its work ‘to draw attention to the catastrophic humanitarian consequences of any use of nuclear weapons and for its ground-breaking efforts to achieve a treaty-based prohibition of such weapons’.<sup>8</sup>

The humanitarian framing of nuclear weapons changed the game from arms management, dominated by the club of weapons possessors, to abolition, in which nations and peoples collectively exerted their will to prevent nuclear weapons use and war. The ban treaty was the product of a many-layered process and hard-fought negotiations. It has been criticized as inadequate for not including all the elements of the model nuclear weapons convention conceived in the 1990s,<sup>9</sup> or some other ideal instrument that would provide verification guarantees and meet the preconditions currently required by states that believe that nuclear weapons are ‘deterrents’ and should not be given up as long as someone else possesses them. It has been dismissed as ‘decreeing disarmament’, and even portrayed as ‘dangerous’.<sup>10</sup>

The ban treaty was never envisaged as the total answer to nuclear problems, let alone broader security dilemmas. From the beginning, it was strategized as a practical and transformative next step towards overcoming the obstacles to disarmament. Instead of treating nuclear armaments as high value assets that would remain attractive and powerful – as long as they were in ‘safe hands’ – facts and evidence were marshalled to expose the human consequences. As noted by Hiroshima survivor, Setsuko Thurlow: ‘No longer shall their abstract theories mask the genocidal reality of their practices.’<sup>11</sup> This was necessary to move from the helplessness many associated with ‘we can’t uninvent nuclear weapons’ to the recognition that these are weapons of terror and genocide that must be ‘stigmatized, banned and eliminated’.<sup>12</sup> The process of outlawing inhumane weapons then makes it possible for ‘compliance, verification and enforcement rules [to] ... be effectively applied’.<sup>13</sup> It

is no coincidence that ICAN's network also comprises many organizations with expertise in interlinked humanitarian campaigns, such as tackling climate destruction and other systems of violence, greed and war. These are connected conversations in the United Nations and across the world.

It is also no coincidence that economic and military rivalries among various nuclear-armed states are implicated in most, if not all, of today's salient threats to international security. Recent nuclear sabre-rattling has been accompanied by increased threats to the collective, international order governed by the rule of law that has been relied on, flaws notwithstanding, for many decades. Far from instruments of strategic stability, nuclear weapons are legacy problems that weaken collective institutions and amplify crises and instability. They also impede efforts to rethink security and enable governments and civil society to work more effectively together to address other life-threatening disasters. Today we are seeing multilateral agreements and institutions being undermined by nuclear possessors and others. That may seem a reason to portray the nuclear ban as pointless. Far from it: deteriorating relations and irresponsible leaders – combined with nuclear, biological and emerging cyber and nano technologies – point to the urgent necessity of ending reliance on nuclear weapons – and with them, the economies and aggression-based politics that hold humanity hostage. This Treaty, and the further steps required to make it work, will provide a pathway forward, which is even more important at times of great global crisis. It should not be surprising that after being opened for signature on 20 September by UN Secretary-General António Guterres, the TPNW quickly passed the entry-into-force minimum of 50 signatures. Over one-third of the required ratifications were achieved in the first year, and ICAN is working hard to bring the ban treaty into force by 2020. When that happens, campaigning will redouble on bringing states that are currently nuclear-armed and dependent into the Treaty, with strategies to accomplish three intersecting global zeros: (1) zero nuclear weapons use; (2) zero nuclear weapons roles; and (3) zero nuclear arsenals.

This chapter provides a brief overview of the logic and rationale underpinning the civil society and diplomatic campaigns that brought the nuclear ban into being, and considers the TPNW in the context of the framers' objectives and choices, with some consideration of how it may be used to reduce nuclear dangers and facilitate greater security and disarmament.

### **From nuclear club dominance to humanitarian prohibition**

Treaties are made at the interface of necessity, desirability, feasibility and achievability, often characterized as 'when the time is ripe' or 'when there is sufficient political will'. These are not moments that emerge by magic. They are opportunities constructed out of exogenous conditions, driven by analysis and political objectives, and achieved through effective strategies and persistent work, involving intersecting governmental, institutional and civil society actors working at national and transnational levels. The issue of power is an important factor, but does not necessarily play out as analysts steeped in 'realist' theories and assumptions expect.

The ban treaty was achieved by changing the debate, including how security and power are perceived and exercised, thereby opening up options and strategies that had been defined as impossible, unachievable or pointless. Humanitarian strategies are underscored by the recognition that 'attributive power', derived from military-industrial resources, is not the primary determinant for positive security outcomes. While still important – not least because leaders wielding their attributive military-industrial power unwisely can destroy our shared world and resources through profligacy and war – such power is seldom decisive.

Much of international relations theory revolves around states' interests, options and preferences. But governments, not states, are the real actors, and need to be understood as representative institutions 'subject to capture and recapture, construction and reconstruction' by social and political actors, through elections, coups, or other forms of governmental change.<sup>14</sup> National security, economic and political interests are not fixed, even if they may appear to be relatively static over some historic periods. They are shaped, as noted by President Eisenhower, when he warned about the 'military-industrial complex' at the end of the 1950s. His analysis was perceptive, but should have included the bureaucratic-academic networks that flourished on the rich pickings of military-industrial power, combined with nuclear fears and the strategic balance of terror, spawned by the Cold War. Their job was to justify nuclear possession, military modernization and high levels of defence spending by sanitizing nuclear weapons as deterrents, portraying them as bringing stability and security in an uncertain world. The US-rooted 'military-industrial-bureaucratic-academic' (MIBA) establishments spread their theories and perspectives around the world, shaping academic discourse as well as military-industrial practices in most, if not all, of the nuclear-armed states and their spheres of influence. As well as benefitting vested interests that spanned from proliferation and weapons production to the management of arsenals, they also, intentionally or through groupthink, served to brand disarmament as an ideal to strive for – but never achieve. Revolving doors between military-industrial professionals and the academic, bureaucratic and political spheres in key countries amplified the groupthink that has dominated security thinking over several generations.

In formulating the ban, ICAN's strategy was rooted in three contributory streams: feminist theories of nonviolent change to disarm the patriarchy,<sup>15</sup> lessons from the Oslo and Ottawa approaches that led to the banning of landmines and cluster munitions in 1997 and 2008 respectively,<sup>16</sup> and updated studies about the risks and catastrophic consequences of nuclear explosions, including global famine caused by 'nuclear winter' climate effects.<sup>17</sup> Reframing nuclear disarmament in humanitarian rather than national security terms radically changed the context and options for change. Instead of preconditions, vetoes and linear steps based on numbers and processes, the humanitarian approach focused on human security requirements. Getting a nuclear ban treaty required strategies that recognized how power and interests could be shaped, strengthened or weakened through domestic and transnational alliances that challenged status quo narratives and assumptions. Communications strategies highlighted shared priorities and dangers, making it possible to

build alliances to overcome the political and diplomatic obstacles. Structural and institutional impediments were bypassed in the nuclear ban process by piloting the process into the UN General Assembly, with rules of procedure that fulfilled ICAN's strategic requirement that the negotiating forum must be open to all states and blockable by none.<sup>18</sup>

Unlike arms control, which is predicated on responsible behaviour by nuclear-armed governments, who determine what steps and timing they are willing to engage in, the humanitarian disarmament approach 'confers responsibilities and obligations on everyone'.<sup>19</sup> In other words, the perceived defence (military-industrial) interests of nuclear possessors are no more relevant than the security interests of people who would be harmed if nuclear weapons were detonated by intention or accident. The transnational harm that can be caused by the weapons of one or more states provided legitimate grounds for any nation to lead and participate in banning inhumane weapons for everyone.<sup>20</sup> These factors underpinned the logic that made it possible – and necessary – to persuade the majority of UN Member States to undertake negotiations. Their imperative was the security of their own people in the face of an existential threat from the weapons held by a handful of nuclear states. This has not yet been fully understood by those who view the TPNW as invalid because certain states chose not to participate.

As threats and the security environment are not static, diplomatic solutions must be dynamic and iterative. To achieve the TPNW, this meant bypassing and challenging approaches that encourage zero sum tactics and are prone to manipulation by military-industrial powers seeking national advantage. The nuclear ban process was successful because it was conducted through 'integrative diplomacy', where participants identified differences (perceived needs, interests, priorities, etc.) and sought collaborative solutions. Instead of fighting for power, resources or security in a bounded, predefined framework, integrative diplomacy focuses on how 'to expand the options and change perceptions of the zones of possible agreement, building support as the disarmament process develops'.<sup>21</sup> This is a positive sum process that applies not only to the negotiations, but to sustaining and building on the outcomes. Integrative outcomes are also associated with greater gender balance. Recent research has demonstrated that the substantial inclusion of women in both government delegations and as civil society participants increases the effectiveness and sustainability of negotiated outcomes affecting peace and security.<sup>22</sup> The nuclear ban reflects such research, and if taken forward with heightened gender awareness, it helps to lay the groundwork for more effective global security, as well as disarmament implementation.

### **The TPNW: context and compromises**

The TPNW is rooted in the humanitarian imperative to prevent nuclear use, war and proliferation. It establishes the principles and conditions for nuclear weapons abolition and elimination, starting with clear prohibitions applicable to all, and a set of practical, adaptable enforcement provisions, intended to equip it with the

capacity to contribute to security, grow, and continue to be effective into the future. It provides two practical pathways for nuclear-armed and umbrella states to comply and join, requiring that they end reliance on nuclear activities and eliminate these weapons, programmes and policies. Not just about the NPT5, the Treaty is intended to build on the NPT obligations that they have already accepted, while also engaging the four nuclear-armed countries outside the NPT in processes and institutions that will bring them into the disarmament and non-proliferation regime as a whole. It was therefore framed with prohibitions and obligations that are universally applicable, and structured to address different levels of nuclear weapons programmes and dependencies without conferring special status or privileges on anyone.

As the TPNW gets embedded in international law, ideas are developing for how it may be helpful for progress in some of the most intractable regional challenges, where nuclear weapons are perhaps most at risk of being used. In many ways, the NPT has been convenient for India, Pakistan, Israel and North Korea. The TPNW removes that convenience, and may therefore help to halt the nuclear arms race between India and Pakistan, open up new approaches for the long-sought Weapons of Mass Destruction-free zone in the Middle East, and facilitate the denuclearization of the Korean Peninsula. Risk reduction steps such as dealerting<sup>23</sup> are also long overdue. These apply mainly to Britain, France, Russia and the United States, which have insisted on keeping some of their forces on high alert, claiming that dealerting would undermine nuclear deterrence and stability. Advocates of dealerting and no first use/sole purpose initiatives have had little success convincing the relevant nuclear-armed governments to implement such steps. By explicitly confronting the reluctant governments with the risks and consequences of launch on warning and nuclear deterrence failures, the TPNW is intended to create the conditions for more interim steps like these to be taken now. As noted by the International Committee of the Red Cross, however, care will need to be taken not to create legal contradictions and confusion with approaches that endorse second strike nuclear use or other activities banned by the TPNW.<sup>24</sup>

The Treaty text does not provide detailed specifications for verification and enforcement. This has been criticized, but needs to be better understood. Traditional arms control, conducted in accordance with state-centric, distributive diplomacy, often embedded prevailing political and technical conditions in legal concrete. Though understandable, this can restrict a treaty's effectiveness over time. By contrast, TPNW framers considered it important to equip the Treaty to deal not only with today's complex, networked world of rapidly evolving technologies, but to adapt over time and therefore increase its security effectiveness for the foreseeable future.

### *Peace and security objectives*

The Treaty's overall purpose is explained in the preamble as the 'realization of the purposes and principles of the Charter of the United Nations' and 'the achievement and maintenance of a world free of nuclear weapons, including the irreversible,

verifiable and transparent elimination of nuclear weapons'.<sup>25</sup> These clearly recognize collective security responsibilities and the need to develop appropriate verification and enforcement institutions and technologies.

The preamble also reflects the humanitarian, feminist, disarmament and security imperatives that reframed the discourse on nuclear weapons, built ICAN and persuaded the majority of states to negotiate the Treaty.<sup>26</sup> It recognizes that nuclear use and testing have caused unacceptable suffering to the survivors (*hibakusha*) and downwinders, and that nuclear weapon activities have had 'disproportionate impact' on indigenous peoples. Victims' rights are enshrined, together with the requirement to take feasible steps to assist and give technical, material and financial support to anyone 'affected by nuclear weapons use or testing', including through environmental remediation. The particular harm caused by nuclear technologies and radiation to women and girls is recognized as a biological fact. The importance of peace education and women's full participation in disarmament and peace processes is underscored, along with the 'role of public conscience in the furthering of the principles of humanity'. In these ways, the TPNW acknowledges that it has to work for multiple stakeholders and take human and environmental security forward, not only through disarmament but through positive steps to build security and peace and diminish militarism and war.

### *Preventing nuclear use, threats and explosions*

Article I, which prohibits – with no exceptions – the major activities that make it possible for anyone to acquire, deploy and use nuclear weapons, is worth showing verbatim, as it demonstrates the heart and purpose of the TPNW so clearly:

#### Article 1

##### Prohibitions

1 Each State Party undertakes never under any circumstances to:

- (a) Develop, test, produce, manufacture, otherwise acquire, possess or stockpile nuclear weapons or other nuclear explosive devices;
- (b) Transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly or indirectly;
- (c) Receive the transfer of or control over nuclear weapons or other nuclear explosive devices directly or indirectly;
- (d) Use or threaten to use nuclear weapons or other nuclear explosive devices;
- (e) Assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Treaty;
- (f) Seek or receive any assistance, in any way, from anyone to engage in any activity prohibited to a State Party under this Treaty;

- (g) Allow any stationing, installation or deployment of any nuclear weapons or other nuclear explosive devices in its territory or at any place under its jurisdiction or control.

This text echoes the NPT's prohibitions on transferring and receiving nuclear weapons and explosive devices, but does not reproduce the ambiguities that were exploited to justify nuclear sharing. Over many years, NATO's nuclear sharing arrangements have been regularly criticized at NPT review meetings, with many Parties arguing that they violate the Treaty.<sup>27</sup> NATO members have, somewhat defensively, refuted these accusations, claiming that their nuclear sharing arrangements predated the NPT, that nuclear exercises are responsible training because control of the weapons may be transferred legally for use in time of war.<sup>28</sup> Under the TPNW, nuclear weapons sharing is ruled out, as actions to 'assist, encourage or induce' anyone to commit prohibited acts are banned. States parties may not allow 'stationing, installation or deployment' of nuclear weapons anywhere under their jurisdiction or control. These provisions underlie accusations that by undermining nuclear deterrence, the TPNW is (or could be) dangerous.

The conferences and meetings leading to the ban treaty indeed highlighted the fundamental incompatibility between the doctrines, practices and requirements of nuclear deterrence and any meaningful progress on nuclear disarmament.<sup>29</sup> Logically, then, questioning the current calculus based on nuclear deterrence is essential in order for nuclear-dependent governments to agree less risky and more sustainable security arrangements without nuclear weapons. Far from undermining security, removing nuclear weapons justifications is intended to strengthen the other security – and deterrence – tools available to all governments. NATO's debates on tailored deterrence in the early 1990s began that process, which was not allowed to get very far by nuclear advocates in the American, British and French establishments. At stake is not deterrence per se, but whether the possession and use – and nuclear-threat-based doctrines – are necessary, desirable or counter-productive for war prevention and security in today's world of complex security challenges, new technologies and risks.

History teaches that miscommunications, miscalculations and bad luck can cause deterrence to fail.<sup>30</sup> Studies on nuclear risks and consequences demonstrated that even states that regarded themselves as safe hands for nuclear weapons have experienced serious nuclear near misses and accidents. Such studies contributed to many governments' decisions to ban nuclear weapons and delegitimize, marginalize and remove the value and justifications attached to nuclear forces and policies. An important question for nuclear deterrence practitioners is whether they believe that the benefits of nuclear deterrence outweigh the risks of its failure. If not, then national security requires that they denuclearize their deterrence postures and alliances. As noted by former nuclear policy-makers, whatever claims were made for nuclear deterrence in the past have far less (if any) credibility in today's very different and more complex international relations.<sup>31</sup> The disagreements at the heart of NATO and other nuclear alliances are essentially about future projections, security,

rights, law and force in international relations. Public opinion as well as governments are divided on these issues, which come to a head over the looming climate crisis as well as nuclear weapons. The TPNW did not create these dilemmas, and evoking Alliance solidarity to thwart disarmament pressures ensuing from the ban treaty will only ever be a temporary bandaid, soon to come unstuck.<sup>32</sup> Rather than treating the nuclear ban as dangerous, it would be smarter to engage constructively on what steps can be taken to denuclearize security thinking and policies across the board, which would help with cooperative threat reduction, stronger controls on missiles and other delivery means, and taking dangerous nuclear materials out of circulation.

The decision to list testing among the banned activities was initially controversial, mainly because some nuclear-armed states had raised the spectre that the ban treaty was set to undermine existing treaties such as the Comprehensive Test Ban Treaty (CTBT) and NPT. A solution was found that would close any loopholes and meet the humanitarian imperative by including 'testing' among the list of explicitly prohibited activities in Article I, while also clearly stating support for the CTBT 'and its verification regime as a core element of the nuclear disarmament and non-proliferation regimes'.<sup>33</sup>

Prohibitions on the use and threatening to use nuclear weapons are at the core of the Treaty's purpose. It is anticipated that there will be uncertainty at first about what activities constitute 'threatening to use', and these may need to be tested in courts. Nonetheless, as the Treaty enters into force, it will become much harder for any governments to use the 'extreme circumstance of self-defence' justification that several adopted after the divided opinion of the International Court of Justice in 1996.<sup>34</sup> Together with the provisions on victim assistance and environmental remediation (Article 6) and international cooperation and assistance (Article 7), the TPNW's unequivocal prohibitions extend and universalize the 'legally binding security assurances' objectives that have long been requested, especially by members of the Non-Aligned Movement (NAM). Calls for 'negative' and 'positive' assurances to be given by the NPT5 have languished on the diplomatic agendas of the NPT and Conference on Disarmament since 1968, with progress made only through the establishment of regional nuclear weapon-free zones. The TPNW reframes and delivers legally binding obligations to prevent nuclear attacks and help and support anyone subjected to nuclear threats or attacks.

In Article 5 (national implementation), states are required to enact national legislation, making its provisions apply to 'persons' (which legally covers individuals, organizations and companies) under their jurisdiction. Article 12 (universality) takes an innovative approach by making it a responsibility of all states parties to encourage others to join the TPNW, hammering home the collective responsibilities they all share for compliance and implementation. In addition, by banning nuclear weapons, the TPNW makes it possible for the International Criminal Court (ICC) to recognize that any use or threatened use of nuclear weapons constitutes a crime against humanity and is a war crime.<sup>35</sup> Mexico and others proposed this when the Rome Statute was negotiated, but their initiative failed because unlike the treaties banning chemical and biological weapons, the NPT did not prohibit nuclear

weapons or their use. Many states signing up to the TPNW are also ICC signatories. They could start the process to have the Rome Statute amended even before the TPNW enters into force.<sup>36</sup>

ICC recognition that using and threatening to use nuclear weapons are criminal acts would be important for many reasons. Charges and penalties fall on individuals; cases, including preparing to commit a humanitarian crime, may be made from evidence of actions such as acquiring, producing, deploying, threatening, deciding on and authorizing nuclear weapons to be used. Relatively minor cogs in chains of nuclear production and decision-making would need to take into account that they could face criminal proceedings even before nuclear weapons are fired. Many people and institutions are risk-averse, especially if the consequences can fall on them personally. On this basis, campaigns such as 'Don't Bank on the Bomb' have already persuaded some banks to stop funding companies involved with activities that are prohibited under the TPNW.<sup>37</sup> Shifting the legal status of deploying and preparing to use nuclear weapons, as well as strengthening the expectation that individuals as well as institutions would be prosecuted if they survive, should act as potent deterrents. At the very least, people may decide it is better to steer clear, divest (in the case of weapons companies and financial institutions), and if necessary blow the whistle on prohibited activities being carried out by their employers, colleagues, or political-military leaders, state or non-state.

In relation to this, it will be very important for the future functioning of international law and security for all efforts to be made to collect relevant evidence and follow through on prosecuting the perpetrators of recent chemical weapons attacks in Syria and the UK. Holding perpetrators (including decision-makers) accountable if they commit and facilitate such crimes will multiply the uncertainties and dangers for anyone contemplating the use of nuclear as well as other banned weapons. It is early days, but incorporating the TPNW's provisions into international and national laws will help open up new space for more effective regional and international action to prevent nuclear terrorism, proliferation, threats and use, thereby strengthening global security, including non-nuclear applications of deterrence consistent with international law.

Also noteworthy is the fact that the TPNW's core prohibitions encompass the production and stockpiling of fissile materials for nuclear weapons. This should render moot the conflict that has stymied diplomatic progress for over two decades on a fissile materials treaty, which centred on whether to prohibit only 'future production' or also deal with 'past production', that is, stockpiles. Both are covered in the TPNW, as befits its disarmament purpose. As the Treaty enters into force and gains normative, legal and diplomatic stature, it will increasingly remove the excuses and reframe the incentives to move forward. India and Pakistan could be encouraged to enter into a bilateral moratorium on fissile materials production, paving the way for negotiations on a fissile materials ban encompassing all the nuclear-armed states. The CD's 'Shannon Mandate' may be dead, but if this important objective is framed by the humanitarian, non-discriminatory prohibitions

and obligations of the TPNW, a different kind of fissile materials negotiations and agreement may now become achievable.

### *Adaptable pathways for elimination and verification*

Treaties, however well verified and enforced, do not provide 100 per cent security guarantees unless they are fully implemented and all the weapons are irreversibly destroyed. Preventing nuclear use and war requires not only prohibitions, but the 'total elimination of nuclear weapons'. Articles 2–5 of the Treaty set out the basic pathways for this to be accomplished. Unlike the NPT, the TPNW does not confer any special status on nuclear-armed states, but it takes into account that their needs and situations may be different. After Articles 2 and 3 on 'declarations' and 'safeguards', Article 4 outlines two options by which states with current nuclear policies and programmes can implement and join the Treaty. During the negotiations these were characterized as 'destroy and join' and 'join and destroy'.

'Destroy and join' is modelled on South Africa's experience of getting rid of its nuclear programme and joining the NPT in 1992. This option allows states that have nuclear weapons, facilities and arrangements to organize their own steps to withdraw, dismantle, and eliminate those (as appropriate). By the end, they are required to call in 'the competent international authority or authorities' to verify that they have been 'denuclearized', and are therefore in a position to sign, accede to and comply with the Treaty. 'Join and destroy' is for states that want to sign the Treaty at an earlier stage and commit to its prohibitions and obligations while they still have some nuclear capabilities. They are required to undertake the necessary steps and negotiations with the competent international authority/ies and Treaty Parties to agree a 'legally binding, time-bound plan for the verified and irreversible elimination' of their nuclear devices and relevant capabilities on their territory or under their control and jurisdiction 'as soon as possible'. The immediate removal of nuclear devices from operational status is made an explicit and early requirement (Article 4 (2)), with particular significance for reducing nuclear dangers and preventing nuclear use.

As noted earlier, some have criticized the TPNW for not containing detailed provisions on all aspects of implementing and verifying the Treaty. Such critics have failed to take into account the diplomatic histories and lessons from earlier treaties, in which verification was often used as a political football to derail agreements or provide mechanisms for surveillance, intelligence gathering or even new markets for military-industrial technologies that may not have been what the agreements really needed. After theoretical but remote cheating scenarios scuppered efforts to achieve a CTBT in the 1950s–1980s, several treaties were concluded with little or no multilateral verification. This was not because verification was considered unnecessary, but because the dominant states were confident that they could monitor any rivals, while protecting themselves from the burdens of institutionalized verification. The ending of the Cold War made it possible for the USA and Russia to come to mutual agreement on intrusive verification provisions

that they extended to others through multilateral provisions in the CWC and CTBT, which both involved detailed and lengthy negotiations on the implementing institutions, verification, and decision-making requirements. Applauded at the time, these were positive in many ways, but also had the unintended consequence of locking into the respective texts some technologies, procedures and timelines that have become problematic over time.

Treaty credibility can be eroded if states use the letter of the text to resist new technologies or procedures that would benefit implementation and the advance of humanitarian, environmental or other best practices, consistent with the Treaty purposes and objectives.<sup>38</sup> The TPNW framers understood this, as well as recognizing that lengthy, technical negotiations were not feasible, due to factors such as the non-participation by nuclear states and the short time allocation for the UN negotiations in 2017. Comprehensiveness is important in specifying prohibited activities, to avoid lawyers arguing that whatever is not explicitly banned is legally permissible. The opposite may be truer for verification and organizational provisions. Overloading treaties with too much technical and procedural detail can actually make them more vulnerable to legalistic arguments, loopholes and compliance challenges.

Another way in which TPNW framers learned from other treaties was in the strategic decision to enable entry into force to be achieved 90 days after the Treaty is signed and acceded to or ratified by 50 UN Member States (Article 15). This is more than required for the NPT (40 plus three depositary states), but does not create an unreasonably high barrier, such as weakened the CTBT, which has still not entered into force, despite widespread support. TPNW negotiators were determined not to replicate such a mistake. Drawing on analyses of many different kinds of treaties, it is clear that enabling early entry into force confers credibility and facilitates treaties to become embedded in law more quickly. This in turn strengthens the normative, legal and political incentives and pressures (domestic as well as international) for remaining states to join, but without creating coercive mechanisms that can be used in domestic debates to justify permanent rejection of the agreements, as happened with the CTBT.<sup>39</sup>

Like the TPNW, the NPT was concluded with a pared-down legal structure and enabled entry into force to be concluded in two years. Over time, the regime has been augmented by instruments such as the Additional Protocol to the safeguards agreements with the International Atomic Energy Agency (IAEA), nuclear supplier constraints, UN Security Council resolutions such as 1540 (addressing non-state threats), and President Obama's nuclear security summits. Because the NPT was in legal force from 1970, such reinforcements enabled it to build credibility over time and practice, providing incentives and a framework for states with nuclear ambitions and capabilities to join. In the early 1990s, for example, China and France acceded as nuclear weapon states, while several other important states divested themselves of nuclear weapons and capabilities and joined as non-nuclear-weapon states, notably South Africa, Brazil, Kazakhstan, Belarus and Ukraine. These were political decisions, facilitated by the legal stature of the NPT. The NPT's fate and relevance would have been very

different if its framers had created high entry into force, verification and institutional barriers. Similar lessons can be drawn from a spectrum of treaties, not only in the field of disarmament and security.

Far from ignoring verification and implementation challenges, then, the TPNW is structured to evolve technically and institutionally, with the ability to create additional agreements and tools for compliance, verification and enforcement, as appropriate, without requiring text amendments. The responsibility for decision-making lies with meetings of States Parties, together with the competent international authority/ies, as designated (Article 4). This allows organizations such as the IAEA, the Comprehensive Test Ban Treaty Organisation (CTBTO), the Organisation for the Prohibition of Chemical Weapons (OPCW) and others to be involved in monitoring and verifying implementation, and also leaves open options for states parties to co-opt or construct other institutions with relevant expertise, and, if deemed necessary, to establish a TPNW-specific commission, secretariat or some other form of implementing organization in the future.

Consistent with its unlimited duration, the framers wanted to equip the ban treaty with the capacity to develop and adapt, to be credible and effective for the foreseeable future. Many also argued that on humanitarian grounds, there should be no possibility of withdrawing from the Treaty. They were defeated by the pragmatic argument that omitting a withdrawal clause could create too high a barrier for nuclear-armed states to join. Accordingly – but controversially – Article 17 allows for withdrawal 12 months after giving notice describing ‘extraordinary events related to the subject matter of the Treaty [that] have jeopardized the supreme interests’ of a country. Though longer periods were proposed, with the example of North Korea’s NPT withdrawal in mind, it was hoped 12 months would at least provide some time for TPNW Parties to address the issues and prevent a country from carrying through its notice to withdraw.

Financial and political considerations may currently constrain thinking on what is viable in terms of formal enforcement, verification and monitoring at this point. Importantly, the Treaty text keeps the options open, so that they can be developed when states parties and the political, security and economic conditions become ready. Those who criticize this future-proofing adaptability as a weakness fail to understand the dynamic characteristics of nuclear risks, proliferation and unpredictability inherent in security challenges. As Patricia Lewis argues in Chapter 4 in this volume, nuclear weapons are a complex ‘wicked problem’. It is prudent, therefore, to ensure that the legal instruments to ban, eliminate and provide monitoring confidence are designed with enough adaptability to increase their effectiveness and capabilities over time.

### ***Relationship with the NPT***

Since 2010, efforts to ban nuclear weapons have faced persistent claims from NATO states and associated MIBA establishments that a ban treaty undermines the NPT. Among the two-thirds of NPT Parties that had initiated and negotiated the TPNW, these claims – which appeared on NATO members’ talking points from

2012 onwards – were dismissed as politically motivated scaremongering. Despite regarding the accusations as devoid of reason or credibility, many statements – too numerous to reference – in NPT, Conference on Disarmament and UN meetings spent time before, during and after the ban treaty negotiations to explain why and how the step of banning nuclear weapons relates to and helps to fulfil the obligations, objectives and purposes of the NPT.<sup>40</sup> Recalling that the humanitarian initiative was formally launched at the 2010 NPT Review Conference, some of these statements pointed to the hypocrisy of such accusations being made by the NPT5 that had reneged on most, if not all, the consensus agreements of NPT Review Conferences from 1995–2010, including the 13 Steps and other disarmament and Middle East commitments.<sup>41</sup>

Much has been written from different political perspectives about the ways in which the NPT's credibility has been eroding since it was indefinitely extended in 1995, and this is not the place to rehash those debates. Suffice it to say that such concerns fed into the TPNW from the start; the relationship between the two treaties required considerable negotiations. The final text reaffirmed commitment to the NPT in several ways, and also entailed compromises that did not please everyone. The NPT already outlaws most of the activities prohibited by the TPNW's Article I – but not for states that had conducted nuclear testing prior to 1 January 1967 and, where use and deployment are concerned, not for nuclear umbrella allies. Moreover, the major burdens of safeguards and restraint obligations fall on NPT Parties that are recognized as non-nuclear. If the differential obligations and burdens between the five nuclear haves and the rest of the world appeared politically necessary in the context of Cold War geostrategic rivalries, they are deeply problematic now. Bilateral US–Russian treaties capped some weapons and activities from the 1970s to 2011, but despite halving the numbers in their arsenals, nuclear arms racing and threats have continued. Meanwhile more states acquired nuclear weapons capabilities, despite – or rather via – the NPT, notably Article IV's nuclear energy assistance provision.

Early 1990s developments gave the IAEA the opportunity to update its 'Comprehensive Safeguards Agreement' (CSA), which had fallen behind political and technical developments. The result was the Additional Protocol, which NPT states parties were encouraged to sign up to, although the regime lacked the powers to make it mandatory.<sup>42</sup> That too has now fallen behind what is really required to prevent proliferation, and remains far from universal. Among NPT-related issues that arose during the TPNW negotiations, the Additional Protocol and the NPT's Article IV provision on 'peaceful uses of nuclear energy' were most controversial. Despite considerable support to make the Additional Protocol a requirement in the TPNW, a small number of NPT parties objected, citing the political reservations they have aired in many NPT meetings.<sup>43</sup> It was finally agreed that since the NPT would continue alongside the TPNW, there was no need for the new treaty to pronounce on the Additional Protocol one way or another. A similar argument arose over Article IV, which a significant number of NGOs and states regard as problematic, in view of the humanitarian and

proliferation risks inherent in a range of nuclear technologies that are permitted – some argue encouraged – in the NPT.

The general solution to these contested issues was Article 18, 'Relationship with other agreements'. This ensures that TPNW implementation '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 TPNW. The point is emphasized in Article 3 of the Treaty, which requires that any state without IAEA safeguards must negotiate and conclude at least CSA level safeguards within 180 days of joining the TPNW (and this must be brought into force within 18 months). All others must at the very least maintain whatever IAEA safeguards they already have in force (i.e. CSA or CSA plus Additional Protocol). This solution does not preclude further steps to strengthen safeguards. Nonetheless, it has to be admitted that there was considerable disappointment that nuclear energy was positively referenced in the preamble, and that the Additional Protocol was not positively advocated in Article 3. But that's what happens in real negotiations. When there are disagreements like these, negotiators have to find the best achievable compromise, consistent with the purposes and objectives of the Treaty (and the time and conditions available). In sum, the TPNW does not alter the current, NPT-based legal position with regard to the Additional Protocol and nuclear energy. It does, however, require nuclear-armed states to negotiate safeguards agreements with the IAEA; and it leaves open the legal possibility for the IAEA and TPNW states parties to strengthen safeguards beyond the current system, which many hope will be done in due course.

## Conclusion

The nuclear ban poses a transformative legal and political challenge to the status and operations of nuclear weapons. Despite the many attacks and constraints they faced, the negotiators achieved a strong, workable text, designed to provide realistic, adaptable tools to diminish the value attached to nuclear armaments and accelerate their elimination from policies and arsenals. Criticisms have tended to focus on what is not included. When all is said and done, however perfect a model treaty might look on paper, it is the real treaties that get negotiated and adopted into international law that matter.

Key to the ban strategy was the analysis of how the concepts and practices of power, security and diplomacy have been changing since the Cold War ended. Working with these real-world developments enabled nuclear-free governments and ICAN to raise awareness, bypass structural and political obstacles, and mobilize a sufficiently powerful majority to push for the negotiations that led to the nuclear ban. The resulting treaty has broken new ground. It has the capacity to open up space for further disarmament steps and become a strong cornerstone, along with the nonproliferation regime and international humanitarian law, on which more effective and sustainable disarmament and security can be collectively built. Nobody is under the illusion that the ban treaty will be easily enforced and

implemented, but this is the pathway that the majority of governments have chosen. Its worth will be demonstrated by its effectiveness over time.

Opponents dismiss it at their peril. As the TPNW enters into force in the next few years, they will find their nuclear behaviour constrained and their options narrowed. Many of them have to contend with defence services that are at best ambivalent about the military utility, roles and resources devoted to nuclear weapons. As civil society continues to mobilize support for the ban treaty among elected representatives and at the level of city and regional governments, TPNW opponents may be surprised at how quickly their security calculus is changed. Experience teaches that states that refuse to sign now will find themselves trying to comply with most if not all of the TPNW's provisions as the consequences of failing to do so begin to bite.

Efforts to destroy the nuclear ban will further expose which states have been using the nonproliferation regime as a cover for nuclear proliferation and modernization. Notwithstanding their rhetoric since the 1960s, the logic of their position is that nuclear weapons are good and disarmament is a hollow promise. Few governments will be willing to make this argument publicly. Genuine disarmament action is expected now, not just NPT-supporting rhetoric. Nuclear weapons are abhorred as well as feared by much of global public opinion. Multilateral disarmament is considered desirable by many military, political and business leaders in states that are currently outside the TPNW. Attempts to tinker at the edges with steps that are meant to complement nuclear deterrence have failed, leaving the world with over 14,500 nuclear weapons, many of which are deliberately kept capable of being launched on warning/short notice.

Consider the consequences of a single nuclear detonation in today's heavily armed world. Due to current policies, insecurity, miscalculation and 'use them or lose them' logics, wargaming indicates that this would likely lead to further use, probably nuclear war. Now imagine such a detonation taking place in a substantially disarmed world where nuclear weapons are illegal. Even in the event of an intentional use rather than an accident, the legal regimes would enable collective action to deal with nuclear perpetrators, so escalation to nuclear war would be extremely unlikely. Of course we hope such catastrophes will not happen, but as there are no guarantees in deterrence or disarmament, nuclear detonations remain possible. If that occurred, which would we prefer: to face mass annihilation and nuclear war or deal collectively with a nuclear crime that is horrendous but survivable for most if not all humanity? These are the humanitarian, security and policy choices we have to address in the real world, where deterrence and MIBA theories seldom function as formulated.

The challenge for TPNW advocates is to bring the ban into force and build on it. That means keeping up the pressure and incentives for the nuclear-armed and all other states to join. Legal, normative, economic and political pressures will be exerted by other governments and national and transnational civil society networks at home and abroad, for and against the Treaty. Without further collective actions to develop appropriate enforcement mechanisms and uphold humanitarian

principles, objectives and laws, even the best treaties – like peace – may fail. To be sustained and successful, this Treaty will require constant vigilance and commitment. The tasks ahead should not be underestimated.

## Notes

- 1 2017 Treaty on the Prohibition of Nuclear Weapons, adopted by the United Nations on 7 July 2017. Available at: <http://undocs.org/A/CONF.229/2017/8>
- 2 Alexander Kmentt, 'The Development of the International Initiative on the Humanitarian Impact of Nuclear Weapons and Its Effect on the Nuclear Weapons Debate', *International Review of the Red Cross*, Vol. 1, No. 899 (2016), pp. 1–29.
- 3 A conscious decision was made by nuclear ban campaigners to describe all states with nuclear arsenals as 'nuclear-armed states', to avoid legal-political confusions or status issues that arise from using the term 'nuclear weapon states' (NWS), which traditionally denotes the five nuclear states defined in the NPT. Following the United Nations Institute for Disarmament Research's (UNIDIR) lead, I use the abbreviation 'NPT5' for these states (China, France, Russia, the UK and the USA). The term 'umbrella states' denotes states that acceded to the NPT as 'non-nuclear-weapon states' (NNWS) but which have nuclear alliance arrangements with the United States (i.e. NATO states, Australia, Japan and South Korea). The term 'nuclear dependent' is used as a collective term covering the nuclear-armed and umbrella states.
- 4 See Joint Press Statement from the Permanent Representatives to the United Nations of the United States, United Kingdom, and France Following the Adoption of a Treaty Banning Nuclear Weapons, New York, 7 July 2017.
- 5 Rebecca Johnson, 'Arms Control and Disarmament Diplomacy', in Andrew F. Cooper, Jorge Heine and Ramesh Thakur, eds, *The Oxford Handbook of Modern Diplomacy* (Oxford: Oxford University Press, 2015), pp. 593–609.
- 6 See Rebecca Johnson, Tim Caughley and John Borrie, *Decline or Transform: Nuclear Disarmament and Security beyond the NPT Review Process* (Geneva: Acronym Institute, 2012).
- 7 See George P. Shultz, William J. Perry, Henry A. Kissinger, Sam Nunn and others, 'A World Free of Nuclear Weapons', *Wall Street Journal*, 4 January 2007; and Bruce Blair, 'Global Zero', 2010. Available at: [www.thesimonsfoundation.ca/projects/global-zero](http://www.thesimonsfoundation.ca/projects/global-zero)
- 8 Berit Reiss-Anderson, announcement of 2017 Nobel Peace Award to ICAN, 6 October 2017. At that time, ICAN was a network of 450 civil society organizations in 100 countries, coordinated by an international steering group of ten international NGOs. Its founding strategists and co-chairs were drawn from the International Physicians for the Prevention of Nuclear War (IPPNW), the Women's International League for Peace and Freedom (WILPF), the Acronym Institute for Disarmament Diplomacy, and Peace Boat. By October 2017, the ISG included Article 36, Norwegian People's Aid, Pax, SEHLAC (a network of Latin American and Caribbean NGOs), Religions for Peace (represented by the African Council of Religious Leaders) and SLMK (the Swedish affiliate of IPPNW).
- 9 Costa Rica, 'Model Nuclear Weapons Convention', NPT/CONF.2010/PC.I/WP.17, updated from the first model NWC (lead drafter Merav Datan, working closely with doctors, lawyers and scientists from several NGOs), submitted to the UN General Assembly by Costa Rica in 1997, UN Doc. A/C.1/52/7.
- 10 See Chapter 6 by James Acton and Chapter 7 by Brad Roberts in this volume.
- 11 Setsuko Thurlow and Beatrice Fihn, Nobel Acceptance Speech on behalf of ICAN, Oslo, 10 December 2017.
- 12 Heinz Fischer, Federal President of Austria, Speech to High Level Meeting of the UN General Assembly on Nuclear Disarmament, New York, 26 September 2013; incorporated into the humanitarian pledge initiated by Austria, and reinforced in the UN General Assembly resolution 'Humanitarian Pledge for the Prohibition and Elimination of Nuclear Weapons', A/RES/70/48, 7 December 2015.

- 13 Weapons of Mass Destruction Commission, 'Weapons of Terror: Freeing the World of Nuclear, Biological and Chemical Arms', Final Report, 1 June 2006, quote at p. 17.
- 14 Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics', in Paul R. Viotti and Mark V. Kauppi, eds, *International Relations Theory*, 3rd edn (Boston: Allyn and Bacon, 1987), p. 250.
- 15 Carol Cohn, Felicity Hill, and Sara Ruddick, 'The Relevance of Gender for Eliminating WMD', *Disarmament Diplomacy*, Vol. 80, Autumn 2005; Felicity Hill, "'Doing a Land-mines" on Gender and Nukes', paper presented at Toward Human Security Conference, 10th Anniversary of the Mine Ban Treaty, Oslo, September 2007; Ray Acheson, 'Time to Reframe the Debate', paper presented on the opening of the 2009 UN First Committee, 5 October 2009; and Rebecca Johnson, 'The Fetishists of Nuclear Power Projection Have Had Their Day', *Open Democracy*, 8 March 2013.
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- 17 Rebecca Johnson, Akira Kawasaki, and Tilman Ruff, 'To Prevent Another Hiroshima, Nuclear Weapons Must Be Banned', *Pressian* (Korean), 16 August 2012; Ira Helfand, 'Nuclear Famine: Two Billion People at Risk', IPPNW, 2013; Beatrice Fihn (ed.), *Unspeakable Suffering: The Humanitarian Impact of Nuclear Weapons*, Reaching Critical Will (Geneva: WILPF, 2013); and Ray Acheson, Thomas Nash and Richard Moyes, 'A Treaty Banning Nuclear Weapons', Reaching Critical Will/WILPF and Article 36, 2014.
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- 19 Rebecca Johnson, 'Linking Humanitarian Law and Nuclear Disarmament Action: The Case for a Nuclear Weapons Convention', *Austrian Review of International and European Law*, Vol. 15 (2010), pp. 173–196 (quote at pp. 190–191).
- 20 See Espen Barth Eide, Norwegian Foreign Minister, summarizing the Oslo HINW Conference findings, 5 March 2013.
- 21 Rebecca Johnson, 'Arms Control and Disarmament Diplomacy', p. 602.
- 22 See, for example, Women, Peace and Security, report by the Government Offices of Sweden, 2016.
- 23 Bruce G. Blair, *Dealerting Strategic Forces* (Washington, DC: Brookings Institution Press, 2004).
- 24 ICRC Statement, 'Nuclear Weapons: Averting a Global Catastrophe', appeal to states, global leaders and citizens by Mr Peter Maurer, President of the International Committee of the Red Cross, 23 April 2018. Available at: [www.icrc.org/en/document/nuclear-weapons-averting-global-catastrophe](http://www.icrc.org/en/document/nuclear-weapons-averting-global-catastrophe)
- 25 Preamble of the 2017 Treaty on the Prohibition of Nuclear Weapons, adopted by the United Nations on 7 July 2017.
- 26 See 'Civil Society Engagement in Disarmament Processes: The Case for a Nuclear Weapons Ban', published by UN Office for Disarmament Affairs, 2016. See also more than 50 of my contemporaneous articles on the nuclear ban process, in *Open Democracy* (2010–2018). Available at: [www.opendemocracy.net/author/rebecca-johnson](http://www.opendemocracy.net/author/rebecca-johnson)
- 27 Rebecca Johnson, 'The 2000 NPT Review Conference: A Delicate, Hard-Won Compromise', *Disarmament Diplomacy*, Vol. 46, May 2000.
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- 36 Zia Mian, 'After the Nuclear Weapons Ban Treaty: A New Disarmament Politics', *Bulletin of the Atomic Scientists*, 7 July 2017.
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- 38 Alexander Kelle, 'Chemical Weapons Destruction Deadline Missed', *Bulletin of the Atomic Scientists*, 24 April 2012.
- 39 Rebecca Johnson, *Unfinished Business: The Negotiations of the CTBT and the End of Nuclear Testing* (New York: United Nations, 2009).
- 40 References are too numerous to cite here, but can be found in statements from nations and NGOs during the past decade, obtainable from Reaching Critical Will at: [www.reachingcriticalwill.org/disarmament-fora/npt](http://www.reachingcriticalwill.org/disarmament-fora/npt). See also Kmentt, 'Development of the International Initiative'; Rebecca Johnson *passim*; and Stuart Casey-Maslen, 'Friend or Foe? The Treaty on the Prohibition of Nuclear Weapons and the NPT', ICAN, 2018, available at: <https://armscontrollaw.com/2018/08/20/friend-or-foe-the-treaty-on-the-prohibition-of-nuclear-weapons-and-the-npt/>
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