

The Treaty on The Prohibition of Nuclear Weapons: Wishful Thinking and Nuclear Deterrence Reality

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Abstract:

The International Campaign to Abolish Nuclear Weapons (ICAN) was awarded the Nobel Peace Prize on October 6, 2017 for its efforts to achieve a treaty prohibiting nuclear weapons. The Treaty on the Prohibition of Nuclear Weapons (TPNW) adopted in July 2017 is the first clear and unequivocal attempt to prohibit nuclear weapons in international law. The TPNW aims to outlaw nuclear weapons in the same way international law has already outlawed other weapons of mass destruction, such as biological and chemical weapons. This landmark achievement in nuclear disarmament could have hardly come at a better time. The world is again faced with potential nuclear war with mounting tensions in the Korean Peninsula (and elsewhere) that may trigger the use of nuclear weapons and release their unmatched destructive potential. Nuclear disarmament in good faith has been a continuous legal obligation for nuclear states for decades. However, in the meantime, the number of nuclear states has increased and modernization programs have resulted in more destructive nuclear weapons.

This paper explores the recent developments in international law on nuclear disarmament by comparing the existing framework provided by the Nuclear Non-proliferation Treaty (NPT) and the emerging one in the TPNW. The adoption of the TPNW and its potential entry into force may represent an important avenue to achieve a nuclear free world. However, at the same time, it may diminish efforts to comply with the NPT and remain a wishful *de lege ferenda* without the participation of nuclear-armed states.

In terms of structure, introductory remarks are provided in section I; section II explores the main features of the NPT as the cornerstone of

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the existing legal framework; section III explores the emerging TPNW and its key features; section IV explores the relationship between the NPT and the TPNW through the dichotomy of wishful thinking and nuclear deterrence reality; and finally, section V provides concluding remarks.

Key terms:

nuclear disarmament, non-proliferation, nuclear free world, Treaty on the Prohibition of Nuclear Weapons, Nuclear Non-proliferation Treaty

I. Introduction:

The bombing of Hiroshima and Nagasaki in August 1945 marked the beginning of the so-called 'nuclear age'.⁽²⁾ Since then, in varying intensities, the world has lived in perpetual fear of nuclear annihilation. The International Court of Justice (ICJ) echoed these fears by stressing the potentially catastrophic and destructive powers of nuclear weapons which 'cannot be contained in either space or time' as they 'have the potential to destroy all civilization and the entire ecosystem of the planet'.⁽³⁾ Einstein's statement that 'I know not with what weapons World War III will be fought, but World War IV will be fought with sticks and stones' may be even 'too optimistic' with the advance of nuclear technology. In an apocalyptic scenario of a US-Russia nuclear war, the Russian President Vladimir Putin stated that 'no one would survive' to 'claim victory'.⁽⁴⁾ Obviously, if true, there would be no one around to use 'sticks and stones' for the following(world) war.

The United States, Russia, China, United Kingdom and France are considered the 'only' nuclear weapons states (NWS's) according to the NPT as they 'have manufactured and exploded a nuclear weapon prior to 1 January 1967'.⁽⁵⁾ The five NWS's of the NPT are at the same time the five permanent members of the United Nations Security Council.⁽⁶⁾ However, in the meantime India, Israel, Pakistan and North Korea have become 'nuclear-armed states', but not NWS's. The shift in terminology from NWS to nuclear-armed states is not only semantics. It

(2) Note that the United States had actually tested its first nuclear device earlier in the summer of 1945 in Alamogordo, New Mexico.

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

(4) See the statement of Russian President, Vladimir Putin, available at: <http://www.presstv.com/Detail/2017/06/07/524445/Russia-Putin-nuclear-war-US-hot-war-Oliver-Stone>, (accessed November 2017).

(5) NPT Treaty, Article IX (3). After the US nuclear test in 1945, the Soviet Union tested a nuclear weapon in 1949, UK in 1952, France in 1960 and China in 1964. See the Marshal Islands written application, p.16.

(6) United Nations Charter, Article 23 (1).

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is important to note that India, Pakistan and Israel never adhered to the NPT and North Korea although once a party to the NPT, announced its withdrawal in January of 2003 based on article X.⁽⁷⁾ Following the nuclear tests conducted by India and Pakistan in 1998, the UN Security Council expressed its position that India and Pakistan cannot have the status of NWS according to the NPT.⁽⁸⁾

Therefore, this paper will use the notion 'nuclear weapon states' or the acronym 'NWS's' to denote only the five NPT states to have formally acquired the status of NWS's; and 'nuclear-armed states' to denote all nine nuclear weapon states. Whether India and Pakistan or North Korea and Israel are formally considered NWS's, in reality, has little or no importance to the fact that they possess nuclear weapons.

In addition, since the term 'nuclear' covers a wide range of inter-related concepts, it is important to determine the scope of this paper.⁽⁹⁾ The notion 'nuclear', among others, is concerned with nuclear weapons,⁽¹⁰⁾ nuclear arms control,⁽¹¹⁾ peaceful use of nuclear energy,⁽¹²⁾ nuclear non-

(7) NPT Treaty, Article X provides for the possibility to withdraw from the treaty upon a three months notice due to existing circumstances jeopardizing supreme interests of a party.

(8) Security Council Res. 1172 (1998).

(9) For useful information on the various concepts and a useful Research Guide, see the Nuclear Law Research Guide, available at: http://www.nyulawglobal.org/globalex/Nuclear_Research1.html, (accessed November 2017).

(10) Nuclear weapons are not defined in the NPT. However, according to Article 5 of the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean of 1967, 'a nuclear weapon is any device which is capable of releasing nuclear energy in an uncontrolled manner and which has a group of characteristics that are appropriate for use for warlike purposes'. Joyner notes that this definition derives from the US Atomic Energy Act of 1954 which defines nuclear weapons to mean 'any device utilizing atomic energy, exclusive of the means for transporting or propelling the device... the principle purpose of which is for use as, or development of, a weapon, a weapon prototype, or a weapon test device', see Daniel H. Joyner, *International Law and the Proliferation of Weapons of Mass Destruction*, Oxford University Press, 2009, pg. 12.

(11) Nuclear arms control covers arrangements to regulate military capability or potential.

(12) Peaceful use covers the use of nuclear material and technology for non-military =

proliferation, and nuclear disarmament. This paper focuses primarily on nuclear disarmament and to a lesser degree on non-proliferation. They are inter-related and as such are discussed from the perspective of the NPT and the TPNW. Nuclear disarmament is concerned with the 'reduction of nuclear weapons, aiming at a gradual elimination of all existing arsenals so as to achieve a nuclear-weapons-free world and reinstitute the pre 'nuclear age' era again.'⁽¹³⁾ Or, as provided for in the NPT preamble, nuclear disarmament is concerned with the 'cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons'.⁽¹⁴⁾ On the other hand, nuclear non-proliferation is concerned with limiting nuclear weapons and nuclear technology.⁽¹⁵⁾

Nuclear non-proliferation and disarmament efforts have resulted in reduction of nuclear warheads and arguably, non-proliferation to many more states than the existing nine. According to the Arms Control Association as of July 2017, the nuclear-armed states have around 15.000 nuclear warheads.⁽¹⁶⁾ These numbers are 'good news' compared to the 60s, when the US and the Soviet Union alone

= purposes, including among others, medicine, food security, environmental management and significant share of world electricity production. See the US Delegation to the 2010 Nuclear Nonproliferation Treaty Review Conference, available at: <https://www.state.gov/documents/organization/141503.pdf>, (accessed November 2017).

(13) See Jankowitsch-Prevor, O. (2008), "International Norms against Nuclear Weapons, an Overview: Treaties, Conventions, Agreements and 'Initiatives' Regarding Non-proliferation of Nuclear Weapons, Disarmament and Arms Control", in G.Janssens-Maenhout (ed.), *Nuclear Safeguards and Non-Proliferation*, ESARDA, Ispra, pp. 67-79. Reference from Sylvain Fanielle, *Towards nuclear disarmament: State of affairs in the international legal framework*, Nuclear Law Bulletin No.97, Vol. 2016/1, OECD, pg. 35-36.

(14) See NPT Treaty, Preamble.

(15) Non-proliferation covers efforts to limit nuclear weapons and related technology. See NPT, Articles I, II, and III.

(16) Russia possesses 7000, United States 6.800, France 300, China 270, United Kingdom 215, Pakistan 140, India 130, Israel 80, North Korea 10 nuclear warheads. See Arms Control Association, available at: <https://www.armscontrol.org/factsheets/Nuclearweaponswhohaswhat>, (accessed November 2017).

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possessed around 30.000 nuclear weapons. However, while the number of nuclear warheads has been reduced (especially by Russia and America), another major concern is that all nuclear-armed states 'are in the process of modernizing their nuclear arsenals'.⁽¹⁷⁾ To illustrate, the Castle Bravo test by the U.S. in the 50s had the power of 1000 times of the Hiroshima detonation and the Tsar Bomba test by the Soviet Union in the early 60s had the power of 3000 times of the nuclear weapons detonated in Hiroshima and Nagasaki.⁽¹⁸⁾ One can only imagine the results of nuclear modernization programs in the last decades.

II. The NPT And Nuclear Disarmament:

The NPT is the single international treaty in force that provides a 'global barrier to the spread of nuclear weapons'.⁽¹⁹⁾ It is the cornerstone of today's international law on nuclear non-proliferation and at the same time the most widely adhered arms non-proliferation agreement in history.⁽²⁰⁾ As of October 2017, the NPT has 191 State Parties.⁽²¹⁾ In the Revision Conference of the NPT in 1995 it was decided to extend the NPT indefinitely.⁽²²⁾

(17) United States and Russia are the possessors of around 93 per cent of the total nuclear weapons in the world today. Stockholm International Peace Research Institute-SIPRI, Global nuclear weapons: Modernization remains the priority, 03 July 2017, available at <https://www.sipri.org/media/press-release/2017/global-nuclear-weapons-modernization-remains-priority>, (accessed November 2017).

(18) For information on the 12 largest nuclear detonations in history see the Brookings Institution, available at: <https://www.brookings.edu/blog/up-front/2014/02/27/castle-bravo-the-largest-u-s-nuclear-explosion/> (accessed November 2017).

(19) See the Letter Dated 10 April 1995 from the Deputy Director of the US Arms Control and Disarmament Agency at the 1995 NPT Conference, available at: <http://www.un.org/Depts/ddar/nptconf/214a.htm>, (accessed November 2017).

(20) TPNW, Preamble; Also see the US Delegation to the 2010 Nuclear Nonproliferation Treaty Review Conference, available at: <https://www.state.gov/documents/organization/141503.pdf>, (accessed November 2017).

(21) For a list of state parties see United Nations Office for Disarmament Affairs available at: <http://disarmament.un.org/treaties/t/npt>, (accessed November 2017).

(22) Such a decision was only made based on the commitment of the NWS to achieve the objectives of Article VI of NPT on disarmament. According to the former Indian

The NPT is the outcome of long standing efforts for nuclear non-proliferation and disarmament.⁽²³⁾ Negotiations on the NPT began in 1965 in Geneva and were finalized by 1968. On 1 July of 1968 the NPT was already open for signature and it entered into force on 5 March 1970 with 43 Parties, including the Soviet Union, United Kingdom and the United States.⁽²⁴⁾

In terms of structure, the NPT has three main pillars: non-proliferation, disarmament, and peaceful use of nuclear energy.⁽²⁵⁾ Although interrelated to a certain degree, the peaceful use of nuclear energy will not be discussed.⁽²⁶⁾ With regard to the non-proliferation, the NPT establishes a *status quo* between states that have nuclear weapons, or the NWS's and states that do not have nuclear weapons, or the NNWS's. Namely, the NWS's have an obligation not to transfer or in any way encourage or induce NNWS's to manufacture or acquire nuclear weapons.⁽²⁷⁾ On the other hand, non-nuclear-weapon states pledge not to acquire or seek assistance to manufacture nuclear weapons.⁽²⁸⁾ In addition, they have an obligation to accept International Atomic Energy Agency (IAEA) safeguards in order to verify that their nuclear activities

= Foreign Minister, the NPT was extended indefinitely and unconditionally 'perpetuating the existence of nuclear weapons in the hands of five countries busily modernizing their nuclear arsenals', see Sylvain Fanielle, Towards nuclear disarmament: State of affairs in the international legal framework, Nuclear Law Bulletin No.97, Vol. 2016/1, OECD, pg. 42, 61-62.

(23) In fact, the first UN GA Resolution was about disarmament of atomic weapons; see GA Res. 1, UN GAOR, 1st Sess., UN Doc. A/RES/1 (1946).

(24) Note that France and China were the only nuclear weapons states that were not among the parties at the time of the entry into force of the NPT.

(25) See Daniel H. Joyner, Interpreting the Nuclear Non-proliferation Treaty, Oxford University Press, 2011, pg. 75; Sylvain Fanielle, Towards nuclear disarmament: State of affairs in the international legal framework, Nuclear Law Bulletin No.97, Vol. 2016/1, OECD, pg. 39.

(26) See NPT Treaty, Article IV and V. In particular, Article IV (2) provides that all the Parties 'have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy'.

(27) NPT Treaty, Article I.

(28) NPT Treaty, Article II.

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are only for peaceful purposes.⁽²⁹⁾

This *quid pro quo* relationship between these two categories of states (whether in possession or not of nuclear weapons) with different obligations has become known as the ‘grand bargain’ of the NPT.⁽³⁰⁾ Due to this relationship, the NPT may not be considered a law-making, but a contract type of a treaty and as a result only the breach by the entirety (not one or few) of a category of states may render the obligations of the other category null and void.⁽³¹⁾

With regard to disarmament, the NPT is the cornerstone of the international law in force today on nuclear disarmament. The most important existing provision on nuclear disarmament is Article VI of the NPT. It provides that:

‘Each of the Parties to the Treaty undertakes 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, and on a Treaty on general and complete disarmament under strict and effective international control.’⁽³²⁾

Article VI creates the following obligations on states: first, the cessation of the nuclear arms race at an early date; second, nuclear disarmament; and third, a treaty on disarmament under international control.⁽³³⁾ According to the ICJ Advisory Opinion, the fulfillment of the obligations of Article VI ‘remains without any doubt an objective of vital importance to the whole international community today’.⁽³⁴⁾ In addition, the Court unanimously held that there is ‘an obligation to pursue in

(29) NPT Treaty, Article III.

(30) Daniel H. Joyner, *International Law and the Proliferation of Weapons of Mass Destruction*, Oxford University Press, 2009, pg. 8-9.

(31) *Ibid.* pg. 9-11.

(32) See NPT Treaty, Article VI.

(33) See Daniel H. Joyner, *Interpreting the Nuclear Non-proliferation Treaty*, Oxford University Press, 2011, pg. 98.

(34) *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ, 1996, p.103.

good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control'.⁽³⁵⁾ Some commentators have pointed out that the obligation of Article VI is 'not to disarm as such, but a positive obligation to pursue in good faith negotiations towards these ends and to bring them to a conclusion'.⁽³⁶⁾ In addition, Christopher Ford has also argued that Article VI creates a minimal obligation for good faith efforts for negotiations on nuclear disarmament.⁽³⁷⁾ On the other hand, the ICJ Advisory Opinion considers Article VI to be a twofold obligation to 'achieve a precise result-nuclear disarmament in all its aspects-by adopting a particular course of conduct'.⁽³⁸⁾ According to principle of *pacta sunt servanda* provided for in Article 26 of the Vienna Convention on the Law of Treaties (VCLT), it is a well-known rule of international law that treaties are binding and must be performed in good faith.⁽³⁹⁾

In a bid to enforce Article VI, the Republic of the Marshall Islands (RMI)⁽⁴⁰⁾ filed applications in the ICJ against all nine nuclear-armed states and in parallel against the US in a US Federal Court contending the breach of the obligation to end nuclear arms race and engage in negotiations on nuclear disarmament.⁽⁴¹⁾ The RMI stated that it wanted to revive the 'fading debate about nuclear disarmament' as well as the threats from

(35) *Ibid.*, p.105 F.

(36) Christine Chinkin, Rabinder Singh, UK Trident Replacement a 'Material Breach' of the NPT, Joint Opinion by Rabinder Singh QC and Professor Christine Chinkin, December 19, 2015, p.69.

(37) Daniel H. Joyner, *Interpreting the Nuclear Non-proliferation Treaty*, Oxford University Press, 2011, pg. 96.

(38) *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ, 1996, p.99-100.

(39) See the Vienna Convention on the Law of Treaties of 1969, Article 26.

(40) The RMI had a special motive to take this initiative due to its dark history with nuclear weapons. From 1946 to 1958, the RMI was the location of 67 nuclear tests conducted by the United States.

(41) See *Obligations concerning Negotiations relating to Cessation of the Nuclear Armed Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)/ (Marshall Islands v. India)/ (Marshall Islands v. Pakistan)*. ICJ Reports, 2016.

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a new arms race.⁽⁴²⁾

With regard to the applications in the ICJ, only the UK, India and Pakistan have accepted the compulsory jurisdiction of the ICJ, other nuclear-armed states did not respond or as in the case of China, formally notified the Court that it does not consent to its jurisdiction. In all three applications against the UK, India and Pakistan, with narrow majority, the Court ruled that it cannot proceed to the merits due to lack of jurisdiction, as there is no dispute between the parties.⁽⁴³⁾ As a result, there was no discussion about the potential breach of Article VI by the nuclear-armed states and whether there is an identical customary international law obligation by India and Pakistan.⁽⁴⁴⁾

In the meantime, parallel to the ICJ Proceedings, on April 2014, the RMI also initiated a lawsuit in US Courts asking the court to order the US to engage in good faith negotiations on nuclear disarmament due to its breach of Article VI of the NPT. The U.S. Federal Court also dismissed this lawsuit and the Ninth Circuit Court of Appeal later affirmed the decision on 31 July 2017. The district court concluded that the RMI lacked standing and that the asserted injury is not related to only one Party to the NPT and that it is a non justiciable political issue.⁽⁴⁵⁾ On the other hand, the ruling of the Ninth Circuit Court of Appeal court was that Article VI of the NPT was not self-executing and judicially enforceable, therefore, such claims are non justiciable.⁽⁴⁶⁾ In addition, the court ruled

(42) See the New York Times, Marshall Islands Can't Sue the World's Nuclear Powers, U.N. Court Rules, Oct. 5, 2016.

(43) For a discussion see Christian Tams, No Dispute About Nuclear Weapons, October 6, 2016, EJIL Talk, available at: <https://www.ejiltalk.org/no-dispute-about-nuclear-weapons/>, (accessed November 2017);

(44) Dan Joyner, My Reaction to the Dismissal of the Marshall Islands Cases by the ICJ, Arms Control Law, October 5, 2016, available at: <https://armscontrollaw.com/2016/10/05/my-reaction-to-the-dismissal-of-the-marshall-islands-cases-by-the-icj/>, (accessed November 2017).

(45) Republic of the Marshall Islands v. United States, 79 F. Supp. 3d 1068, 1072 (N.D. Cal. 2015).

(46) See, US Court of Appeals for the Ninth Circuit, Republic of the Marshall Islands v. United States of America, No.15-15636, D.C. No. 4:-14-cv-01885-JSW, July 31, =

that such negotiations are within the realm of the executive, and not of the judiciary and such claims would put the 'judiciary in the role of a nanny to the executive'.⁽⁴⁷⁾ As a result, both applications by the RMI in the ICJ and the US Federal Courts were dismissed.

Turning to a more positive note on nuclear disarmament, the establishment of zones without nuclear weapons, or the so-called Nuclear-Weapon-Free Zones (NWFZ).⁽⁴⁸⁾ In the absence of total nuclear disarmament, regional groupings of states have used the opportunity 'to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories'.⁽⁴⁹⁾ Currently there are five NWFZ zones including: Latin America and the Caribbean zone⁽⁵⁰⁾; South Pacific zone⁽⁵¹⁾; Southeast Asia zone⁽⁵²⁾; the African zone⁽⁵³⁾; and the Central Asia nuclear free zone⁽⁵⁴⁾. Except for NWFZ's, Mongolia is recognized as a nuclear-weapon-free state.⁽⁵⁵⁾ NWFZ cover more than 50% of the world's landmass with 107 states having signed or are

⁼ 2017, pg.10. It provides that 'at its core, the question of self-execution addresses whether a treaty provision is directly enforceable in domestic courts'.

(47) *Ibid.*, pg. 5, 13-15.

(48) A NWFZ is a zone recognized by the UNGA as such by which a group of States 'in the free exercise of their sovereignty, has established by virtue of a treaty or convention' the total absence of nuclear weapons in the zone followed by an international verification system, See GA Res. 3472 B (1975). Also See the Report of the Disarmament Commission, General Assembly, Annex 1 on the 'Establishment of nuclear-weapon-free zones on the basis of arrangements freely arrived at among the States of the region concerned'.

(49) See NPT Treaty, Article VII. In 1993, the Disarmament Commission adopted 'Guidelines and recommendations for the regional approaches to disarmament', see [http://www.undocs.org/A/54/42\(SUPP\)](http://www.undocs.org/A/54/42(SUPP)), (accessed November 2017).

(50) See the Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean of 1967, Article 1 and 3.

(51) See the South Pacific Nuclear Free Zone Treaty of 1985, Article 1 and 3.

(52) See the Treaty on the Southeast Asia Nuclear Weapon-Free-Zone of 1995, Articles 1, 2, and 3.

(53) See the African Nuclear Weapon Free Zone Treaty of 1996, Article 2, 3 and 4.

(54) See the Treaty on a Nuclear Weapon-Free Zone in Central Asia of 2006, Article 2, and 3.

(55) See GA Res. 55/33 S (2001).

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parties to NWFZ Treaties.⁽⁵⁶⁾ In addition, the Antarctica⁽⁵⁷⁾, the Outer Space⁽⁵⁸⁾, the Moon,⁽⁵⁹⁾ the Seabed and the Ocean Floor⁽⁶⁰⁾ are also considered denuclearized areas. Optimists may say that the glass is 'more than half full'.

The realists, would probably, most respectfully, beg to differ. There is an increase of the number of states possessing nuclear weapons and an ongoing modernization of existing nuclear warheads. Nuclear disarmament is even more pressing as there are fears that not only states, but also non-state actors, including terrorist groups may acquire nuclear weapons.⁽⁶¹⁾ Without a complete nuclear disarmament, even few or a single nuclear warhead can result in unprecedented mayhem for humanity.

Clearly, humanity is at a turning point. The perception that there is stagnation with the NPT disarmament is widespread among relevant

(56) See GA Res. 3472 B (1975). This area covers also Antarctica, which pursuant to the Antarctic Treaty of 1959 is considered demilitarized.

(57) See the Antarctic Treaty of 1959, Article 1, 5.

(58) See GA Res. 1884 (XVIII) of 17 October 1963; The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies of 1967, Article 4 which provides that the Parties 'undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner'.

(59) See the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies of 1979, Article 3 (3) which provides that State Parties 'shall not place in orbit around or other trajectory to or around the moon objects carrying nuclear weapons of mass destruction or place or use such weapons on or in the moon'.

(60) See the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea Bed and the Ocean Floor and the Subsoil Thereof of 1971, Article 1 (1) providing that the Parties undertake not to emplant on the sea-bed, the ocean floor and the subsoil thereof 'nuclear weapons or any other types of weapons of mass destruction as well as structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons.'

(61) See the International Convention on the Suppression of Acts of Nuclear Terrorism of 1998, UN SC Res. 1540, UN SC Res. 1887.

multilateral forums.⁽⁶²⁾ This brings us to the efforts to negotiate a new treaty that would ban nuclear weapons and ensure nuclear disarmament.

III. The 2017 Treaty on The Prohibition of Nuclear Weapons:

The Treaty on the Prohibition of Nuclear Weapons adopted on July 7, 2017 is the newest edition in the line of international instruments providing for the international legal framework on nuclear disarmament.⁽⁶³⁾ According to Joyner, the TPNW is a product of two trends in international relations: first, the longstanding frustration with NWS to fulfill their disarmament obligation pursuant to article VI; and second, the humanitarian Initiative of ICAN (the Nobel Peace Prize Laureate) to ban nuclear weapons.⁽⁶⁴⁾ The initiative on the humanitarian impact of nuclear weapons provided an important opportunity to discuss the (il)legality of nuclear weapons.⁽⁶⁵⁾ As a result, the United Nations General Assembly decided to convene a UN Conference in New York to negotiate a binding instrument to prohibit nuclear weapons.⁽⁶⁶⁾

All nuclear-armed states, but North Korea boycotted the negotiations. The boycott can also be observed to be a violation of their obligation under Article VI of the NPT. This was explicitly made clear by Sweden which decided to participate in the negotiations, as otherwise it would

(62) Tim Caughley, *Analysing Effective Measures: Options for multilateral nuclear disarmament and implementation of NPT article VI*, United Nations Institute for Disarmament Research (UNIDIR), Paper No 3 of 5, 2015, pg. 8.

(63) See the Treaty on the Prohibition of Nuclear Weapons of 2017, available online at: https://treaties.un.org/doc/Treaties/2017/07/20170707%2003-42%20PM/Ch_XXVI_9.pdf, (accessed November 2017).

(64) Dan Joyner, *The Treaty on the Prohibition of Nuclear Weapons*, EJIL: Talk, July, 26, 2017, available at: <https://www.ejiltalk.org/the-treaty-on-the-prohibition-of-nuclear-weapons/>, (accessed November 2017).

(65) Gro Nystuen, *Legal Aspects of Nuclear Weapons: A 'bird's-eye-view' of international law and nuclear weapons*, United Nations Institute for Disarmament Research (UNIDIR), Paper No 6 of 6, 2014, pg. 6.

(66) See GA Res. 71/258, *Taking forward multilateral nuclear disarmament*, 23 December 2016.

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‘evade an obligation’ enshrined in Article VI.⁽⁶⁷⁾ Even Japan, benefiting from a so-called nuclear umbrella decided to vote against the resolution calling for negotiations of the TPNW.⁽⁶⁸⁾

However, 124 states participated in the UN Conference negotiating a treaty on the prohibition of nuclear weapons and 122 voted in favor of the TPNW, with Singapore abstaining and the Netherlands being the only country to vote against the adoption of the treaty.⁽⁶⁹⁾ In its explanatory note on the vote, the Netherlands criticized the final text of the TPNW as it places the treaty ‘above the NPT’ and described it to be a ‘recipe for competition and fragmentation when our efforts on disarmament should be concentrated’.⁽⁷⁰⁾

At the signing ceremony of the TPNW, the UN Secretary General hailed it as a historic treaty and a milestone in the commitment for the universally-held goal of a world free of nuclear weapons’.⁽⁷¹⁾ However, this historical development was achieved over the clear objection by nuclear-armed states, which consider it premature and inappropriate in a security environment that requires a more gradual approach.⁽⁷²⁾ There are strong concerns that the TPNW will not result in the disarmament

(67) See the Explanation of vote by Sweden, on text of Nuclear Ban Treaty, 7 July 2017, available at: <https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/07/170707-EoV-Sweden.pdf>, (accessed November 2017).

(68) Paulina Izewicz, The Nuclear Ban Treaty and its possible Ramifications, International Institute for Strategic Studies, IISS Voices, 1 November 2016.

(69) The United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, Leading Towards their Total Elimination, 16 February, 27-31 March, 15 June-7 July 2017, see the UN Website for detailed information, available at: <https://www.un.org/disarmament/ptnw/>, (accessed November 2017).

(70) See the Explanation of vote of the Netherlands on text of Nuclear Ban Treaty, News item, 07-07-2017, available at: <https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/07/Netherlands-EoV-Nuclear-Ban-Treaty.pdf>, (accessed November 2017).

(71) The United Nations Secretary General remarks at signing ceremony for the Treaty on the Prohibition of Nuclear Weapons, New York, 20 September 2017.

(72) NE. Ritchie, J. Borrie, T. Caughley, W. Wan, Negotiation of a Nuclear Weapons Prohibition Treaty: Nuts and Bolts of the Ban, the New Treaty: Taking Stock, United Nations Institute for Disarmament Research (UNIDIR), 2017, pg. 3.

of nuclear states and that it will undermine the NPT as the cornerstone of nuclear non-proliferation and disarmament.⁽⁷³⁾ However, it is the preamble of the TPNW that reaffirms the role of the NPT as the cornerstone of the nuclear disarmament and non-proliferation regime, and in promoting international peace and security.⁽⁷⁴⁾ Another argument is that based on the VCLT, the TPNW will not undermine the NPT, but rather complement it. The VCLT provides that when a later treaty does not include all the parties of the earlier treaty, the later treaty will not disrupt the existing treaty obligations for the states not joining the TPNW.⁽⁷⁵⁾

The adopted text of the TPNW unequivocally prohibits nuclear weapons for the first time in human history. The preamble of the TPNW stresses the possible catastrophic humanitarian consequences from nuclear weapons to all humanity and the need to prohibit nuclear weapons in order to establish a nuclear-weapon-free world.⁽⁷⁶⁾ Despite the slow pace of disarmament, the preamble stresses the obligation to pursue in good faith negotiations to achieve complete disarmament under international control that would be strict and effective.⁽⁷⁷⁾

Unlike the NPT, the TPNW does not provide the opportunity for

(73) See for example, NE. Ritchie, J. Borrie, T. Caughley, W. Wan, *Negotiation of a Nuclear Weapons Prohibition Treaty: Nuts and Bolts of the Ban, the New Treaty: Taking Stock*, United Nations Institute for Disarmament Research (UNIDIR), 2017, pg. 7; Adam Mount and Richard Nephew, *A Nuclear Weapons Ban Should First Do No Harm to the NPT*, *Bulletin of the Atomic Scientists*, 7 March 2017; Dan Joyner, *The Treaty on the Prohibition of Nuclear Weapons*, *EJIL: Talk*, July, 26, 2017, available at: <https://www.ejiltalk.org/the-treaty-on-the-prohibition-of-nuclear-weapons/>, (accessed November 2017); George Perkovich, *The Nuclear Ban Treaty: What Would Follow?* Carnegie Endowment of International Peace, 31 May 2017; Paulina Izewicz, *The Nuclear Ban Treaty and its possible Ramifications*, *International Institute for Strategic Studies, IISS Voices*, 1 November 2016.

(74) TPNW, Preamble.

(75) See Treaa Dunworth, *The Treaty on the Prohibition of Nuclear Weapons*, October 31, 2017, *American Society of International Law Insights*, Volume: 21, Issue:12; *Vienna Convention on the Law of Treaties of 1969*, Articles 30, 59.

(76) TPNW, Preamble.

(77) TPNW, Preamble.

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certain category of states (like the NWS's) to lawfully possess nuclear weapons. It prohibits all states to develop, test, produce, possess, stockpile, transfer, receipt, station, and use or threaten to use nuclear weapons.⁽⁷⁸⁾ The fact that the TPNW does not allow stationing, installation or deployment of nuclear weapons⁽⁷⁹⁾ may have strong implications on NATO member states such as Belgium, Germany, Italy and Turkey that have around 180 thermonuclear bombs in their territories, although they are not NWS's.⁽⁸⁰⁾ This was done on purpose in order to address the loophole of the NPT that may prove to be the main reason why NATO members would consider the TPNW not to be in compliance with their NATO obligations.⁽⁸¹⁾ This represents a serious challenge to the TPNW.

Furthermore, nuclear armed states can choose whether to join the TPNW by first disarming their nuclear weapons, or to agree to disarm after they become parties to the TPNW.⁽⁸²⁾

On the other hand, the NNWS are under the obligation to continue to apply the IAEA safeguards.⁽⁸³⁾ By doing so, the TPNW aspires to provide for the continuation of the IAEA safeguards and avoid a potential vacuum.

As of September 20, 2017 the TPNW is open for signature and will enter into force 90 days after 50 ratifications take place.⁽⁸⁴⁾ By November 10, 2017, the TPNW has 53 signatories and 'only' 3 ratifications.⁽⁸⁵⁾ The

(78) TPNW, Article 1 (a).

(79) TPNW, Article 1(g);

(80) Dan Joyner, *The Treaty on the Prohibition of Nuclear Weapons*, EJIL: Talk, July, 26, 2017, available at: <https://www.ejiltalk.org/the-treaty-on-the-prohibition-of-nuclear-weapons/>, (accessed November 2017).

(81) *Ibid.*

(82) TPNW, Article 4.

(83) TPNW, Article 3.

(84) See TPNW, Article 15.

(85) For the most recent update on signatories and ratifications, see the UN Treaty Collection, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-9&chapter=26&clang=en, (accessed November 2017).

signatory states and states that have expressed their consent to be bound by the TPNW, are under the obligation not to defeat the object and purpose of the treaty prior its entry into force.⁽⁸⁶⁾

IV. The NPT and TPNW: Wishful Thinking and Nuclear Deterrence Reality:

Both the NPT and the TPNW are a result of continuous efforts to establish international legal obligations for non-proliferation of nuclear weapons to NNWS's and nuclear disarmament of nuclear-armed states. However, in a field, where international law confronts the most drastic form of military power, uncertainties and imponderables remain. From a more formalistic point of view, the first challenge that the TPNW faces is the ratification by the required 50 states for the treaty to enter into force. Second, the more difficult part is that the number of parties to the TPNW must be truly universal in order to achieve complete nuclear disarmament. Third, no nuclear disarmament is possible under the TPNW without the nuclear-armed states.

If eventually the nuclear-armed states decide not to join the TPNW, the alternative would be to achieve an international prohibition of nuclear weapons based on the evolution of a customary rule of international law. There are already submissions that there is a customary international law obligation concerning nuclear disarmament identical to Article VI of the NPT. For example, the RMI argued that there is a breach of customary international law obligations on the side of India and Pakistan (subsequently including Israel and North Korea) as they are not parties to the NPT and as a result, not bound by Article VI as a treaty obligation.⁽⁸⁷⁾ Since the ICJ rejected the RMI's application on jurisdictional grounds, as stated above, the World Court made no pronouncement whether there is such a customary international law obligation.

(86) See Vienna Convention on the Law of Treaties of 1969, Article 18.

(87) See the Application Instituting Proceedings Against India submitted on 24 April 2014, by the RMI to the ICJ p.41-49; also see the Application Instituting Proceedings Against Pakistan submitted on 24 April 2014, by the RMI to the ICJ p. 36-44.

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However, the possibility for an evolution of customary international law based on the TPNW is not very viable as nuclear-armed states may opt out from such an obligation by persistently objecting to such a general practice accepted as law.⁽⁸⁸⁾

In such circumstances, as an alternative, the TPNW may evolve into having normative effect without the formal accession of the nuclear armed states; as was the case with the 1925 Geneva Protocol and the 1993 Chemical Convention, or the Landmines Convention that have resulted in compliance in many ways by states that are not parties to them.⁽⁸⁹⁾ Human and state perceptions change, this may also happen with nuclear weapons regardless of how unlikely this may seem for NWS's at these early stages.⁽⁹⁰⁾

However, more than these reasons, the possible success of the TPNW to achieve a world without nuclear weapons may present the main cause for concern. The basis of this unexpected argument is that a nuclear free world would undermine the existing understanding of the balance of powers between and within nuclear-armed states and NNWS's. Moreover, the doctrine of nuclear deterrence would be obsolete. States have an argument when they claim that nuclear weapons deter aggressions and that the 'prohibition puts the cart before the horse'.⁽⁹¹⁾ In fact, some may argue that nuclear weapons do not serve any purpose, except to act as deterrence.⁽⁹²⁾ Nuclear weapon states have adopted national policies based on nuclear deterrence.

(88) Paulina Izewicz, *The Nuclear Ban Treaty and its possible Ramifications*, International Institute for Strategic Studies, IISS Voices, 1 November 2016.

(89) See Treasa Dunworth, *The Treaty on the Prohibition of Nuclear Weapons*, October 31, 2017, *American Society of International Law Insights*, Volume: 21, Issue:12;

(90) For a discussion on the evolution of a normative ban on nuclear weapons based on a similar pattern as the one to the prohibition of cluster munitions and anti-personnel mines, see, John Borrie, *Humanitarian reframing of nuclear weapons and the logic of a ban* *International Affairs* 90:3, 2014, pg. 645.

(91) George Perkovich, *The Nuclear Ban Treaty: What Would Follow?* *Carnegie Endowment of International Peace*, 31 May 2017, pg.12.

(92) Michael J. Glennon, *Pre-empting Proliferation: International Law, Morality and Nuclear Weapons*, *The European Journal of International Law*, Vol. 24, no. 1, pg. 109.

For example, the US has adopted a national policy that it would only consider the use of nuclear weapons in ‘extreme circumstances to defend the vital interests of the United States or its allies and partners would be obsolete.’⁽⁹³⁾ The use and possession of nuclear weapons are inherently linked as ‘one cannot use what one does not have’.⁽⁹⁴⁾ This is the reason why the TPNW is opposed by nuclear states, NATO allies, as well as by Australia, South Korea and Japan due to their respective arrangements with the US.⁽⁹⁵⁾ This presents the single main challenge to the TPNW, the dichotomy between the idealism of a nuclear free world and the reality of nuclear deterrence.

V. Conclusion:

No ‘*quid pro quo*’ or ‘grand bargaining’ is provided by the TPNW. The TPNW takes a traditional international law approach in prohibiting nuclear weapons: one based on ‘sovereign equality’, where all states are equal to one another.⁽⁹⁶⁾ While this is the key to acquire the support of the vast majority of states, it is the reason why it is challenged by nuclear-armed states. However, this is a *conditio sine qua non* to a nuclear free world. It is either total disarmament or a continuum of limited in number, apocalyptic nuclear weapons. There is no third possibility.

At the same time, one has to be aware that a treaty by itself would not make nuclear bombs magically disappear.⁽⁹⁷⁾ But the alternative to continue with the NPT is simply not reasonable. The curious point is that the NPT was designed on the basis that, as a matter of *realpolitik*

(93) The US Department of Defense Law of War Manual, June 2015, pg.393-394.

(94) Daniel H. Joyner, *Interpreting the Nuclear Non-proliferation Treaty*, Oxford University Press, 2011, pg. 97.

(95) See Treasa Dunworth, *The Treaty on the Prohibition of Nuclear Weapons*, October 31, 2017, *American Society of International Law Insights*, Volume: 21, Issue: 12.

(96) See UN Charter, Article 2 (1).

(97) George Perkovich, *The Nuclear Ban Treaty: What Would Follow?* Carnegie Endowment of International Peace, 31 May 2017, pg. 9.

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the nuclear-armed states were to be privileged. Given the conditions of the past, this made sense. But by now the wheel has turned. The NPT is in force since 1970, almost half a century later, the prospect for a complete nuclear disarmament, remains just that, a prospect. The obligations from Article VI and nuclear disarmament are consistently marginalized by NWS's that have maintained an interpretation that the disarmament obligation is of a very limited scope and 'in some cases approaching non-existence'.⁽⁹⁸⁾ Clearly, without a clear commitment to achieve the end result of Article VI of the NPT, NWS's do not have a lot of credibility to scrutinize how the non-nuclear states are complying with their obligations.⁽⁹⁹⁾

As a result, international support to the NPTW is going to increase due to the failure of the nuclear-armed states to demonstrate good faith to pursue nuclear disarmament.⁽¹⁰⁰⁾ While much remains to be determined with the TPNW, it is a welcome treaty to 'shakeup stagnant NPT politics'.⁽¹⁰¹⁾ The TPNW would make it extremely difficult to close a blind eye to the existential threat to all humanity from nuclear weapons. Simply put, the *status quo* of business as usual is no longer an option.

(98) Daniel H. Joyner, *Interpreting the Nuclear Non-proliferation Treaty*, Oxford University Press, 2011, pg. 95-96.

(99) Jorge Morales Pedraza, *Non-Proliferation and Disarmament of Nuclear, Chemical and Biological Weapons: New Tasks for the United Nations Specialised Agencies*, *Public Organiz. Rev.* 14:19-33, 2014, pg. 23.

(100) George Perkovich, *The Nuclear Ban Treaty: What Would Follow?* Carnegie Endowment of International Peace, 31 May 2017, pg.1.

(101) Dan Joyner, *The Treaty on the Prohibition of Nuclear Weapons*, *EJIL: Talk*, July, 26, 2017, available at: <https://www.ejiltalk.org/the-treaty-on-the-prohibition-of-nuclear-weapons/>, (accessed November 2017);

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