

Changing the Status Quo in Nuclear Arms Control Law: The Treaty on the Prohibition of Nuclear Weapons 2017

I can't believe that this world can go on beyond our generation and on down to succeeding generations with this kind of weapon on both sides poised at each other without someday some fool or some maniac or some accident triggering the kind of war that is the end of the line for all of us. And I just think of what a sigh of relief would go up from everyone on this earth if someday – and this is what I have – my hope, way in the back of my head – is that if we start down the road to reduction, maybe one day in doing that, somebody will say, “Why not all the way? Let's get rid of all these things.”

Ronald Reagan, May 16, 1983¹

INTRODUCTION TO THE BOOK

The Treaty on the Prohibition of Nuclear Weapons 2017² marks an important development in nuclear arms control law, diplomacy and relations between states. Adopted by the UN General Assembly on July 7, 2017, it was supported by 122 nations, representing a potential disruptor to the nuclear status quo. It is the first treaty to ban nuclear weapons outright, taking a clear humanitarian approach to disarmament. Despite its success in coming to fruition, however, it is not celebrated by all nations. The permanent members of the UN Security Council neither participated in its negotiations, nor adopted the final text. No state with nuclear weapons endorses the Treaty and indeed they openly oppose its very existence. That said, its adoption is supported by the vast majority of UN Member States, representing a wide range of geographical areas spanning the globe and consisting of a sizable proportion of the world's population. Furthermore, civil society groups seem determined to activate grassroots-level citizen support intended to change attitudes against the conventional nuclear stance toward meaningful change and calling for the complete abolition of nuclear weapons and explosive devices. While the real and practical impact of this Treaty remains to be seen, there is little doubt that it marks

¹ See www.thereaganvision.org/quotes/.

² Treaty on the Prohibition of Nuclear Weapons, A/CONF.229/2017/8 (July 7, 2017), available online: <http://undocs.org/A/CONF.229/2017/8>.

a fundamental departure from present-day affairs regarding nuclear arms control and armament matters.

The purpose of this book is to examine the Treaty on the Prohibition of Nuclear Weapons (TPNW) within the contemporary international context, exploring various legal, diplomatic and geopolitical issues emanating from its adoption at the UN General Assembly in 2017. The primary focus is to examine the Treaty against the existing legal infrastructure of the nuclear nonproliferation and disarmament framework; to see how it fits into the overarching legal and diplomatic international architecture.

It should be noted from the outset that this author is in favor of any agreement or development that advances nonproliferation and moves toward complete and verifiable nuclear disarmament. Any apparent criticisms are meant to be constructive and aimed at understanding outstanding gaps to be filled for full disarmament. Hence, this book is a foray into new territory following the advent of the 2017 Treaty, which by some accounts this author feels is the most important nuclear arms treaty since the atom bomb was created.

Discussion throughout this work grapples with the Treaty from many different perspectives: the historical development leading to this controversial agreement; the philosophical and sociological underpinnings of its foundations; legal implications regarding its real and potential impact within the global context for both states acceding to the Treaty and those that oppose it; as well as exploring its current and possible future effects on the international architecture (i.e., the legal, institutional and diplomatic framework that governs nuclear weapons and regulates nuclear capacity). This covers various perspectives, including its potential for good; its deficiencies; its effects on international relations; the new global humanitarian movement that the Treaty represents; and finally, suggestions for the future developments in the area of nuclear disarmament and nonproliferation law.

While first assessments have been published on the Treaty,³ an in-depth discussion on these issues remains necessary in order to explore a wide range of issues from various perspectives. It is inevitable that a book of this nature will delve into possible options regarding the regulation of nuclear weapons, offering constructive observations. All discussion is meant in a positive spirit with the hope of identifying issues to address with a view to moving forward on what seems like an intractable “wicked problem”⁴ facing humanity today: the nuclear conundrum regarding what this author would call “the nuclear trilemma: weapons, waste and war.”

³ See, e.g., Dieter Fleck, “The Treaty on the Prohibition of Nuclear Weapons: Challenges for International Law and Security,” in: Black-Branch and Fleck (eds.) *Nuclear Non-Proliferation in International Law: Vol. IV Human Perspectives on the Development and Use of Nuclear Energy* (Asser Press/Springer, 2019), 395–415; Stuart Casey-Maslen, *The Treaty on the Prohibition of Nuclear Weapons. A Commentary* (Oxford University Press, Oxford Commentaries on International Law, 2019).

⁴ First defined by design theorists Horst Rittel and Melvin Webber who introduced the term “wicked problem.” See www.stonybrook.edu/commcms/wicked-problem/about/What-is-a-wicked-problem. With the hallmarks of a “super wicked problem” (Levin, K. B., Cashore, S. Bernstein and Auld,

In essence, the primary aim of this book is to explicate the Treaty with a view to examining what it may mean for the international community as a whole, including what it has done and may do to the international nuclear legal infrastructure. In doing so, it is inevitable that an analysis of this nature will offer commentary as to whether this Treaty is a viable solution to solve the nuclear weapons problem, and what it has achieved and could still achieve within the contemporary global context.

A NEW DIRECTION IN INTERNATIONAL DISARMAMENT LAW

The TPNW brings together a commitment on the part of many nations and civil society groups to change the nuclear legal landscape and political status quo. Its origins, aims and aspirations highlight hope of a new way of looking at such destructive weapons that ultimately threaten peace and security. Treaty deliberations, negotiations and adoption at the UN present a new dawn in the field of nuclear disarmament, delivering a new deal calling for a reconfiguration of arms approaches based on humanitarian principles and ideals. Campaigners promote positive traction toward the abolition and elimination of nuclear weapons in a peaceful fashion. In order to fully understand the psychology leading up to and delivering the Treaty, it is appropriate to examine the thinking that went into the deliberations leading to such a Treaty and how proponents see its adoption as a natural step in the progression toward disarmament within the broader international context.

To that end, Chapter 2 explores the historical development of the TPNW; the context in which – how and why – the Treaty arose. It discusses how non-nuclear weapon states became frustrated with the lack of progress in the implementation of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons⁵ (NPT)⁶ which ultimately calls for disarmament. This growing discontent amongst non-nuclear weapon states prompted discussions that produced a Model Nuclear Weapons Convention,⁷ to no avail. Concomitant to this, the NPT Review Conferences under the quintennial (five annual) review cycle failed to make progress, while parallel to this time frame three conferences on the *Humanitarian*

G. (2012). “Overcoming the Tragedy of Super Wicked Problems: Constraining our Future Selves to Ameliorate Global Climate Change.” *Policy Sciences*, 45, 121–152.)

⁵ Treaty on the Non-Proliferation of Nuclear Weapons (July 1, 1968), 729 UNTS 161.

⁶ For a legal analysis of the NPT see Daniel H. Joyner, *Interpreting the Nuclear Non-Proliferation Treaty* (Oxford: Oxford University Press, 2011), with Foreword by Mohamed I. Shaker, author of *The Nuclear Nonproliferation Treaty: Origin and Implementation 1959–1979*, three volumes (London/Rome/New York: Oceana, 1980). See also 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document (NPT/CONF, 2010/50), 2–19.

⁷ For the Nuclear Weapons Convention see UN General Assembly First Committee Resolution A/C.1/71/L.41 (October 14, 2017) on “Taking forward multilateral nuclear disarmament negotiations,” and Report by the open-ended Working Group A/71/371 (September 1, 2016); see also, UN Doc A/62/650 (January 18, 2008), http://inesap.org/sites/default/files/inesap_old/mNWC_2007_Unversion_English_No821377.pdf.

Impact of Nuclear Weapons were held in Norway, Mexico and Austria⁸ and an Open-ended Working Group was established by the General Assembly aimed to move “forward multilateral disarmament negotiations.”⁹ These conferences helped raise awareness of the humanitarian impact of nuclear weapons and built momentum and participation among a majority of states, the International Committee of the Red Cross and hundreds of NGOs which were led by the International Campaign to Abolish Nuclear Weapons (ICAN).¹⁰ The negotiations for the Treaty began in 2015 within the United Nations General Assembly, leading to a report in 2016 that called upon states to create and conclude as soon as possible a legally binding instrument to prohibit nuclear weapons leading to their elimination. Ultimately, the Treaty was finalized and again endorsed by 122 countries in 2017.

Chapter 2 goes into detail explaining the key developments that helped build the foundation for the Treaty, including: (1) the Declaration of the Tenth Special Session of the General Assembly; (2) the United Nations Millennium Declaration;¹¹ (3) the secretary-general’s five-point proposal on nuclear disarmament; (4) the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons;¹² (5) General Assembly Resolutions produced by the Open-ended Working Group; (6) the absence of concrete outcomes of multilateral nuclear disarmament negotiations within the United Nations framework for more than a decade; and (7) the urgency for substantive progress on priority disarmament and nonproliferation issues.

A look at the Treaty Working Group deliberations, in contrast with Secretary-General Ban Ki-Moon’s proposal and earlier developments on nuclear disarmament, reveals the overwhelming complexity and divisiveness of the negotiations among states to create a treaty that would be explicit, contain effective measurable outcomes with strict timelines, have a strong verification and compliance regime and include as many nuclear and non-nuclear armed states as possible while making a bold and clear commitment to achieving and maintaining the elimination of nuclear weapons on a global scale. This chapter lays the foundation for the discussion throughout the rest of the book noting the unique development of the Treaty that has its strengths and weakness for now and in the future.

TOWARD HUMANITARIAN NUCLEAR DISARMAMENT

Humanitarian efforts have made great strides in recent years toward addressing the destructive force of weapons as well as protecting and providing remedial assistance

⁸ See www.bmeia.gv.at/en/european-foreign-policy/disarmament/weapons-of-mass-destruction/nuclear-weapons/vienna-conference-on-the-humanitarian-impact-of-nuclear-weapons/.

⁹ A/RES/67/56 (2012), www.un.org/disarmament/wmd/nuclear/tpnw/.

¹⁰ See overview at www.un.org/disarmament/wmd/nuclear/tpnw/.

¹¹ UNGA Res 55/2 (September 8, 2000), www.ohchr.org/EN/ProfessionalInterest/Pages/Millennium.aspx.

¹² 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, Vols. I–III (NPT/CONF.2010/50 (Vols. I–III)).

to individuals affected by them. Chapter 3 explores the development of the humanitarian nuclear disarmament approach that effectively mobilized civil society groups across the world in the fight to eliminate nuclear weapons and ultimately leading to the TPNW. Humanitarian disarmament refocuses the nuclear debate on preventing and remediating human suffering in all nations caused by nuclear weapons. Traditional disarmament in contrast has, since 1968, mostly hinged on states trying to control nuclear weapons to advance mainly their own state security and political interests. The humanitarian disarmament movement has also developed its own unique “processes, purposes and provisions” that stand in stark contrast to traditional disarmament techniques. The unique process was applied in 1997 with the Landmines Treaty and then in 2008 with the Convention on Cluster Munitions, both of which were primarily driven by groups and ordinary individual citizens and focused on the protection of civilians rather than states with the primary aim of reducing and restricting dangerous weapons and mitigating their effects. These citizens and civil society groups, along with the movers of the TPNW focused on criticizing nuclear weapons and exposing their devastating force and destructive human impact. Thus, treaty negotiations included some of the very people affected by nuclear weapons.

LEGAL CONGRUENCE WITH EXISTING TREATY OBLIGATIONS

The success of conceiving the TPNW, and its adoption at the UN level aside, its legal enforcement depends on treaty incorporation into domestic law at the national level. Which states will ultimately sign and ratify it within their respective home jurisdictions is yet to be seen. Moreover, questions remain regarding how Treaty implementation will occur and moreover, how it will affect other obligations under the current nuclear architecture. Chapter 4 analyzes the degree to which the Treaty on the Prohibition of Nuclear Weapons is legally compatible and congruent with existing laws and international obligations under the NPT¹³ as well as the Comprehensive Nuclear-Test-Ban Treaty 1996 (CTBT).¹⁴ It explores whether TPNW developments complement existing obligations or serve to compete with these same requirements, actually creating ambiguity and division, rather than harmony and legal certainty. Additionally, the chapter examines the legally binding nature of the Treaty, including the effect on those states that have neither signed nor ratified it, particularly regarding its enforceability within the various jurisdictions adhering to the NPT and those intending to adopt the CTBT. It begins with

¹³ For a legal analysis of the NPT see Daniel H. Joyner, *Interpreting the Nuclear Non-Proliferation Treaty* (Oxford: Oxford University Press, 2011), with foreword by Mohamed I. Shaker, author of *The Nuclear Nonproliferation Treaty: Origin and Implementation 1959–1979*, three volumes (London/Rome/New York: Oceana, 1980). See also 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document (NPT/CONF, 2010/50), 2–19.

¹⁴ Comprehensive Nuclear-Test-Ban Treaty (CTBT), adopted by General Assembly Resolution 50/245 (September 10, 1996), 35 *ILM* 1439.

summaries of the NPT, the Partial Nuclear Test Ban Treaty¹⁵ (PTBT), the CTBT and the organizations that implement these treaties. It then explores the articles of the TPNW and its congruence with the CTBT and the NPT.

UNIVERSALITY UNDER CUSTOMARY INTERNATIONAL LAW

The TPNW aims to achieve universality. In that regard, there is little doubt that moves are afoot to alter the nuclear status quo relating to how politicians, diplomats and lawyers alike view such weapons with the intention of achieving a universal consensus for their elimination. Chapter 5 explores the question of whether the TPNW will be able to achieve universality through a shift in customary international law which changes according to state practice and *opinio juris*. It highlights the major challenges of achieving the ultimate goal of universality, including the opposition of nuclear-armed states as well as some non-nuclear-weapon states and comments on the lack of support from ICJ jurisprudence to that end. The discussion explains how customary international law develops and argues that the non-party states do not view the Treaty as imposing a legal obligation and show no sign of changing state practice to meet the Treaty obligations. Persistent objectors have already staked their claims and are not likely to budge in any manner, marking a fundamental challenge for Treaty supporters.

SAFEGUARDS, VERIFICATION AND IMPLEMENTATION

Aspirations for a world free of nuclear weapons provide new hope and meaning for many seeking their abolition. That said, full implementation requires complete and verifiable disarmament. Chapter 6 explores such issues, focusing on the text of the Treaty provisions and examining the specific wording in its various provisions. The fact that the Treaty lacks any distinct verification regime of its own raises important questions regarding measurable outcomes and credible enforcement mechanisms. The chapter discusses the verification deficiencies of the TPNW including problems with states self-declaring whether they own or have eliminated their nuclear weapons, different requirements for different states and the future role of the IAEA without having involved the organization in the Treaty negotiations. The chapter also draws lessons about the importance of strong verification regimes from the history of other weapons treaties and organizations including the NPT, the Biological Weapons Convention, the Chemical Weapons Convention and the IAEA. It explores how the Treaty could face challenges developing a competent international authority with expertise, capacity and staff.

¹⁵ Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space, and under Water (August 5, 1963), 480 UNTS 43.

NUCLEAR DETERRENCE POLICIES AND THE PROHIBITION
TREATY

The TPNW challenges deterrence policies. Once promoted by nuclear-armed governments as a necessity to ward off would-be attacks, the Treaty calls for the absolute abolition of all nuclear weapons, including for deterrence purposes. Chapter 7 analyzes deterrence policies within a modern context, looking at the emerging position advanced through the Treaty and international activism. It explores how nuclear weapons have traditionally been promoted as effective deterrents by nuclear-weapon states and organizations such as NATO, examining various challenges to this hitherto accepted defense doctrine. The discussion focuses on the relationship between the TPNW and NATO and umbrella states as well as those of other defense alliances including the Collective Security Treaty Organization (CSTO) and the Shanghai Cooperation Organisation (SCO).

The TPNW clearly prohibits threats to use nuclear weapons which, this author argues, includes for deterrence purposes. This implies that the TPNW could be construed to be in direct conflict with the collective nuclear deterrence strategy of NATO, requiring states parties who aspire to accede to the TPNW and who are also members or umbrella states of NATO either to sever their relationship, or significantly alter it, depending on whether they possess or host nuclear weapons. Discussion focuses on the positions of states currently harboring weapons, and organizations promoting their role for deterrence purposes, noting that none of them show any sign of changing their policy any time soon toward adopting the TPNW in the near future.

NUCLEAR DEFENSE DOCTRINES AND DISARMAMENT

Defense doctrines predicated on nuclear arms and the use of nuclear weapons would be contrary to the spirit and intent of the TPNW. Chapter 8 discusses current defense doctrines and how they might interact with the TPNW and new developments in international humanitarian law. Discussion focuses on the ICJ 1996 *Advisory Opinion* which left open the possibility of using nuclear capacity in the event of extreme necessity and subject to IHL conditions. It suggests that a future court might decide differently given that there is now a treaty expressly banning nuclear weapons and the shift in how many states are now against the use of nuclear weapons. The Treaty also has important implications for international law under *jus ad bellum* and *jus in bello*, such that it may strengthen these norms and further restrictions on the use of nuclear weapons as reason to initiate war or to use during a war. The Treaty could also bolster norms that restrict the use of nuclear weapons found in the UN Charter and International Humanitarian Law.

A BIFURCATED INTERNATIONAL LEGAL INFRASTRUCTURE

Questions remain regarding the legal effect and impact the TPNW will have in a modern context. It remains to be seen just how it will fit within the existing nuclear architecture, or juxtaposed against the present legal structure. Chapter 9 explores how the Treaty may serve to challenge existing international legal infrastructure by establishing a different set of legal norms, principles and expectations that may further fragment an already divided global community. This author divides states into two main camps; Resolute States that will ratify the treaty and Stalwart States that may not be expected to do so. The chapter discusses how the Treaty may challenge the nonproliferation and disarmament framework, serving to disrupt current nuclear legal authority and organizational architecture. It explores relationships with: (1) the NPT; (2) the IAEA; (3) the CTBTO; (4) partners coordinating approaches regarding terrorism by non-state actors; and (5) the positions of NATO and umbrella states. The chapter examines the degree to which the TPNW may serve to fragment existing structures, forging a new international legal infrastructure regarding disarmament and nuclear nonproliferation law.

Additionally, the author explores the relationship between existing nuclear-weapon-free zones (NWFZ) and the obligations under the TPNW, concluding that NWFZ may serve to strengthen and further the goals of the Treaty and that such zones may create additional obligations on NWFZ states that will advance nuclear disarmament. However, the TPNW also has the potential to disrupt NWFZ states' relationships with NWS and break down the complex legal framework of the many NWFZ treaties.

STIGMATIZATION ACTION

Civil society groups are working toward the successive elimination of nuclear weapons through stigmatization action aimed at complete denuclearization. Chapter 10 explores how proponents of the Treaty employ scientific research; activism both within and outside governmental institutions, driven by civil society groups and nuclear survivors; legal and philosophical research; economic divestment of nuclear weapons; and advocacy to their cause. Their aim is to move citizens and states from a "nuclearist" stance to a "non-nuclearist" worldview. This shift is currently happening among lawyers, citizens, government leaders, corporations and banks, further contributing to the delegitimization of nuclear weapons and their eventual elimination.

TOWARD NEO-UNIVERSALISM

Beyond the goal of universality, the Treaty provides an opportunity to promote universalism within the spirit of its aspirations. Many proponents of the Treaty

are concentrating their efforts on mobilizing collective action in order to change perceptions of how nuclear weapons are perceived and valued both locally and globally. As discussed in Chapter 11, effectively, a new form of universalism may change the current nuclear posture, igniting new forms of universal values based on what this author calls “nuclear peace without nuclear fear” (explored more fully in concluding Chapter 13).

Specifically, Chapter 11 examines how the TPNW, under the guidance of humanitarianism, may sow the seeds of new normative behavior within the global context ultimately contributing to an ideological shift from the current conventional armament stance based on realism to that of a humanitarian neo-universalism that shuns nuclear defense doctrines and the weapons that provide their very foundations. Whether or not states currently consent to the Treaty, at present there is an emerging move toward a united universal understanding of the risks and perils that such weapons pose. There is a growing shared fear of their effects and potential impact on political discourse, the environment and humanity as a whole.

OBLIGATIONS ERGA OMNES

A fundamental problem facing the TPNW is that the nine states with nuclear weapons openly defy its existence. Both states parties to the NPT – Russia, the United States, China, France and the UK – and non-NPT parties – India, Pakistan, Israel and North Korea – oppose it outright. They refused to participate in Treaty negotiations and contend that they will neither sign nor ratify it. Moreover, they have important backing from other states through various agreements such as NATO and umbrella alliances, as well as the CSTO and SCO. Consequently, it seems there is an important gulf between supporters of the TPNW and those opposing it. The dream of legally enforcing the Treaty seems more than remote; indeed, it seems nonexistent. The TPNW does not directly bind the NWS and it seems highly unlikely that they would ever join the Treaty or be bound under customary international law. At present there appears to be an intractable division between the positions of both camps.

In its 1996 Advisory Opinion relating to nuclear issues, the International Court of Justice (ICJ) referred to obligations *erga omnes*.¹⁶ Chapter 12 explores these obligations relating to nuclear matters as universal norms applicable to all states and owed to the international community as a whole. It examines what is meant by *erga omnes* obligations, assessing their current recognition throughout the international community. It looks at why they are relevant to the area of nuclear disarmament discussions and how they may apply to current discussions. Moreover, discussion

¹⁶ See also *Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (February 5) at paras. 33–34.

pursues how they should be enforced, analyzing a link between the goals of the TPNW and binding nuclear legal obligations within a contemporary context.

CONCLUSION: UNITED WE STAND, DIVIDED WE FALL

In essence the TPNW has prompted much debate and speculation across the globe regarding its success as an arms control treaty, as well as its overall impact within the wider international community. The main purpose of the book is to examine a variety of issues emerging from the adoption of the Treaty in the UN General Assembly and to explore various implications pertaining to the Treaty. The concluding Chapter 13 will assess its real and potential impact, pointing to strengths and weaknesses, and thus illuminating how the Treaty could play out on the international stage. It ultimately calls for the right to nuclear peace and freedom from nuclear fear, concluding that nuclear weapons threaten peace and induce fear.