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The Treaty on the Prohibition of Nuclear Weapons: Disarmament and international law

The Norwegian Academy of International Law (NAIL)

Renewed debate about nuclear disarmament is important and should be welcomed. It is vital that this debate is based on facts and sound analysis. In the following, we offer our conclusions about four key issues in the debate about the Treaty on the Prohibition of Nuclear Weapons (TPNW).

Nuclear weapons under international law

Use of nuclear weapons on any scale would violate key norms of international law. Under international humanitarian law, parties to a conflict are obliged, *inter alia*, to take “constant care” to “spare the civilian population, civilians and civilian objects”, to refrain from using weapons “of a nature to cause superfluous injury or unnecessary suffering”, and to refrain from “indiscriminate attacks”.¹ International humanitarian law leaves little if any room for the lawful use of nuclear weapons. Yet, pending the entry-into-force of the TPNW, there exists no explicit international prohibition against the use of nuclear weapons. The purpose of the TPNW is to communicate clearly – and in legal form – that the use and possession of nuclear weapons is unacceptable in all circumstances.

International law plays a vital role both as a framework to regulate international conduct and as an embodiment of shared understandings and values. The TPNW reinforces key norms applicable to nuclear weapons and the use of force, including those enshrined in international humanitarian law and the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). The NPT obliges all its parties to pursue effective measures for nuclear disarmament.

NATO and nuclear disarmament

It has been clearly established that ratification of the TPNW is not legally at odds with NATO membership. The question is political, not legal.² NATO’s legal basis, the North Atlantic Treaty,

¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, articles 57, 35, and 51.

² E.g. International Human Rights Clinic, “Nuclear Umbrella Arrangements and the Treaty on the Prohibition of Nuclear Weapons”, Harvard Law School (June 2018). http://hrp.law.harvard.edu/wp-content/uploads/2018/06/Nuclear_Umbrella_Arrangements_Treaty_Prohibition.pdf; Norwegian Academy of International Law, “The TPNW and its implications for Norway” (September 2018). <http://intl.no/wp-content/uploads/2018/10/tpnw-implications-for-norway-25-sept-2018.pdf>; Norwegian Ministry of Foreign Affairs,

does not mention nuclear weapons, and the TPNW does not preclude membership in military alliances with nuclear-armed states.

Current NATO doctrine provides that NATO shall endeavour to “create the conditions” for nuclear disarmament.³ The TPNW arguably constitutes an attempt at creating precisely such conditions through stigmatising and delegitimising nuclear arms. At the same time, and somewhat contradictory, NATO policy also provides that the alliance will maintain an “appropriate mix” of nuclear and conventional military capabilities. However, in contrast to NPT, which legally obliges Iceland to pursue the objective of a world without nuclear weapons, NATO’s nuclear doctrine is not based on a legally binding document.

Nuclear policy has always been a source of disagreement within NATO. While three member states have acquired nuclear weapons, the other 26 have not. While five member states have agreed to host nuclear weapons on their territory, others, including Iceland, have refused. And while some member states have resisted virtually all meaningful disarmament initiatives, including the adoption by NATO of a no-first-use policy, others have played leading roles in the work for a disarmament. On several occasions in recent years, Iceland has subscribed to joint statements delivered to UN and NPT meetings, stating that nuclear weapons should never be used again “under any circumstances”.⁴

Non-proliferation verification

A number of observers have maintained that the TPNW provides for a less robust verification system than the NPT and, by extension, undermines the international safeguards system. This is not correct. The TPNW demands the same minimum safeguards standard as the Non-Proliferation Treaty (IAEA “comprehensive safeguards”). In addition, the TPNW obliges all states that have voluntarily accepted an IAEA additional protocol – more than two thirds of the TPNW’s early supporters – to maintain that standard. By contrast, there is nothing in the NPT that prevents its parties from withdrawing from the additional protocol. In this view, the TPNW takes a step in the right direction. That said, supporters of nuclear non-proliferation and disarmament should endeavour to make the IAEA additional protocol mandatory for all states.⁵

Nuclear disarmament approaches

It is often stated that the main disagreement in nuclear disarmament diplomacy is not about the goal, but the approach. Opponents of the TPNW argue that stigmatization and moral condemnation of nuclear weapons will make the world less stable and threaten international peace and security. In their view, nuclear disarmament can only be achieved in a balanced and irreversible manner, with proven methods and with all the nuclear-armed states involved.

“Uttredning om Traktaten om forbud mot atomvåpen” (2018). <https://www.regjeringen.no/no/dokumenter/prop.-1-s-20182019/id2613564/>.

³ NATO, “Active Engagement, Modern Defence: Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organization” (2010).

https://www.nato.int/nato-static-f12014/assets/pdf/pdf_publications/20120214_strategic-concept-2010-eng.pdf.

⁴ Joint Statement on the Humanitarian Consequences of Nuclear Weapons, UN General Assembly First Committee (28 April 2015). http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/revcon2015/statements/28April_AustriaHumanitarian.pdf.

⁵ See Norwegian Academy of International Law, “The TPNW: Setting the Record Straight” (October 2018). <http://intl.law.no/wp-content/uploads/2018/10/TPNW-Setting-the-record-straight-Oct-2018-WEB-1.pdf>.

Supporters of the TPNW do not dispute that nuclear disarmament should be irreversible, or that it would require reductions to be balanced, irreversible and verified, but where they disagree is on the role of stigmatization and the part that non-nuclear-armed states can play in creating the conditions for nuclear disarmament. Proponents of the TPNW see the new treaty as a tool for generating normative and political pressure on the states that continue to rely on nuclear weapons for their national defence.

In our view, warnings about the destabilizing effect of the TPNW appear exaggerated and largely unsubstantiated. We would also posit that the two approaches are in fact not contradictory. The role of the TPNW is to serve as a catalyst for effective measures for disarmament, which means that progress along tracks that have worked in the past would also be welcomed. The problem is that in recent years, very little progress has been achieved along the traditional disarmament route, and on some levels it has even gone backwards.

Since the 1970s, arms control agreements have come and gone: the SALT agreements, the SORT agreement, the START agreements, and the INF Treaty. The nine NPT review conferences convened thus far have all failed to agree on time-bound disarmament obligations. Review conferences have on occasion succeeded in agreeing on broad roadmaps for disarmament, but have then been undermined by lacking implementation. The TPNW represents something new, and something that could potentially provide a much-needed boost to international nuclear disarmament efforts. If the alternative is to continue to support approaches that have not worked, while at the same time refusing to condemn nuclear weapons, this will at best perpetuate the status quo.

In closing, it is difficult to find credible arguments for why a stronger norm against nuclear weapons would not make the achievement of a world without nuclear weapons more likely. And for Iceland, any decision on how to move forward with regards to the TPNW should be based on a recognition of this fact.

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