

A COMPARISON OF NATIONAL REVIEWS OF THE TREATY ON THE PROHIBITION OF NUCLEAR WEAPONS

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I. INTRODUCTION

The 2017 Treaty on the Prohibition of Nuclear Weapons (TPNW), which was adopted in June 2017 and entered into force on 22 January 2021, represents the most recent iteration of attempts to advance global nuclear disarmament.¹ Since it entered into force, the provisions of the TPNW have been binding international law for its states parties. As such, the TPNW is the first legally binding international instrument to prohibit its states parties to use, threaten to use, develop, produce, manufacture, acquire, possess, stockpile, transfer, station, or install nuclear weapons or assist with any prohibited activities.²

Europe is the region most divided on the TPNW.³ Of all the European states, only 13 participated in the drafting process: Andorra, Austria, Cyprus, the Holy See, Ireland, Liechtenstein, Malta, Monaco, the Netherlands, North Macedonia, San Marino, Sweden and Switzerland.⁴ From this group, just 5 (Austria,

¹ Treaty on the Prohibition of Nuclear Weapons (TPNW), opened for signature 20 Sep. 2017, entered into force 22 Jan. 2021. The TPNW was almost unanimously adopted with 122 votes in favour, 1 against (the Netherlands) and 1 abstention (Singapore). Casey-Maslen, S. and Vestner, T., 'Trends in global disarmament treaties', *Journal of Conflict & Security Law*, vol. 25, no. 3 (2020), p. 465.

² TPNW (note 1), Article 1.

³ Hilgert, L.-M., Kane, A. and Malygina, A., 'The TPNW and the NPT', Deep Cuts Issue Brief no. 15, Jan. 2021, p. 1.

⁴ United Nations, 'List of participants', UN Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, Leading Towards their Total Elimination, 16 Feb., 27–31 Mar., 15 June–7 July 2017. The EU member states which participated are: Austria, Cyprus, Ireland, Malta, Netherlands and Sweden. The Netherlands was the only NATO member state participating.

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SUMMARY

This paper maps and analyses the national reviews of the 2017 Treaty on the Prohibition of Nuclear Weapons (TPNW) conducted by Germany, Ireland, the Netherlands, Norway, Sweden, Switzerland and the United Kingdom. These reviews differ in length, depth and purpose, but present a wide range of important arguments from both legal and policy perspectives. The focus is on three main aspects: the interplay between the TPNW and existing legal instruments and international law; the verification provisions in the TPNW; and the consequences of signing the TPNW for security cooperation with the designated nuclear weapon states of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty, NPT). Through a comparative analysis of these national reviews, the paper seeks a better understanding of how the TPNW is seen and interpreted by various European states. This will help to clarify what the next steps towards a future common European position should be.

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the Holy See, Ireland, Malta and San Marino) were among the first 50 to ratify the treaty. However, the TPNW has led to discussions in a number of European national settings. Germany, Ireland, the Netherlands, Norway, Sweden, Switzerland and the United Kingdom have conducted reviews of the TPNW within their national frameworks. These documents offer a unique insight into national perspectives on the key challenges and opportunities presented by the TPNW. To date, however, there has been no comprehensive comparative analysis of the different understandings of the treaty that they advance. This paper offers such an analysis.

These national reviews differ in length and depth, and also in the purpose they fulfil. Not all the reviews have the same focus and same goal. Nonetheless, they present a wide range of important arguments from both a legal and a policy perspective.

The German review was drafted by the Research Services division of the German Bundestag (Federal Parliament) in January 2021, ahead of the TPNW's entry into force.⁵ The Irish document was produced by the Library and Research Service of the Oireachtas (National Parliament) in May 2019, and prepared for distribution to Oireachtas members to assist them in their parliamentary duties.⁶ In addition to this document, statements by the Irish Minister of Foreign Affairs set out in the parliamentary and committee debates on the TPNW are also included.⁷ The Dutch review was issued in January 2019 in response to the Voordewind motion, which requested a legal analysis of the compatibility of national law and the TPNW.⁸ The Norwegian position paper was issued in November 2018 as a review of the consequences for Norway of ratifying the TPNW.⁹ The Swedish inquiry was published by the government in January 2019, intended as an analysis of the consequences of

Sweden's accession to the TPNW.¹⁰ The Swiss report was published by the government in June 2018. It also seeks to delve into the implications for Switzerland if it were to become a state party.¹¹ Finally, the British analysis considers the Joint Statement on the Treaty on the Non-Proliferation of Nuclear Weapons issued by the five permanent members of the United Nations Security Council in October 2018 (P5 Joint Statement), the conclusions of a report published by the House of Lords Select Committee on international relations in April 2019, and a debate in the House of Lords on the prohibition of nuclear weapons in January 2021.¹²

The goal of this paper is to map and understand, rather than to assess the validity of, the legal arguments and interpretations presented in the national reviews. While some of those interpretations are complementary or differ only slightly, there are also diametrically opposing views. Conducting a comprehensive analysis of these reviews sheds light on which aspects of the treaty are most controversial for states, and where the priorities of the reviewing countries lie.

The European Union (EU) has positioned itself for almost 20 years as the global leader against the proliferation of weapons of mass destruction.¹³ EU member states have worked together to advance this agenda in a number of global settings—be it the UN General Assembly's First Committee (on disarmament) or in the review process of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty, NPT).¹⁴ At the same time, however, one EU member state is a nuclear weapon state (France), four are thought to host United States nuclear weapons on their territory (Belgium, Germany, Italy and the Netherlands) and a majority of EU member states'

¹⁰ Lundin, L., Inquiry into the consequences of a possible Swedish accession to the Treaty on the Prohibition of Nuclear Weapons, Jan. 2019.

¹¹ Swiss Federal Department of Foreign Affairs, Report of the Working Group to analyse the Treaty on the Prohibition of Nuclear Weapons, 30 June 2018.

¹² British Government, P5 Joint Statement on the Treaty on the Non-proliferation of Nuclear Weapons, 24 Oct. 2018; British House of Lords, Select Committee on International Relations, 'Rising nuclear risk, disarmament and the Nuclear Non-Proliferation Treaty', 7th Report of Session 2017–19, 24 Apr. 2019; and British Minister of State, Foreign, Commonwealth and Development Office, Lord Ahmad of Wimbledon, 'Prohibition of Nuclear Weapons', vol. 809, 21 Jan. 2021.

¹³ Council of the European Union, EU Strategy Against Proliferation of Weapons of Mass Destruction, 15708/03, 10 Dec. 2003.

¹⁴ Portela, C., *The EU's Arms Control Challenge: Bridging Nuclear Divides*, Chaillot Paper no. 166, (European Union Institute for Security Studies: Apr. 2021).

⁵ German Parliament, Report on the Legal Relationship between the Treaty on the Prohibition of Nuclear Weapons and the Non-Proliferation Treaty, 19 Jan. 2021.

⁶ Hurley, D., 'The Treaty on the Prohibition of Nuclear Weapons', Oireachtas Library and Research Service, May 2019.

⁷ Irish Houses of the Oireachtas, Minister of State at the Irish Department of Foreign Affairs and Trade (Deputy Ciarán Cannon), Dáil Éireann debate, vol. 986, no. 3, 19 Sep. 2019; and Irish Houses of the Oireachtas, Seanad Éireann debate, vol. 268, no. 12, 4 Dec. 2019.

⁸ Blok, S. A. and Bijleveld-Schouten, A. Th. B., 'Reaction of the Dutch Government to the motion Voordewind about nuclear disarmament and non-proliferation', 30 Jan. 2019, p. 3 (informal translation).

⁹ Norwegian Ministry of Foreign Affairs, Review of the consequences for Norway of ratifying the Treaty on the Prohibition of Nuclear Weapons, 28 Nov. 2018.

security policies are closely connected to cooperation with nuclear weapon states, given that they are members of the North Atlantic Treaty Organization (NATO) and as such benefit from the nuclear umbrella. The EU is also an important partner of a number of other states, such as Switzerland. For this reason, it is essential to better understand how the individual member states view the TPNW. Such an understanding can help predict possible openings for cooperation, but also where conflicts or rifts might lie.

Reflecting the themes of the national reviews, the paper focuses on three main issues. First, it addresses how the national reviews assess the relationship between the TPNW and other instruments of international law, notably the NPT (section II). It finds that the degree to which the TPNW contributes to the development of international norms and the disarmament process is contested. Second, it reviews the analyses undertaken in the national reviews of the disarmament verification and safeguards methods set out in the TPNW (section III). It finds a general sense of dissatisfaction, albeit for different reasons, to be the common denominator in the reviews that touch on this subject. Third, it examines another core concern about the TPNW addressed in the reviews, which is cooperation with the nuclear weapon states, either through assistance or as a member of NATO (section IV). Finally, it presents conclusions on how the TPNW is seen and interpreted by several European states, and suggests some next steps towards a future common European position on interpretation of the TPNW (section V).

II. THE TPNW AND EXISTING LEGAL INSTRUMENTS

The first issue is how individual national perspectives view the link between the TPNW and other legal instruments, and how these national positions compare with academic writings on the TPNW. The focus is on the legal aspects of the TPNW, but it should be noted that the treaty's normative objectives are not limited to formal international law. Instead, the treaty aims to establish a strong stigma against the possession or use of nuclear weapons. Scholars have for some time recognized the existence of a 'nuclear taboo', or a social norm among states that prohibits the use of nuclear weapons, but the status of this taboo is uncertain.¹⁵ A

¹⁵ For a recent review of the scholarship on the 'nuclear taboo', see Smetana, M. and Wunderlich, C., 'Non-use of nuclear weapons in world

leading goal of the TPNW is to support this prohibitive social norm and extend it to the possession and the threat of use of nuclear weapons. In this sense, the TPNW is less concerned with resolving all the minute legal details, and more about strengthening the norm against nuclear weapons. Having said that, it takes the form of a legal document and TPNW proponents use legal terminology, such as nuclear weapons being 'illegal'. For this reason, the legal analysis offered by this paper is warranted.

The TPNW and the development of international law

The reviews of Germany, Ireland, the Netherlands, Sweden, Switzerland and the UK touch on the issue of whether the TPNW contributes to the development of general international law. Their conclusions range between those which argue that the TPNW does not contribute to the development of international law and those which see the TPNW as an important contribution to the development of international law.

At one end of the spectrum, the P5 Joint Statement argues that the TPNW neither contributes to the development of customary international law, nor sets new standards or norms.¹⁶ Somewhere around the midpoint is the report from the Netherlands, which states that the TPNW, on balance, does not make an effective contribution to the disarmament processes of the international legal order because, among other things, it does not have broad political support.¹⁷ At the other end of the spectrum, the Swiss review argues that the TPNW further develops existing legal obligations, reaffirms and complements existing prohibitions and restrictions under international law, and stipulates the incompatibility of the use of nuclear weapons with international law.¹⁸

The national reviews are also vocal on the impact of the TPNW from a policy perspective, disagreeing among themselves on whether the TPNW undermines or supports the global disarmament process. The P5 Joint Statement states that the TPNW fails to address the key issues that must first be overcome before lasting global nuclear disarmament can be achieved. It also argues that the TPNW 'creates division across the international non-proliferation and disarmament

politics: Toward the third generation of "nuclear taboo" research', *International Studies Review*, 13 Feb. 2021.

¹⁶ British Government, P5 Joint Statement (note 12).

¹⁷ Blok, S. A. and Bijleveld-Schouten, A. Th. B. (note 8), p. 3.

¹⁸ Swiss Federal Department of Foreign Affairs (note 11), p. 8.

machinery, which could make further progress on disarmament even more difficult'.¹⁹ Finally, it suggests an alternative based on gradual multilateral disarmament negotiated in a step-by-step approach—a posture also adopted by the British Government.²⁰ The House of Lords inquiry concludes that the TPNW has little chance of achieving its goal in the short or medium term, and that while it may not undermine the NPT, it could exacerbate polarization and increase division between the nuclear weapon states and the non-nuclear weapon states.²¹ However, the House of Lords also suggests that the British Government 'adopt a less aggressive tone about this treaty and seek opportunities to work with its supporters towards the aims of Article VI of the [NPT]'.²²

The Swedish review follows a similar line, arguing that the nuclear disarmament process is stagnating and fragmentation must be avoided. In this regard, the review foresees that Sweden's accession to the TPNW could prevent it from playing a facilitating role in global nuclear disarmament, while also damaging the perception of Sweden in Europe. However, the Swedish review also acknowledges that the TPNW has helped to increase awareness of the need for nuclear disarmament.²³

The German review states that the TPNW is part of a common nuclear disarmament architecture, whereas the Irish review interprets it as a way to highlight the international community's concern at the slow pace of nuclear disarmament within the NPT framework.²⁴ The Swiss review also stresses that the TPNW could, over time, reinforce the taboo associated with the use of nuclear weapons.²⁵

Weighing the different arguments related to the development of international law

One of the arguments in favour of adoption of the TPNW was to close the so-called legal gap related to

the use of nuclear weapons.²⁶ The notion of a legal gap is rooted in the 1996 Advisory Opinion on Nuclear Weapons delivered by the International Court of Justice (ICJ). In its decision, the ICJ held that it was not able to 'conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance'. In this connection, it referred to 'the fundamental right of every State to survival, and thus its right to resort to self-defence . . . when its survival is at stake'.²⁷ In other words, the ICJ suggested that the use of nuclear weapons can be lawful under international law, albeit in very limited circumstances.²⁸ In this context, and unlike the case of chemical or biological weapons, which were banned by multilateral treaty, there is a legal gap in relation to prohibition of the use, production, transfer and possession of nuclear weapons.²⁹

The TPNW seeks to close this gap. Proponents of the TPNW often argue that their goal is to 'outlaw' nuclear weapons and to make them 'illegal'.³⁰ In its preamble, which goes further than the ICJ Advisory Opinion, the TPNW notes that 'any use of nuclear weapons would be contrary to the rules of international law applicable in armed conflict, in particular the principles and rules of international humanitarian law'.³¹

The provisions of the TPNW are binding on the states parties to the treaty. To make them applicable to non-parties, the TPNW would have to reach the status of customary international law. The TPNW does not currently reflect customary international law because the ban on nuclear weapons has not yet reached customary status, but its provisions could contribute to the future development of custom. To determine the existence and content of customary international law, two elements must be considered separately: state practice and *opinio juris*. State practice refers to a general practice, while *opinio juris* concerns whether such practice is accepted as law.³²

¹⁹ British Government, P5 Joint Statement (note 12).

²⁰ British Minister of State (note 12).

²¹ British House of Lords (note 12), p. 64.

²² British House of Lords (note 12), p. 65.

²³ Lundin (note 10), pp. 39, 44, 52. A frequent criticism of this report is that it is just the opinion of one person. While this report might have been written by one person, it was in response to an official request from the Swedish Government to Ambassador Lundin. It was also typeset by the Cabinet Office and published by the Swedish Government on an official website. In these circumstances, in the current authors' view, the report can be considered to be the Swedish review.

²⁴ German Parliament (note 5), p. 11; and Hurley (note 6), p. 23.

²⁵ Swiss Federal Department of Foreign Affairs (note 11), p. 5.

²⁶ Nystuen, G. and Egeland, K., 'A "legal gap"? Nuclear weapons under international law', Arms Control Association, Mar. 2016.

²⁷ International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, paras 95–96.

²⁸ See e.g. Casey-Maslen, S., *The Treaty on the Prohibition of Nuclear Weapons: A Commentary*, Oxford Commentaries on International Law (Oxford University Press: Oxford, 2019), p. 102.

²⁹ Nystuen and Egeland (note 26).

³⁰ ICAN, 'The Treaty on the Prohibition of Nuclear Weapons enters into force' [n.d.].

³¹ TPNW (note 1), preamble.

³² International Law Commission, 'Draft conclusions on identification of customary international law', Text adopted by the

Adoption of the TPNW reflects state practice and, over time, widespread adherence coupled with respect for its provisions could confirm the development of custom. However, as one scholar notes, the concepts of ‘specially affected states’ and ‘persistent objectors’ are relevant in this process.³³ For a new custom to be developed, the specially affected states—in this case, the nuclear weapon states—ought to consent. Some scholars expand this category of states to ‘those in whose territories and against whose populations nuclear weapons have been used and/or tested’, albeit that ‘these states may be considered specially affected only with regard to those customary rules that concern past usages or testing of nuclear weapons’.³⁴ Even if a new rule were created, however, those states which objected to it while it was being developed, as ‘persistent objectors’, would not be bound by it.³⁵ This explains why some states, such as the members of NATO, position themselves as persistent objectors and affirm that there is no customary rule that bans nuclear weapons.³⁶

The interplay between the TPNW and the NPT

The TPNW mentions the NPT in its preamble, in which it reaffirms that ‘the full and effective implementation of the Treaty on the Non-Proliferation of Nuclear Weapons, which serves as the cornerstone of the nuclear disarmament and non-proliferation regime, has a vital role to play in promoting international peace and security’.³⁷

Article 18 of the TPNW deals with the relationship between the treaty and other agreements. This article is modelled after Article 26(1) of the Arms Trade Treaty, providing a link with the rest of the arms control and disarmament architecture, including the NPT. Article 18 was one of the more contested articles, on which it was difficult to reach agreement during treaty negotiations.³⁸ It reads, ‘The implementation of

this Treaty shall not prejudice obligations undertaken by States Parties with regard to existing international agreements, to which they are party, where those obligations are consistent with the Treaty’.³⁹ As one scholar notes, the controversy that this article generated is linked to the final clause, ‘where those obligations are consistent with the Treaty’. The discussion on what this wording means is reflected in the various national reviews, which offer a broad range of interpretations.

The P5 Joint Statement and the British Government conclude that the TPNW conflicts with and risks undermining the disarmament architecture achieved with key partners on the NPT.⁴⁰ The German review makes a quite different assessment, stating that the TPNW is not in legal conflict with the NPT because Article 18 does not establish the explicit priority of the TPNW to the detriment of the NPT, and membership of the TPNW neither repels nor qualifies existing NPT obligations.⁴¹

The Swedish review notes that the TPNW is largely dependent on what has been agreed under the NPT regime, including through the 1996 Comprehensive Nuclear-Test-Ban Treaty (CTBT), because there is no independent system for compliance in the TPNW. It also expresses concern that the international community might lose the will to promote implementation of the NPT regime.⁴² The Irish review affirms that the NPT is reinforced by the TPNW, as the latter ‘provides for states to fulfil their disarmament obligations under the non-proliferation treaty, Article VI, and affirm their commitment to achieving a world free from nuclear weapons’.⁴³

The Norwegian review, for its part, suggests that the TPNW and the NPT could be compatible, after assessing that certain provisions of the TPNW impose more comprehensive or new obligations in the field of non-proliferation. Recalling the ICJ’s 1996 Advisory Opinion, which emphasizes that Article VI contains an obligation to achieve a specific result—nuclear disarmament in all its aspects—it concludes that ‘there are no grounds for asserting that the TPNW is contrary to the provisions of the NPT . . . However, opinions

Commission at its 70th session, 2018, submitted to the United Nations General Assembly as a part of the work of that session (A/73/10, para. 65), conclusions 2 and 3.

³³ Hill, S., *NATO and the Treaty on the Prohibition of Nuclear Weapons*, Chatham House Research Paper (Chatham House: London, Jan. 2021), p. 24.

³⁴ Lythgoe, G., ‘Nuclear weapons and International Law: the Impact of the Treaty on the Prohibition of Nuclear Weapons’, *EJIL:Talk!*, Blog of the European Journal of International Law, 2 Dec. 2020.

³⁵ Casey-Maslen (note 28), p. 24.

³⁶ Hill (note 33), p. 25.

³⁷ TPNW (note 1), preamble.

³⁸ Casey-Maslen (note 28), pp. 255–57.

³⁹ TPNW (note 1), Article 18.

⁴⁰ British Minister of State (note 12); and British Government, P5 Joint Statement (note 12).

⁴¹ German Parliament (note 5), p. 36.

⁴² Lundin (note 10), p. 54.

⁴³ Irish Houses of the Oireachtas, Minister of State at the Irish Department of Foreign Affairs and Trade (note 7).

are divided as to whether the Treaty is an appropriate instrument for achieving the goal of a world without nuclear weapons'.⁴⁴

The Swiss review, which presents a position close to the German review, states that the legality of nuclear weapon possession is assessed differently in both treaties and that it is not yet clear how states parties to both treaties will handle this tension or what the resulting implications for the NPT will be. The review notes that it remains to be seen whether future meetings of states parties to the TPNW will allow constructive interaction between the agreements, or will result in duplication, fragmentation or further polarization.⁴⁵ However, the Swiss review also predicts that it may be harder to achieve consensus on the NPT because certain states might refer to the higher prohibition standard in the TPNW, and that political pressure could restrict cooperation while also stigmatizing the nuclear weapon states.⁴⁶

The Swiss review further regrets that the centrality of the NPT was not more firmly enshrined in the treaty text.⁴⁷ This position was articulated during the TPNW negotiations: Ireland, Sweden and Switzerland supported a preambular reference to the NPT, noting that its obligations should be framed as complementary and affirming.⁴⁸ At the same time, Switzerland argued against creating an explicit hierarchy between treaties and Sweden similarly emphasized that the complementary aspect of the TPNW was a significant factor in its decision to join the negotiations.⁴⁹

In the negotiations, the Netherlands argued that the hierarchy of agreements should be clarified and that there should be some assurance that in case of conflict between the TPNW and the NPT, the latter would prevail.⁵⁰ It also expressed concerns about the direction the treaty was taking with respect to other instruments that it was meant to complement,

not only the NPT but also the CTBT.⁵¹ According to the Netherlands, these concerns led it to vote against adoption of the TPNW, explaining that it felt that the TPNW now undermined the NPT.⁵² However, the Dutch review concludes that the Netherlands sees NATO membership as essential to its national interest, and regards the TPNW as incompatible with its membership. Dutch accession to the treaty is therefore not possible.⁵³

From a legal standpoint, TPNW sceptics in academia share the view that Article 18 allows the subordination of the NPT to the TPNW. For instance, some scholars conclude that, 'given the complicated relationships between the NPT, the NWFZ [Nuclear-Weapon-Free Zone] treaties and the ban treaty, parties to these separate treaties may have difficulty deciphering where the legal application of one treaty regime begins and another ends. This risk is exacerbated by the drafting of the ban treaty, which . . . allows for alternative interpretations of the legal requirements of the treaty itself'.⁵⁴ Taking a similar stand, another scholar concludes that whether the two regimes conflict will 'only become apparent in practice'.⁵⁵

Supporters of the TPNW, such as the Austrian Ambassador and delegate to the TPNW negotiations, Thomas Hajnoczi, note that achieving the goal of Article VI of the NPT would be impossible without the development of further legal instruments, which the article foresees.⁵⁶ Indeed, Article VI envisages future negotiations 'on a treaty on general and complete disarmament under strict and effective international control'.⁵⁷ The ICJ also made clear that Article VI of the NPT is an obligation to achieve nuclear disarmament, which has been translated into the understanding of a duty to negotiate.⁵⁸ Hajnoczi further argues that the

⁵¹ Reaching Critical Will, *Nuclear Ban Daily*, vol. 2, no. 9, 28 June 2017, p. 7.

⁵² Reaching Critical Will, *Nuclear Ban Daily*, vol. 2, no. 15, 8 July 2017, p. 3.

⁵³ Blok, S. A. and Bijleveld-Schouten, A. Th. B. (note 8), p. 2.

⁵⁴ Highsmith, N. and Stewart, M., 'The nuclear ban treaty: A legal analysis', *Survival*, vol. 60, no. 1 (2018), p. 141.

⁵⁵ Hill (note 33), p. 16.

⁵⁶ Hajnoczi, T., 'The relationship between the NPT and the TPNW', *Journal for Peace and Nuclear Disarmament*, vol. 3, no. 1 (2020), p. 89; and Hilgert, Kane and Malygina (note 3), p. 3.

⁵⁷ Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty, NPT), opened for signature 1 July 1968, entered into force 5 Mar. 1970, Article VI.

⁵⁸ Kadelbach, S., 'Possible means to overcome tendencies of the nuclear weapons ban treaty to erode the NPT', eds J. L. Black-Branch and D. Fleck, *Nuclear Non-proliferation in International Law, Volume V:*

⁴⁴ Norwegian Ministry of Foreign Affairs (note 9).

⁴⁵ Swiss Federal Department of Foreign Affairs (note 11), pp. 3, 9.

⁴⁶ Swiss Federal Department of Foreign Affairs (note 11), p. 4.

⁴⁷ Swiss Federal Department of Foreign Affairs (note 11), p. 3.

⁴⁸ Reaching Critical Will, *Nuclear Ban Daily*, vol. 1, no. 3, 29 Mar. 2017, p. 8. Because no official negotiation records (*travaux préparatoires*, in legal terminology) of the TPNW have been made available, the *Nuclear Ban Daily*, a day-by-day account of the negotiations published by Reaching Critical Will, is a useful resource for assessing states' positions during the drafting of the treaty.

⁴⁹ Reaching Critical Will, *Nuclear Ban Daily*, vol. 2, no. 13, 6 July 2017, p. 10.

⁵⁰ Reaching Critical Will, *Nuclear Ban Daily*, vol. 2, no. 5, 21 June 2017, p. 11.

TPNW uses the NPT's terminology, for instance, by not defining nuclear weapons, and its Article 18 is in no way problematic as the TPNW is fully compatible with the NPT.⁵⁹

III. THE DISARMAMENT AND VERIFICATION PROCESS

The second issue that is widely touched on in several of the national reviews is the disarmament process and the verification methods laid out in the TPNW. The TPNW follows the model of a 'simple ban treaty'. This was a conscious choice after consideration was given to a more ambitious model of 'nuclear weapon convention', which seemed impossible to negotiate in international forums.⁶⁰ For this reason, the simplicity of the TPNW is seen as a feature not a flaw by its supporters. It also means, however, that the treaty lacks elaborate verification mechanisms.

The TPNW and its safeguards provisions

Disarmament verification presents scientific and technical challenges.⁶¹ The majority of the national reviews analysed express dissatisfaction with the way the TPNW addresses this issue (see box 1). A particular strand of dissatisfaction is related to the absence of references to the 1997 IAEA Additional Protocol to the standard Comprehensive Safeguards Agreement, which is often thought to be the gold standard for nuclear non-proliferation obligations.⁶² The Additional Protocol, however, is the subject of intense international debate and has been rejected by a number of countries that were instrumental in the TPNW negotiations.⁶³

Legal Challenges for Nuclear Security and Deterrence (Asser Press: The Hague, 2020), pp. 309–310.

⁵⁹ Hajnoczi (note 56), pp. 90–91; and Casey-Maslen (note 28), p. 257.

⁶⁰ For a distinction between the two, see Preparatory Committee for the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 'Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons', Working paper submitted by Ireland on behalf of the New Agenda Coalition (Brazil, Egypt, Ireland, Mexico, New Zealand and South Africa), NPT/CONF.2015/PC.III/WP.18, 2 Apr. 2014.

⁶¹ Highsmith and Stewart (note 54), p. 132; and Onderco, M., 'The Dutch public and nuclear disarmament', *Militaire Spectator*, vol. 190, no. 2 (2021), p. 114.

⁶² IAEA, Model Protocol Additional to the Agreement(s) between State(s) and the International Atomic Energy Agency for the Application of Safeguards, INFCIRC/540 (corrected), Sep. 1997, reprinted Dec. 1998.

⁶³ Coppen, T., 'Developing IAEA Safeguards: An institutional perspective on the state-level concept', *Journal of Conflict and Security*

At one end of the spectrum, the Netherlands states that the TPNW cannot be verified.⁶⁴ The P5 Joint Statement, as well as the German, Norwegian, Swedish and Swiss reports affirm that the verification system the TPNW foresees is inadequate. The P5 Joint Statement concludes that the TPNW 'fails to meet the highest standards of non-proliferation'. The Swedish review argues that, as it currently stands, the TPNW does not correspond to the consensus decision recorded in Action 30 of the conclusions of the 2010 NPT Review Conference, which notes that the Additional Protocol to the NPT should be in force in all states in a world free from nuclear weapons.⁶⁵ It also notes that although the TPNW prohibits nuclear testing, it does not require verification or accession to the CTBT.⁶⁶ The Norwegian review also fears that 'the traditional safeguards system of comprehensive safeguards agreements under the NPT and the TPNW do not provide a sufficient guarantee against the risk of civilian nuclear materials and facilities being diverted for military purposes, as we saw in Iraq in the early 1990s'.⁶⁷ The Swiss review notes that the TPNW stipulates an outdated verification standard as a minimum standard, ignoring more appropriate ones. In this regard, it concludes that the TPNW has certain shortcomings when measured against agreements that seek to achieve comprehensive and verifiable disarmament and non-proliferation.⁶⁸ In this vein, the Swedish review explicitly rejects parallels with the 1993 Chemical Weapons Convention, which is a highly elaborate elimination treaty, and argues that achieving a similar level of credibility would be a much more complex endeavour for the TPNW due to the way in which the treaty is formulated.⁶⁹

These national reviews correspond with the positions these states took during the drafting process, when they were vocal as regards including a robust verification regime. Throughout the process, Switzerland advocated inclusion of the most developed

Law, vol. 20, no. 2 (2015), pp. 169–93. For a list of countries with an Additional Protocol in place, see IAEA, Status List, Conclusion of Safeguards Agreements, Additional Protocols and Small Quantities Protocols, Status as of 1 June 2021.

⁶⁴ Blok, S. A. and Bijleveld-Schouten, A. Th. B. (note 8), pp. 3, 17.

⁶⁵ In line with this recommendation, the majority of states already have an Additional Protocol in place.

⁶⁶ Like the NPT, the Comprehensive Nuclear-Test-Ban Treaty is mentioned in the preamble of the TPNW.

⁶⁷ Norwegian Ministry of Foreign Affairs (note 9).

⁶⁸ Swiss Federal Department of Foreign Affairs (note 11), p. 4.

⁶⁹ Lundin (note 10), pp. 39, 42–43.

Box 1. Summary of TPNW implementation obligations

Articles 2–4 of the 2017 Treaty on the Prohibition of Nuclear Weapons (TPNW) set out the implementation obligations of states parties to the treaty.

Article 3 concerns safeguards agreements to be concluded with the International Atomic Energy Agency (IAEA), noting that each state ‘that has never owned, possessed, or controlled nuclear weapons or other nuclear explosive devices is obligated to either conclude or maintain an IAEA comprehensive safeguards agreement’. The language in Article 3 of the TPNW reflects the inability of the negotiating states to agree that the treaty should require each state party to either conclude or maintain an IAEA Additional Protocol. However, Article 3 also requires states parties to maintain their existing IAEA safeguards ‘without prejudice to any additional relevant instruments’.^a

Article 4 refers to the verification and disarmament obligations of the states parties that are nuclear weapon states (which can dismantle their nuclear weapon arsenals either before or after joining the treaty) and those states parties that host a third state’s nuclear weapons or other nuclear explosive devices. They are obliged to destroy all their nuclear weapons or other nuclear explosive devices ‘as soon as possible’, and to conclude a safeguards agreement with the IAEA. Former nuclear weapon states must conclude a safeguards agreement with a competent international authority to credibly assure that the declared nuclear material is not diverted. The authority intended to be in charge of this task, although not specified in the text of the treaty, is presumed to be decided at a meeting of states parties or at a review conference.^b

^a Casey-Maslen, S., *The Treaty on the Prohibition of Nuclear Weapons: A Commentary*, Oxford Commentaries on International Law (Oxford University Press: Oxford, 2019), p. 180.

^b Casey-Maslen (note a), pp. 180–94.

and robust safeguards under the IAEA.⁷⁰ Sweden also suggested following the model of the Additional Protocols of the IAEA.⁷¹ The Netherlands also supported this argument on multiple occasions.⁷² Although these states would have preferred the TPNW to contain strong verification provisions, the vast majority of states participating in the negotiations argued that existing verification mechanisms, such as those in the NPT or under NWFZ treaties, were sufficient for the TPNW.⁷³

The German review acknowledges that the government’s official position is that the lack of a verification standard makes the NPT and the TPNW incompatible.⁷⁴ The report itself, however, argues that Article 3 of the TPNW affirms the safeguards arrangements in place at the time of accession, which is an explicit recognition of the fact that an Additional Protocol would be in place for many states parties. The report also makes clear that the TPNW and the NPT serve different objectives and hence reflect different

verification standards. Furthermore, the report notes that the TPNW and the NPT are identical in this respect, since the NPT does not require member states to sign an Additional Protocol either. Here, the German review explicitly accepts the view advanced by a number of TPNW advocates, which is that the TPNW keeps existing requirements in place and that it is, in some respects, more advanced than the NPT in its wording.⁷⁵

However, the latter point is somewhat harder to sustain, given that the NPT regime has been consistently developed through the review process and commitments adopted within that framework. Therefore, the development of IAEA safeguards—including development of the Additional Protocol—strengthens the NPT’s non-proliferation regime.⁷⁶ Since all the states discussed in this paper have an Additional Protocol in place, it is understandable that they would wish to see explicit reference to it in the TPNW. The reluctance of other states to include such an explicit reference is akin to the debates in the NPT setting where the Additional Protocol remains a politically sensitive subject. However, future TPNW meetings of states parties may choose to address this

⁷⁰ Reaching Critical Will (note 48), p. 9; Reaching Critical Will, *Nuclear Ban Daily*, vol. 1, no. 4, 30 Mar. 2017, p. 13; Reaching Critical Will, *Nuclear Ban Daily*, vol. 1, no. 6, 4 Apr. 2017, p. 8; Reaching Critical Will, *Nuclear Ban Daily*, vol. 2, no. 4, 20 June 2017, p. 5; and Reaching Critical Will (note 51), p. 7.

⁷¹ Reaching Critical Will, *Nuclear Ban Daily*, vol. 1, no. 4, 30 Mar. 2017, p. 13; Reaching Critical Will, *Nuclear Ban Daily*, vol. 2, no. 3, 19 June 2017, p. 7; and Reaching Critical Will (note 51), p. 3.

⁷² Reaching Critical Will (note 50), p. 6; and Reaching Critical Will (note 51), p. 3.

⁷³ Reaching Critical Will, *Nuclear Ban Daily*, vol. 1, no. 4, 30 Mar. 2017, p. 1.

⁷⁴ German Parliament (note 5), p. 11.

⁷⁵ For a comparison, see Nuclear Weapons Ban Monitor, ‘The obligation to have Safeguards Agreements and Additional Protocols with the IAEA’, [n.d.].

⁷⁶ Carlson, J., Kuchinov, V. and Shea, T., *The IAEA’s Safeguards System as the Non-Proliferation Treaty’s Verification Mechanism* (Nuclear Threat Initiative: Washington, DC, May 2020).

point, and to encourage those TPNW states parties that have not yet done so to sign an Additional Protocol.

The ‘competent international authority’

The TPNW refers to a ‘competent international authority’ as being in charge of nuclear disarmament verification.⁷⁷ This responds to the logic that the IAEA has expertise in verifying non-proliferation and not disarmament, which means that the IAEA verifies that peaceful nuclear activities are not being diverted to weapon programmes but has only limited expertise in verifying nuclear disarmament.⁷⁸ In fact, most nuclear disarmament verification is done on a bilateral basis in the context of the US–Russian disarmament agreements.⁷⁹

A further institutional impediment lies in the fact that the IAEA Board of Governors includes all the nuclear weapon states and several opponents of the TPNW.⁸⁰ It is therefore unlikely that the Board of Governors would approve IAEA verification of the TPNW, since it might think that such verification could in future undermine the IAEA and, depending on how the TPNW is implemented, the Additional Protocol.⁸¹ At the same time, however, it seems implausible that the nuclear weapon states would accept any mechanism negotiated without them.⁸²

This discussion on the competent authority becomes crucial when it comes to the possibility of a nuclear weapon state joining the TPNW. While the TPNW requires nuclear disarmament to be verified by a competent international authority, it does not specify what cooperation between that authority and the disarming state would involve. It seems likely that

⁷⁷ TPNW (note 1), Article 4.

⁷⁸ Highsmith and Stewart (note 54), p. 133. To become more active in the verification of nuclear disarmament, the IAEA would require a stronger mandate from its member states and expanded resources. For more information on the IAEA member states’ views on its role on disarmament, see Vertic, ‘Verification matters: Member state views on an IAEA role in verifying nuclear disarmament’, Vertic Research Reports no. 10, Sep. 2015.

⁷⁹ Erästö, T., Komžaitė, U. and Topychkanov, P., ‘Operationalizing nuclear disarmament verification’, SIPRI Insights on Peace and Security no. 2019/3, Apr. 2019.

⁸⁰ The IAEA Board of Governors has 13 designated members and 22 elected members; 11 of the designated members are nuclear weapon states or their allies; and the 4 Western European members have always historically included at least 3 NATO member states. The board works to reach its decisions by consensus (the first-ever vote took place in 2005); when a vote is called, the most important decisions are taken by a two-thirds majority.

⁸¹ Highsmith and Stewart (note 54), p. 143.

⁸² Highsmith and Stewart (note 54), p. 134.

further clarity on this issue would be needed before any nuclear weapon state considered joining the treaty.⁸³

Since the IAEA does not have a sufficiently comprehensive mandate for nuclear disarmament verification, a different solution might be sought. Some scholars have made suggestions for the creation of a two-part organizational structure, to institutionalize the treaty for when a nuclear weapon state wishes to join it. This structure would comprise an implementation unit and a scientific and technical body, and be tasked with supporting TPNW implementation, providing scientific and technical advice, reviewing and negotiating the plan for the elimination of nuclear weapons, and supporting ad hoc inspections should a nuclear weapon state join the TPNW.⁸⁴

According to the TPNW, a state can dismantle its nuclear weapons either before or after joining the treaty. Nuclear disarmament verification would take place after the fact in the former case, while in the latter case the process of nuclear weapon dismantlement would be verified.

The South African case provides a precedent for post-facto verification and illustrates the related challenges, which include the potential loss of key information during unverified nuclear weapon dismantlement.⁸⁵ It also highlights the dangers of weak non-proliferation safeguards. The IAEA’s initial mission to South Africa, after it signed the NPT in 1991, did not discover a nuclear weapon programme. The IAEA team noted an unusually large amount of highly enriched uranium in the country (and that it was perfectly legal for a country to possess such material in such quantities), but it found no evidence of a past nuclear weapon programme.⁸⁶ Had South Africa not voluntarily revealed the existence of its past nuclear weapon programme in 1993, it might never have been known. Even then, the IAEA was able to verify that the nuclear weapon programme had been dismantled only with the cooperation of experts from nuclear weapon states.⁸⁷ While the IAEA is given more powers through the Additional Protocol, not all

⁸³ Highsmith and Stewart (note 54), p. 133.

⁸⁴ Patton, T., Philippe, S. and Mian, Z., ‘Fit for purpose: An evolutionary strategy for the implementation and verification of the Treaty on the Prohibition of Nuclear Weapons’, *Journal for Peace and Nuclear Disarmament*, vol. 2, no. 2 (2019), pp. 387–409.

⁸⁵ Erästö, Komžaitė and Topychkanov (note 79).

⁸⁶ Von Baeckmann, A., Dillon, G. and Perricos, D., ‘Nuclear verification in South Africa’, National Reports, IAEA Bulletin, 1/1995.

⁸⁷ Kelley, R. E., *A Technical Retrospective of the Former South African Nuclear Weapon Programme* (SIPRI: Stockholm, Oct. 2020).

the NPT signatories have agreed to adhere to it and, as discussed above, the position of the Additional Protocol within the TPNW is problematic.⁸⁸

At the same time, verification could be made much more manageable if it is agreed on in advance and the dismantlement process is observed to ensure that the process meets the agreed standards. For that to be possible, however, non-nuclear and nuclear weapon states would need to start working together to develop a credible and effective inspection system.⁸⁹

IV. POLITICAL AND MILITARY COOPERATION WITH NUCLEAR WEAPON STATES

The third issue that is reflected in the national reviews is the impact of the TPNW on cooperation with nuclear weapon states. This issue is at the core of the political and legal concerns about the compatibility of the TPNW with existing security commitments and arrangements. In the cases of the states reviewed in this paper, this is particularly related to cooperation within the framework of NATO or, for NATO non-members, cooperation with NATO.

The TPNW and the notion of assistance

Article 1(1)(e) of the TPNW prohibits assisting, encouraging or inducing prohibited activities in any way.⁹⁰ However, it does not define the term ‘assistance’, as is noted in the Swedish and Swiss reviews and was highlighted by the Netherlands during the treaty negotiations.

The Swedish review argues that the TPNW is not formulated in a way that facilitates clear and enduring legal interpretation in the implementation of the treaty. The review concludes that the lack of a definition of the term ‘assistance’ is problematic for two reasons: first, because this notion is defined in different ways by different states; and, second, because analogies with the assistance prohibition provisions in existing treaties on landmines and cluster munitions are unsuitable as nuclear disarmament is a completely different and a more difficult challenge than other disarmament processes.⁹¹

The Swiss review affirms that the scope of the prohibition on assistance depends on how it is

interpreted, and that it is important to define which support activities would be covered by the prohibition. At this point, for instance, an extensive interpretation of the prohibition on assistance could include a prohibition on financing.⁹² This concern is not just theoretical—the issue of nuclear weapon financing has already been linked to the TPNW by disarmament non-governmental organizations (NGOs) such as PAX No Nukes.⁹³ NGO campaigns use an extensive definition of financing, interpreted as investment in nuclear weapon production, and any investment in any company active in any part of the process—regardless of whether the company has other, non-military, interests. Such companies would include, for instance, Boeing. Finally, throughout the negotiations on the TPNW, the Netherlands registered its continuing concern about the lack of definitions of the prohibitions, and stated that it would have liked to have seen these elaborated further.⁹⁴

One scholar foresees that Article 1(1)(e) of the TPNW is likely to be one of the most contested provisions in terms of interpretation and application because its precise scope is unclear—especially for acts such as transit and financing, but also ‘whether knowledge or intent is required on the part of the state party to amount to a violation’.⁹⁵ Indeed, ‘The breadth of the undertaking in Article 1(1)(e) of the 2017 Treaty is first and foremost evidenced by the term “in any way”. This extends the scope of the prohibition to encompass indirect as well as direct actions’.⁹⁶

The USA came close to this broad reading of the potential consequences of the TPNW for cooperation within NATO in its non-paper distributed to the members of the North Atlantic Council in October 2016, ahead of the TPNW negotiations. In this document, the USA makes clear that the TPNW would render a very broad range of activities related to NATO cooperation impossible. It would also call into question the whole assurance mechanism for NATO member states.⁹⁷ For this reason, it makes sense to focus more closely on the effects of the TPNW on cooperation with NATO.

⁹² Swiss Federal Department of Foreign Affairs (note 11), p. 7.

⁹³ See the Don’t Bank on the Bomb website, <<https://www.dontbankonthebomb.com/>>.

⁹⁴ Reaching Critical Will, *Nuclear Ban Daily*, vol. 2, no. 3, 19 June 2017, p. 6; and Reaching Critical Will (note 51), p. 6.

⁹⁵ Casey-Maslen (note 28), p. 158.

⁹⁶ Casey-Maslen (note 28), pp. 159–60.

⁹⁷ North Atlantic Treaty Organization, United States NonPaper, ‘Defense impacts of potential United Nations General Assembly Nuclear Weapons Ban Treaty’, Committee on Proliferation, 17 Oct. 2016.

⁸⁸ IAEA (note 63), as of 1 June 2021.

⁸⁹ Mian, Z., Patton, T. and Glaser, A., ‘Addressing verification in the Nuclear Ban Treaty’, *Arms Control Today*, June 2017.

⁹⁰ TPNW (note 1), Article 1(1)(e).

⁹¹ Lundin (note 10), pp. 41, 47.

The TPNW and cooperation with NATO member states

The effect of the TPNW on NATO cooperation is of key relevance to the European states discussed in this paper. Their interpretations, however, differ.

The Swiss review interprets the TPNW in such a way that the treaty does not restrict military cooperation with nuclear weapon states or nuclear umbrella states, as long as such cooperation is not aimed at developing, modernizing, acquiring or using nuclear weapons. Based on current knowledge, the Swiss review concludes that other forms of cooperation are unlikely to be affected.⁹⁸ According to the Swedish review, the TPNW will do nothing ultimately to limit nuclear danger until nuclear weapon states join.⁹⁹

In a response to the House of Lords, the British Government raised the issue of the incompatibility of the UK's NATO obligations with the TPNW.¹⁰⁰ This view is similar to the approach taken by the Netherlands, which concludes that Article 1 of the TPNW is incompatible with obligations derived from Dutch NATO membership and the principles of NATO's 2012 Deterrence and Defense Posture Review (DDPR), which contains the provision that NATO will remain a nuclear alliance for as long as nuclear weapons exist.¹⁰¹ These reviews do not distinguish between political and legal obligations, even though the Dutch review discusses the DDPR under the heading of 'legal analysis'.

The Norwegian review, however, separates legal obligations from political ones. The review acknowledges that there are no conflicts as regards legal obligations between the TPNW and the North Atlantic Treaty. However, it also recognizes that NATO's 2010 Strategic Concept, the DDPR and various NATO summit communiqués provide a framework for the political obligations of NATO member states, including on the role of nuclear weapons as a core component of its deterrence policy.¹⁰² Norway concludes that Article 1 of the TPNW would make it impossible to participate in any element of NATO's nuclear deterrence and defence.¹⁰³ This view comes close to that of the Netherlands, which unlike Norway

does participate in NATO nuclear sharing, and which already during the treaty negotiations stated several times that Article 1 was contrary to its commitments in the framework of NATO.¹⁰⁴

NATO has a long history of footnoting and permitting member states to chart their own path when it comes to nuclear weapons.¹⁰⁵ This could, in theory, offer a path towards a particular national position, including those in favour of the TPNW. If a NATO country were to sign and ratify TPNW, that commitment would supersede past approval of NATO documents that endorse nuclear deterrence.¹⁰⁶

Yet, ratifying the TPNW would most likely be qualitatively different from the past expressions of nuclear distinction. For example, in Article 137 of its constitution, Lithuania prohibits any stationing of weapons of mass destruction. At the same time, it participates in the Nuclear Planning Group, and recent news items reported the trepidation that the German debate about the future of nuclear sharing caused in Lithuania, which continues to see NATO's nuclear deterrent as essential to its security.¹⁰⁷ It is therefore likely that for NATO members, signing the TPNW would create a much more serious hurdle.

NATO non-members have mainly political concerns but security-related ones as well. The Swedish review, for its part, assesses that if Sweden were to accede to the treaty, it could lead to a stagnation of its current cooperation with NATO—and its bilateral cooperation with NATO members. The review argues that 'the expectation that accession to the new Treaty will be cost-free for States Parties in their cooperation with the nuclear powers and their allies is unrealistic'.¹⁰⁸ Switzerland concludes similarly that the TPNW could have negative political implications for two reasons: first, since—in extreme cases—it would limit Switzerland's freedom of action; and, second, because neighbouring countries strongly object to the treaty, so

⁹⁸ Swiss Federal Department of Foreign Affairs (note 11), p. 6.

⁹⁹ Lundin (note 10), pp. 37, 42.

¹⁰⁰ British Minister of State (note 12).

¹⁰¹ Blok, S. A. and Bijleveld-Schouten, A. Th. B. (note 8), p. 1.

¹⁰² A similar point was made in the speech delivered by NATO Secretary General Stoltenberg at the High-level NATO Conference on Arms Control and Disarmament in Oct. 2019.

¹⁰³ Norwegian Ministry of Foreign Affairs (note 9).

¹⁰⁴ Reaching Critical Will, *Nuclear Ban Daily*, vol. 2, no. 2, 16 June 2017, p. 3; Reaching Critical Will (note 51), p. 6; and Reaching Critical Will (note 51), p. 3.

¹⁰⁵ Kubiak, K., 'Reviewing NATO's non-proliferation and disarmament policy', *Istituto Affari Internazionali Paper no. 21*, 4 Feb. 2021, p. 9; and Caughley, T. and Afina, Y., *NATO and the Frameworks of Nuclear Non-proliferation and Disarmament: Challenges for the 10th NPT Review Conference* (Chatham House: London, May 2020), pp. 15–16.

¹⁰⁶ Hill (note 33), p. 8.

¹⁰⁷ Saldžiūnas, V., 'JAV branduoliniai ginklai Europoje vėl skelia žiežirbas: kaip tai atsilies Lietuvosai', [US nuclear weapons are sparking again in Europe: How this will affect Lithuania], *DELFI Žinios*, 31 May 2020.

¹⁰⁸ Lundin (note 10), p. 42.

Switzerland's accession could have negative political implications for its cooperation with NATO members within the framework of the Partnership for Peace.¹⁰⁹

V. CONCLUSIONS: THE WAY FORWARD

This paper maps the views contained in reviews of the TPNW published by seven European states to facilitate a critical assessment of the arguments presented.

Although the EU is not a party to the TPNW, and the EU is also absent from the national reviews discussed in this paper, the TPNW is important for the EU. The EU aims to be an important actor on a global scale when it comes to addressing the global nuclear danger, but the TPNW exposes the fissures among its member states when it comes to nuclear disarmament. Understanding the points on which member states converge is important because it could allow the EU to harness the energy for nuclear disarmament generated by the TPNW. However, understanding points of difference is also important, because it allows the EU to understand where 'agreeing to disagree' might be a more productive strategy. This also applies to the need, at times, to resort to more creative legal drafting in order to resolve disagreements among member states.

For its advocates, the TPNW closes the so-called legal gap that exists vis-à-vis the other weapons of mass destruction, going further than the ICJ's interpretation in its Advisory Opinion in the Nuclear Weapons Case. It would be a positive step if states, especially those which are the most critical, acknowledged that the TPNW establishes new norms that are binding on the states parties. If states issuing such statements wish to be perceived as persistent objectors, they could nuance the acknowledgment of these new norms by clarifying that they are not bound by them. This recommendation could help states that are not party to the TPNW to strike a more conciliatory tone, while still clarifying their position. An acknowledgement could, for example, find its way into an EU statement at an NPT review conference, where the EU could acknowledge the existence of a new treaty that is binding for its states parties while recognizing that there are persistent objectors.

From a legal standpoint, there seems to be a consensus that the TPNW and the NPT are compatible. From a policy standpoint, however, states are divided on whether the TPNW reinforces or fragments

the NPT framework. To mitigate concerns about further stagnation and polarization of the nuclear non-proliferation regime, the TPNW states parties could take three complementary steps in the upcoming meeting(s) of states parties. First, they could explain how they intend to revitalize discussions on nuclear disarmament in cooperation with the NPT states that have not (yet) ratified the TPNW. Second, they could reflect on how to integrate the non-NPT nuclear weapon states. Third, they could reinforce the understanding of the TPNW as a development of Article VI of the NPT. The EU member states that are party to the TPNW are well positioned to take a lead in these discussions.

There is also strong criticism of the TPNW linked to the fear that the new treaty could undermine the IAEA safeguards system because the Additional Protocol is not the mandatory standard set in the treaty. During the drafting process of the TPNW, it became clear that it would be drafted as a disarmament treaty rather than a nuclear weapons convention. This means that there are no detailed provisions on the safeguards mechanisms that apply. Therefore, in the upcoming first meeting of states parties, those states that have not yet concluded an agreement with the IAEA could be encouraged to sign an Additional Protocol to do so. The meeting could also highlight the provision set out in Article 3(1), which does not allow states to withdraw from their safeguards once the TPNW enters into force. This means that the treaty does not undermine the existing safeguards that states have in place. This could be useful for easing concerns about states first withdrawing from the NPT and the related safeguards obligations, and then joining the TPNW and accepting only the minimal safeguards required by the TPNW. In the upcoming meeting, states parties could also start to consider whether they would opt for the creation of a new verification regime, or the IAEA would be a valid option for undertaking nuclear disarmament verification-related tasks. As an important partner and co-financer of the IAEA, the EU has a stake in this debate.

Finally, an exact definition of 'assistance' is not provided in the TPNW and what the concept encompasses remains unclear. Therefore, the upcoming meeting of states parties could start discussions to clarify its scope. In this regard, Article 31 of the 1969 Vienna Convention on the Law of Treaties (VCLT), which notes that treaties 'shall be interpreted in good faith in accordance with the ordinary meaning

¹⁰⁹ Swiss Federal Department of Foreign Affairs (note 11), pp. 6–7.

to be given to the terms of the treaty in their context and in the light of its object and purpose', could be a useful starting point.¹¹⁰ In practical terms, this would mean that states parties could use the interpretation of 'assistance' in counterpart treaties for reference. Article 32 of the VCLT, which suggests examining supplementary means of interpretation for additional guidance, notes that states parties could also refer to the *travaux préparatoires* as a complementary reference—to use the interpretation formulated by the states parties during the drafting process.¹¹¹

¹¹⁰ Vienna Convention on the Law of Treaties (VCLT), concluded on 23 May 1969, Article 31.

¹¹¹ VCLT (note 110), Article 32.

ABBREVIATIONS

CTBT	1996 Comprehensive Nuclear-Test-Ban Treaty
DDPR	2012 Deterrence and Defense Posture Review
EU	European Union
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
NATO	North Atlantic Treaty Organization
NGO	non-governmental organization
NPT	1968 Treaty on the Non-Proliferation of Nuclear Weapons, Non-Proliferation Treaty
P5	Five permanent members of the UN Security Council
TPNW	2017 Treaty on the Prohibition of Nuclear Weapons
VCLT	1969 Vienna Convention on the Law of Treaties

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A EUROPEAN NETWORK

In July 2010 the Council of the European Union decided to support the creation of a network bringing together foreign policy institutions and research centers from across the EU to encourage political and security-related dialogue and the long-term discussion of measures to combat the proliferation of weapons of mass destruction (WMD) and their delivery systems. The Council of the European Union entrusted the technical implementation of this Decision to the EU Non-Proliferation Consortium. In 2018, in line with the recommendations formulated by the European Parliament the names and the mandate of the network and the Consortium have been adjusted to include the word 'disarmament'.

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The main aim of the network of independent non-proliferation and disarmament think tanks is to encourage discussion of measures to combat the proliferation of weapons of mass destruction and their delivery systems within civil society, particularly among experts, researchers and academics in the EU and third countries. The scope of activities shall also cover issues related to conventional weapons, including small arms and light weapons (SALW).

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