

## I. Treaty on the Prohibition of Nuclear Weapons

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The landmark Treaty on the Prohibition of Nuclear Weapons (TPNW) was opened for signature on 20 September 2017 after a relatively short period of negotiation. The treaty is the first legally binding international agreement to comprehensively prohibit the development, deployment or use of nuclear weapons, with the ultimate goal of their total elimination. As such, it marks the culmination of an international movement to establish a normative and legal basis for banning nuclear weapons. As of 31 December 2017, the TPNW had been signed by 56 states and ratified by 3.<sup>1</sup> The treaty will enter into force 90 days after 50 states have ratified it.

The TPNW remains controversial, and international support for it remains far from universal. None of the nuclear weapon-possessing states or their allies have expressed a willingness to join the treaty. While the TPNW's practical and normative implications will only be discernible with time, it has already sparked debate about the future of nuclear weapons and the multilateral juridical framework for nuclear disarmament.

This section recounts the origins of the negotiation of the TPNW, summarizes the main issues considered during the talks and the steps leading to the treaty's adoption, and examines the principal arguments that have been made in favour of and against a nuclear weapon ban treaty. Finally, it highlights the key issues to be addressed to ensure that the treaty supplements rather than supplants existing nuclear arms control and related regulatory measures.

### **The origins of the nuclear weapon ban treaty negotiations**

The interest in a treaty prohibiting the possession or use of nuclear weapons reflects the growing international awareness in recent years of the catastrophic humanitarian consequences of any use of nuclear weapons.<sup>2</sup> The humanitarian dimension was raised in the final document of the 2010 Review Conference of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty, NPT). The states parties to the NPT expressed 'deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons' and reaffirmed the need 'for all States at all times to comply with applicable international law, including international

<sup>1</sup> For a summary and other details of the TPNW see annex A, section I, in this volume.

<sup>2</sup> Kmentt, A., 'The development of the international initiative on the humanitarian impact of nuclear weapons and its effect on the nuclear weapons debate', *International Review of the Red Cross*, vol. 97, no. 899 (Sep. 2015), pp. 681–709.

humanitarian law'.<sup>3</sup> This language was interpreted as a mandate to take action to highlight the humanitarian impact of nuclear weapons.

A series of international conferences on the humanitarian impact of nuclear weapons was subsequently convened, which brought together states, international organizations and civil society groups. These were held in Oslo on 4–5 March 2013, in Nayarit, Mexico, on 13–14 February 2014 and in Vienna on 8–9 December 2014.

One of the main achievements of the conferences was to call international attention to the humanitarian dimension of nuclear disarmament by providing well-documented analyses of the ways in which the use of nuclear weapons would cause profound and long-term damage to the environment, the climate, human health and well-being, and socio-economic development irrespective of national borders. The overarching conclusion from the conference presentations was that no single state or international body could address in an adequate manner the immediate humanitarian emergency caused by a nuclear weapon detonation or provide sufficient assistance to those affected.<sup>4</sup>

At the end of the third and final conference, Austria made a national pledge to work 'to fill the legal gap for the prohibition and elimination of nuclear weapons' and 'to cooperate . . . in efforts to stigmatise, prohibit and eliminate nuclear weapons in light of their unacceptable humanitarian consequences and associated risks'.<sup>5</sup> The Austrian pledge was subsequently internationalized as the Humanitarian Pledge for the Prohibition and Elimination of Nuclear Weapons, which was adopted in a resolution by the United Nations General Assembly on 7 December 2015.<sup>6</sup>

#### *The open-ended working group and diverging approaches to disarmament*

Concurrent with the adoption of the Humanitarian Pledge, the UN General Assembly established an open-ended working group (OEWG) to consider concrete legal measures, norms and recommendations for the advancement of multilateral nuclear disarmament negotiations that would lead to a world without nuclear weapons.<sup>7</sup> Three OEWG meetings were held in Geneva, in

<sup>3</sup> 2010 NPT Review Conference, Final Document, Vol. I, NPT/CONF.2010/50 (Vol. I), para. 80, 28 May 2010, p. 19; and for a summary and other details of the NPT see annex A, section I, in this volume.

<sup>4</sup> Williams, H., Lewis, P. and Aghlani, S., *The Humanitarian Impacts of Nuclear Weapons Initiative: The 'Big Tent' in Disarmament*, Research paper (Royal Institute of International Affairs, Chatham House: London, Mar. 2015), pp. 10–12.

<sup>5</sup> Austrian Federal Ministry for Europe, Integration and Foreign Affairs, 'Pledge presented at the Vienna Conference on the Humanitarian Impact of Nuclear Weapons', 9 Dec. 2014.

<sup>6</sup> UN General Assembly Resolution 70/48, 'Humanitarian pledge for the prohibition and elimination of nuclear weapons', adopted 7 Dec. 2015, A/RES/70/48, 11 Dec. 2015.

<sup>7</sup> UN General Assembly Resolution 70/33, 'Taking forward multilateral nuclear disarmament negotiations', adopted 7 Dec. 2015, A/RES/70/33, 11 Dec. 2015. An OEWG is 'open' in the sense that all UN member states can participate.

February, May and August 2016. None of the nuclear weapon-possessing states participated in the meetings.

The OEWG considered four distinct approaches to nuclear disarmament that had featured frequently in debates in the First Committee of the UN General Assembly (on disarmament and international security) and the NPT review cycle. These approaches focused on: (a) a comprehensive nuclear weapons convention that would involve the participation of all nuclear weapon-possessing states from the outset and would establish provisions for the prohibition and elimination of nuclear weapons, including effective means for verification and inspection; (b) a nuclear weapon ban treaty that would provide the basic prohibitions and obligations for all states parties and establish political objectives for the complete elimination of nuclear weapons but would not include provisions on existing nuclear arsenals and their elimination or on verification, and would not necessarily need to be universal from the outset; (c) a framework (or 'chapeau') agreement that would establish key prohibitions and provide for the subsequent negotiation of protocols to elaborate measures for the elimination of nuclear weapons and related objectives; and (d) a progressive approach, building on existing nuclear disarmament, non-proliferation and security agreements and arrangements, that would elaborate parallel legal and non-legal measures as well as confidence-building measures leading to a comprehensive nuclear weapons convention after a 'minimization point' has been reached.<sup>8</sup>

The OEWG discussions on the feasibility and effectiveness of the various approaches revealed a clear division among the participating states on preferred approaches to taking forward multilateral nuclear disarmament. This division tended to reflect a country's status under the NPT and its membership of other treaty regimes and military alliances.<sup>9</sup>

A majority of the non-nuclear weapon states (NNWS) in the OEWG expressed support for a treaty banning nuclear weapons. At the May 2016 session, 10 NNWS jointly submitted a working paper formally proposing a 2017 conference to launch negotiations on a nuclear weapon ban treaty (approach b above).<sup>10</sup> The proposal was opposed by, among others, many of the NNWS members of the North Atlantic Treaty Organization (NATO),

<sup>8</sup> United Nations, General Assembly, Report of the open-ended working group taking forward multilateral nuclear disarmament negotiations, A/71/371, 1 Sep. 2016. The 'minimization point' refers to a situation where nuclear weapons have been greatly reduced from current numbers to a minimal number from which the next step would be the elimination of all nuclear weapons.

<sup>9</sup> Nielsen, J., '2016 open ended working group: Towards 2017 nuclear weapon ban negotiations?', Arms Control Wonk, 13 Sep. 2016.

<sup>10</sup> United Nations, General Assembly, Open-ended working group taking forward multilateral nuclear disarmament negotiations, 'Addressing nuclear disarmament: Recommendations from the perspective of nuclear-weapon-free zones', Working paper submitted by Argentina, Brazil, Costa Rica, Ecuador, Guatemala, Indonesia, Malaysia, Mexico, Philippines and Zambia, A/AC.286/WP.34/Rev.1, 11 May 2016.

which along with Australia, Japan and the Republic of Korea (South Korea) have defence arrangements with the United States that include extended nuclear deterrence. These so-called nuclear umbrella states favoured the progressive approach (*d* above), based on using effective legal and practical measures as ‘building blocks’ to support progress towards nuclear disarmament, without a defined timeline.<sup>11</sup>

Despite this and other substantive disagreements, the OEWG was able to adopt, through a series of procedural manoeuvres, a final report in its concluding session in August 2016. The report recommended that the UN General Assembly convene a conference in 2017 to begin negotiations on a legally binding instrument for the prohibition and elimination of nuclear weapons.<sup>12</sup>

#### *The UN General Assembly adopts a ban resolution*

The 2016 session of the UN General Assembly’s First Committee approved a draft resolution on convening negotiations in 2017 on ‘a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination’.<sup>13</sup> Among the states voting against the draft resolution were France, the United Kingdom and the USA, which released a joint explanation of their votes in which they declared that the ban on nuclear weapons proposed in the resolution ‘can in no way constitute an acceptable basis for negotiations’. They stated that a consensus-based, ‘step-by-step approach is the only way to combine the imperatives of disarmament and of the maintenance of global security’.<sup>14</sup>

On 23 December 2016 the UN General Assembly adopted the draft resolution forwarded by the First Committee as Resolution 71/258 by a vote of 113 states in favour, 35 against and 13 abstentions.<sup>15</sup> Of the nine states that are known or believed to possess nuclear weapons, only the Democratic People’s Republic of Korea (DPRK, or North Korea) voted in favour; China, India and Pakistan abstained; and France, Israel, Russia, the UK and the USA voted against.<sup>16</sup> Among the other states voting against the resolution were all the

<sup>11</sup> United Nations, General Assembly, Open-ended working group taking forward multilateral nuclear disarmament negotiations, ‘A progressive approach to a world free of nuclear weapons: Revisiting the building blocks paradigm’, Working paper submitted by Australia, Belgium, Bulgaria, Canada, Estonia, Finland, Germany, Hungary, Italy, Japan, Latvia, Lithuania, Netherlands, Poland, Portugal, Romania, Slovakia and Spain, A/AC.286/WP.9, 24 Feb. 2016.

<sup>12</sup> United Nations, General Assembly, Report of the open-ended working group taking forward multilateral nuclear disarmament negotiations, A/71/371, 1 Sep. 2016, para. 67.

<sup>13</sup> United Nations, General Assembly, First Committee, Resolution on ‘Taking forward multilateral nuclear disarmament negotiations’, A/C.1/71/L.41, 14 Oct. 2016, para. 8.

<sup>14</sup> France, United Kingdom and United States, ‘Explanation of vote’, delivered by France, 27 Oct. 2016.

<sup>15</sup> UN General Assembly Resolution 71/258, ‘Taking forward multilateral nuclear disarmament negotiations’, adopted 23 Dec. 2016, A/RES/71/258, 11 Jan. 2017.

<sup>16</sup> International Campaign to Abolish Nuclear Weapons, ‘Voting on UN resolution for nuclear ban treaty’, 23 Dec. 2016.

NATO member states except the Netherlands, which abstained, as well as Australia, Japan and South Korea, which have extended nuclear deterrence commitments from the USA.

## **The negotiation of the treaty**

### *Opening of the negotiations*

Prior to the opening of the UN Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, a one-day organizational meeting was held in New York on 16 February 2017, attended by more than 100 states. The participating states elected Ambassador Elayne Whyte Gómez of Costa Rica as the president of the conference and adopted a provisional agenda for the first substantive session, which was scheduled for March.<sup>17</sup> The states also agreed that the conference's rules of procedure would be those used by the UN General Assembly, which require, among other things, a two-thirds majority for matters of substance and a simple majority for procedural matters. This meant that no single state or small group of states would be able to block the conference's decisions.<sup>18</sup>

The opening session of the conference took place in New York on 27–31 March 2017. More than 130 states participated, along with representatives from international organizations and civil society groups. No nuclear weapon-possessing state took part in the meeting, and of the NNWS allied with the USA only the Netherlands participated in the talks.<sup>19</sup> In an October 2016 memorandum, the USA had warned other NATO members that efforts to negotiate a treaty prohibiting nuclear weapons or to delegitimize nuclear deterrence were 'fundamentally at odds with NATO's basic policies on deterrence' and urged them not to participate in the negotiations on a ban treaty.<sup>20</sup>

The discussion in the opening session focused on the purpose and scope of the proposed treaty. There was general agreement among the states about the core prohibitions to be codified in the treaty text. These included prohibitions on the use, possession, development, acquisition, transfer and

<sup>17</sup> United Nations, 'United Nations conference to negotiate ban on nuclear weapons holds first organizational meeting, adopts agenda for 2017 substantive session', Press Release DC/3685, 16 Feb. 2017; and Ware, A., 'UN commences nuclear abolition negotiations', *Abolition 2000*, 24 Feb. 2017.

<sup>18</sup> Rauf, T., '2017: The year in which nuclear weapons could be banned?', *Commentary*, SIPRI, 20 Mar. 2017.

<sup>19</sup> The Dutch Government attended the meeting at the insistence of a majority of the parties in parliament, which in turn reflected civil society sentiment. In May 2016 the Dutch Parliament adopted a motion urging the government to work for an international ban on nuclear weapons. Van Oostward, S., 'The Netherlands should actively negotiate an international nuclear weapons ban treaty', *International Campaign to Abolish Nuclear Weapons*, 23 May 2016.

<sup>20</sup> US Mission to NATO, 'Defense impacts of potential United Nations General Assembly nuclear weapons ban treaty', Non-paper, AC/333-N(2016)0029 (INV), 17 Oct. 2016; and International Campaign to Abolish Nuclear Weapons, 'US pressured NATO states to vote no to a ban', 1 Nov. 2016.

deployment of nuclear weapons as well as on assistance with prohibited activities.

However, there were disagreements on a number of questions regarding the treaty's scope. These included differences over whether to prohibit the threat of use of nuclear weapons. Proposed language to prohibit nuclear threats 'under any circumstances' was eventually dropped, in part because of concern that many NNWS members of NATO would see it as being incompatible with their NATO obligations and would hence reject the treaty. Proposed language prohibiting the transit of nuclear weapons through the territories of signatory states—a prohibition set out in existing nuclear weapon-free-zone treaties—was similarly excluded from the draft text of the treaty. States were also divided over whether the treaty text should include language banning nuclear testing; some expressed concern that such a prohibition could come into conflict with the 1996 Comprehensive Nuclear-Test-Ban Treaty (CTBT) and therefore undermine efforts to secure its entry into force.<sup>21</sup>

More fundamentally, states diverged on whether the TPNW would need its own verification protocols in addition to those that exist under the NPT. There was disagreement over whether the treaty should contain provisions for the verified dismantlement and physical elimination of nuclear weapon stockpiles, or leave this for later negotiations with nuclear weapon states—possibly in connection with discussions on a process for the accession by these states to the treaty. There was also no consensus on whether the treaty should be formally linked with the verification system established by the International Atomic Energy Agency (IAEA), in particular, with the application of IAEA safeguards.<sup>22</sup>

There was broad agreement among the participating states that the treaty should have a relatively simple text that codified the norms of the non-use and non-possession of nuclear weapons. By leaving more detailed legal and technical measures for subsequent negotiations, the initial agreement could be concluded relatively quickly. A few states, including Iran and Egypt, expressed interest in a more comprehensive treaty with extensive prohibitions and verification provisions that would probably have taken considerably longer to negotiate.<sup>23</sup>

<sup>21</sup> Acheson, R., *Banning Nuclear Weapons: Principles and Elements for a Legally Binding Instrument* (Women's International League for Peace and Freedom: Geneva, Mar. 2017); and Meier, O., Cordes, S. and Suh, E., 'What participants in a nuclear weapons ban treaty (do not) want', *Bulletin of the Atomic Scientists*, 9 June 2017.

<sup>22</sup> Carlson, J., 'Nuclear weapon ban convention: Overview of first draft', Nuclear Threats Monitor, Asia-Pacific Leadership Network, 26 May 2017; and Meier, Cordes and Suh (note 21).

<sup>23</sup> Potter, W. C., 'Disarmament diplomacy and the nuclear ban treaty', *Survival*, vol. 59, no. 4 (Aug.–Sep. 2017), p. 96.

*Completion of the negotiations*

On 22 May 2017 the president of the conference circulated an initial draft of the treaty.<sup>24</sup> The draft text reflected debates and informal consultations during the first round of negotiations and served as the basis for the second round, which began at the UN headquarters in New York on 15 June.

There was general agreement among the participating states about the basic purpose of the treaty, as explained in the preamble, and the general obligations set out in Article 1. It would oblige all state parties to prohibit the possession, development, production, transfer and use of nuclear weapons, and to prohibit assisting any other state with any of these activities. In addition, the treaty would prohibit a state party from stationing another state's nuclear weapons on its territory.

The draft text included a prohibition on the parties from carrying out 'any nuclear weapon test explosion or any other nuclear explosion', but this was excluded from the final text. Cuba and Iran also proposed the addition of prohibitions on the financing and transit of nuclear weapons, but these too were not included in the final text.<sup>25</sup>

One of the most controversial issues during the second round of negotiations dealt with safeguards and related legal instruments intended to ensure that civilian nuclear material and facilities are not used for military purposes. A number of states, led by Sweden and Switzerland, wanted to require all parties to the treaty to agree to negotiate an Additional Protocol to their safeguards agreements with the IAEA.<sup>26</sup> However, Brazil and other states opposed making mandatory what had previously been a voluntary agreement. The final text instead required states that have yet to negotiate a comprehensive safeguards agreement with the IAEA to do so, and for all other states to maintain at a minimum their IAEA safeguards obligations in force at the time of the treaty's entry into force. This led some observers to complain that the treaty framers had missed an opportunity to promote state-of-the-art safeguards practices that would strengthen nuclear disarmament efforts.<sup>27</sup>

Following a series of parallel consultations led by the conference president, a final draft of the treaty was completed on 7 July 2017, which was the end date recommended in UN General Assembly Resolution 71/258. The

<sup>24</sup> United Nations Conference to Negotiate a Legally Binding Instrument to Prohibit Nuclear Weapons, Leading Towards Their Total Elimination, 'Draft convention on the prohibition of nuclear weapons', A/CONF.229/2017/CRP.1, 22 May 2017.

<sup>25</sup> Sanders-Zakre, A., 'Nuclear weapons ban treaty adopted', *Arms Control Today*, vol. 47, no. 6 (July/Aug. 2017), pp. 21–22.

<sup>26</sup> An Additional Protocol significantly enhances the IAEA's ability to verify the peaceful use of all nuclear material in states with comprehensive safeguards agreements. International Atomic Energy Agency, 'Additional Protocol', [n.d.].

<sup>27</sup> Wolfsthal, J., 'Second time is not a charm for the nuclear ban treaty', *Arms Control Wonk*, 29 June 2017.

participating states adopted the treaty text by a vote of 122 in favour, with 1 state (the Netherlands) voting against and 1 state (Singapore) abstaining.<sup>28</sup>

#### *Opening for signature*

On 20 September 2017 the Treaty on the Prohibition of Nuclear Weapons opened for signature at the UN headquarters in New York. More than 50 heads of state, heads of government and foreign ministers took part in a signing ceremony held on the margins of the annual opening of the UN General Assembly.<sup>29</sup>

The TPNW will enter into force 90 days after its 50th instrument of ratification has been deposited. This will not be contingent on the ratification of any particular state or group of states. During the treaty negotiations, many states had argued that the TPNW should have simple requirements for entry into force in order to avoid the long-running procedural impasse that has blocked the CTBT's entry into force (see section III).

### **Contending views on the treaty**

The opening for signature of the TPNW highlighted long-standing disputes and divisions over a nuclear weapon ban.<sup>30</sup> Some states have emphasized the need to bridge the division between nuclear weapon-possessing states and non-nuclear weapon states. For example, the Netherlands, the only NATO member state to take part in the negotiations, said that, while it supported a legally binding prohibition in principle, in order to be meaningful it must be comprehensive and verifiable and must eventually gain the support of the nuclear weapon-possessing states.<sup>31</sup>

#### *Arguments in favour of the nuclear weapon ban treaty*

Proponents of the prohibition treaty make at least four broad arguments in support of a legal ban on nuclear weapons. These focus primarily on its normative and legal implications.

<sup>28</sup> UN News Centre, 'UN conference adopts treaty banning nuclear weapons', 7 July 2017. The Netherlands voted against the treaty on the grounds that it was incompatible with the country's NATO obligations, contained inadequate verification provisions and could undermine the NPT. Permanent Representation of the Netherlands to the United Nations in New York, 'Explanation of vote of the Netherlands on text of Nuclear Ban Treaty', 7 July 2017.

<sup>29</sup> International Campaign to Abolish Nuclear Weapons, 'UN nuclear weapon ban treaty opens for signature', 20 Sep. 2017.

<sup>30</sup> Borrie, J. et al., *A Prohibition on Nuclear Weapons: A Guide to the Issues* (United Nations Institute for Disarmament Research (UNIDIR) and International Law and Policy Institute: Geneva and Oslo, Feb. 2016).

<sup>31</sup> United Nations Conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination, Statement by the Netherlands, Agenda item 8(b), 28 Mar. 2017.



First, many proponents argue that outlawing nuclear weapons is, above all, a moral and humanitarian imperative.<sup>32</sup> As shown during the conferences on the humanitarian impact of nuclear weapons, the case for prohibiting nuclear weapons is clear: they are by nature inhumane and indiscriminate; and they are uniquely dangerous because they are uniquely destructive. Accordingly, the preamble to the ban treaty acknowledges ‘the ethical imperatives for nuclear disarmament and the urgency of achieving and maintaining a nuclear-weapon-free world, which is a global public good of the highest order’.<sup>33</sup>

Second, support for a ban treaty reflects the growing frustration of many non-nuclear weapon states over the lack of progress on multilateral nuclear disarmament under the NPT.<sup>34</sup> The nuclear weapon states have come under increased criticism for their perceived unwillingness to take seriously the commitment under Article VI of the NPT to ‘pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament’.<sup>35</sup> There has been particular disappointment that the nuclear weapon states failed to implement many of the steps toward nuclear disarmament agreed at the 2000 and 2010 NPT Review Conferences.<sup>36</sup> This in turn led many non-nuclear weapon states to support the convening of negotiations on a nuclear ban treaty within the UN but outside the context of the NPT.<sup>37</sup>

Third, proponents of a ban treaty argue that it is also a legal imperative, required to fill a gap in international law.<sup>38</sup> They note that biological and chemical weapons, the other two categories of non-conventional weapon, are explicitly prohibited because their use would conflict with the requirements of international humanitarian law. In contrast, although nuclear weapons would have a far more devastating humanitarian impact, there is no general and universally applicable prohibition in international law regarding their possession or use. In the view of many proponents of a nuclear weapon ban treaty, weapons that cause unacceptable harm to civilians cannot remain legal or be considered legitimate options in times of war.

<sup>32</sup> Fihn, B., ‘The logic of banning nuclear weapons’, *Survival*, vol. 59, no. 1 (Feb./Mar. 2017), pp. 43–50; and Sauer, T. and Pretorius, J., ‘Nuclear weapons and the humanitarian approach’, *Global Change, Peace and Security*, vol. 26, no. 3 (Sep. 2014), pp. 233–50.

<sup>33</sup> Treaty on the Prohibition of Nuclear Weapons (note 1).

<sup>34</sup> Nielsen, J. and Ingram, P., ‘Opportunities for effective strategic dialogue: Bridging the nuclear deterrence and disarmament constituencies’, British–American Security Information Council (BASIC), 1 Jan. 2017.

<sup>35</sup> Treaty on the Non-Proliferation of Nuclear Weapons (note 3).

<sup>36</sup> See 2000 NPT Review Conference, Final Document, NPT/CONF.2000/28 (Vol. I), section 15, 24 Apr. 2000, pp. 14–15; and 2010 NPT Review Conference, Final Document (note 3), pp. 19–29.

<sup>37</sup> Cronberg, T., ‘After 72 years, nuclear weapons have been prohibited’, Commentary, SIPRI, 21 July 2017.

<sup>38</sup> Nystuen, G. and Egeland, K., ‘A “legal gap”? Nuclear weapons under international law’, *Arms Control Today*, vol. 46, no. 3 (Mar. 2016).

Finally, many proponents of the TPNW maintain that the treaty will engender a normative shift in the political discourse about nuclear weapons, away from long-standing claims about the security benefits allegedly provided by nuclear deterrence, and towards the consideration of alternative political and diplomatic strategies based on humanitarian and moral imperatives.<sup>39</sup> The existing NPT regime is unable to unequivocally delegitimize nuclear weapons and the practice of nuclear deterrence, given that it discriminates between nuclear weapon states and non-nuclear weapon states. By prohibiting the possession of nuclear weapons and threats to use them, the TPNW reflects the opposition of the majority of countries in the world to security policies and practices that are premised on nuclear deterrence.<sup>40</sup>

#### *Arguments against the nuclear weapon ban treaty*

Opponents of the TPNW tend to argue that the prohibition of nuclear weapons is unnecessary, unrealistic and potentially detrimental to multilateral nuclear disarmament efforts.

First, a number of states that oppose a nuclear weapon ban treaty, such as Canada and the Netherlands, have explicitly rejected the claim that the absence of a law or legal norm prohibiting the possession of nuclear weapons constitutes a legal gap.<sup>41</sup> They note that, while an advisory opinion issued by the International Court of Justice in 1996 imposed strict limits on the permissible circumstances in which nuclear weapons can be used, under current customary international law the possession and use of such weapons is not illegal. In the view of these states, the NPT continues to provide the necessary and sufficient legal basis for making progress towards disarmament.

Second, many opponents of the TPNW have stressed that it is both an unrealistic nuclear disarmament measure and inadvisable, since the nuclear weapon ban could have adverse consequences for international security. The nuclear weapon states and many states under the US nuclear umbrella have complained that the ban does not take account of the international security environment, the current geopolitical situation and the role of nuclear weapons in existing security doctrines. The USA has cautioned that efforts to delegitimize nuclear weapons will undermine the long-standing strategic stability that underpins the international security structure and regional security arrangements. In particular, the treaty could—and is ‘designed by ban advocates to’—‘destroy the basis for US nuclear extended deterrence’ on

<sup>39</sup> Meyer, P., ‘The mirage of nuclear deterrence’, *The NPT and the Prohibition Negotiation: Scope for Bridge-building* (UNIDIR: Geneva, May 2017), pp. 3–10.

<sup>40</sup> Mian, Z., ‘After the nuclear weapons ban treaty: A new disarmament politics’, *Bulletin of the Atomic Scientists*, 7 July 2017.

<sup>41</sup> United Nations, General Assembly, Open-ended Working Group on taking forward multilateral nuclear disarmament negotiations, ‘Reflections on the “Legal Gap for the elimination and prohibition of nuclear weapons”’, Submitted by Canada, A/AC.286/WP.20, 12 Apr. 2016.

which many US allies and partners depend.<sup>42</sup> In this context, some observers have argued that, intentionally or not, the ban treaty will create divisions between democratic allies and could weaken deterrence of non-democratic governments that will be less constrained by public opinion and the norms reflected in the treaty. This, in turn, would make actual nuclear disarmament less likely.<sup>43</sup>

Third, opponents have expressed concern that the TPNW could create confusion regarding the implementation of the NPT and complicate fulfilment of the NPT's nuclear disarmament obligations. Some states have pointed out that the TPNW provides for a comprehensive parallel review mechanism with a mandate that at least partially overlaps with that of the NPT. This could in turn lead to a fragmentation of disarmament efforts.<sup>44</sup> Concerns have also been raised that the ban treaty could distract attention from the consideration in international forums of important operational steps connected with reducing the risks and dangers posed by nuclear weapons.<sup>45</sup>

Finally, some observers have warned that the TPNW could exacerbate existing non-proliferation challenges. For example, the creation of an alternative treaty structure governing nuclear weapons could lead to 'forum-shopping', in which a state might hope to dilute international condemnation over its non-compliance with the strict verification requirements of the existing NPT by participating in the new, less rigorous treaty.<sup>46</sup> In addition, critics have noted that the inclusion of a three-month withdrawal procedure in Article 18 of the TPNW creates a risk that a state with a clandestine nuclear weapon programme could use the treaty and its protections until it decided to stage a nuclear 'breakout' with little warning.<sup>47</sup>

### Next steps

While the adoption and opening for signature of the TPNW marked an important achievement, the treaty itself provides only a general legal and normative framework for nuclear disarmament. The TPNW must ultimately be complemented by a verifiable, enforceable nuclear disarmament regime if the current divide between the nuclear weapon 'haves' and 'have nots' is to be bridged. The process of designing a prototype disarmament regime will

<sup>42</sup> US Mission to NATO (note 20).

<sup>43</sup> Harries, M., 'The real problem with a nuclear ban treaty', Nuclear Policy Program, Carnegie Endowment for International Peace, 15 Mar. 2017.

<sup>44</sup> Permanent Representation of the Netherlands to the United Nations in New York (note 28).

<sup>45</sup> Sagan, S. and Valentino, B. A., 'The nuclear weapons ban treaty: Opportunities lost', *Bulletin of the Atomic Scientists*, 16 July 2017.

<sup>46</sup> Mount, A. and Nephew, R., 'A nuclear weapons ban should first do no harm to the NPT', *Bulletin of the Atomic Scientists*, 7 Mar. 2017.

<sup>47</sup> Wolfsthal (note 27).

have to address questions not considered in the treaty negotiations, such as which activities, materials and facilities useful for developing and producing nuclear weapons must be prohibited, and how to manage and monitor nuclear activities with both military and civilian applications.<sup>48</sup>

While the treaty provides for the accession of nuclear weapon-possessing states and allows for the designation of a ‘competent international authority’ to verify the irreversible disarmament of such a state, that authority is not identified in the treaty. As a result, there is a need to identify the national and international transparency and verification protocols required by disarming states, and which international body or bodies would have responsibility for enforcing such a regime.<sup>49</sup>

The TPNW is unlikely to have any impact for the foreseeable future on the nuclear arsenals and modernization plans of the nine nuclear weapon-possessing states.<sup>50</sup> None of these states participated in the treaty negotiations and none has indicated that it will join the treaty. Against this background, critics of the TPNW are likely to continue to challenge what many treaty proponents highlight as its main long-term contribution: that it will serve to delegitimize and stigmatize nuclear weapons for future generations and thereby contribute to achieving the ultimate goal of nuclear disarmament.

<sup>48</sup> Perkovich, G., ‘The nuclear ban treaty: What would follow?’, Nuclear Policy Program, Carnegie Endowment for International Peace, 31 May 2017.

<sup>49</sup> Perkovich (note 48); and Arms Control Association, ‘The Treaty on the Prohibition of Nuclear Weapons at a glance’, Fact sheet, July 2017.

<sup>50</sup> For detail about the size and composition of the nuclear warhead inventories of the 9 nuclear weapon-possessing states see chapter 6, sections I–IX, in this volume.