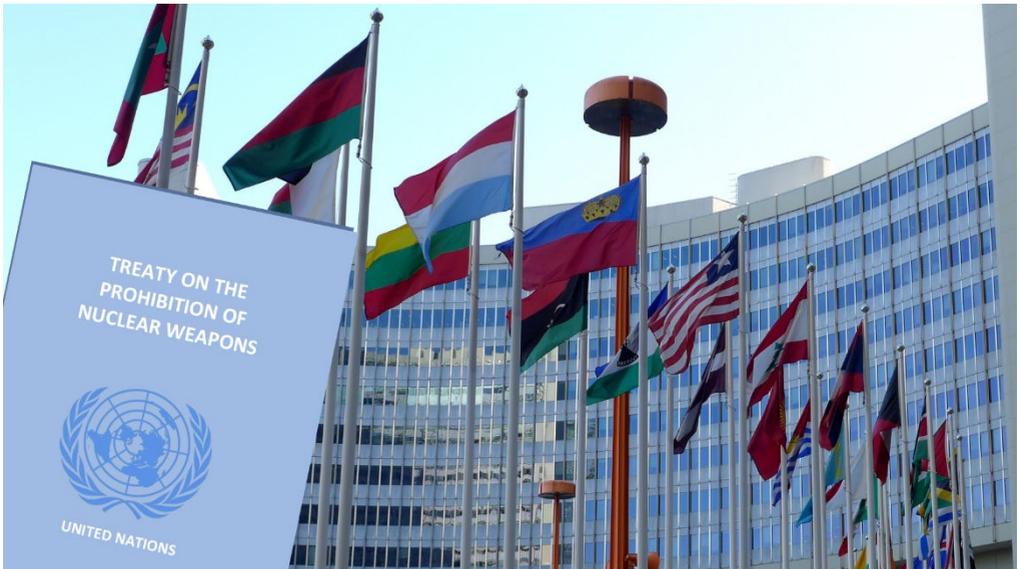


# Treaty on the Prohibition of Nuclear Weapons

A Commentary Article by Article

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# Treaty on the Prohibition of Nuclear Weapons

## A Commentary Article by Article

### General Introduction

What happened on July 7, 2017 at the United Nations in New York deserves our attention since it constitutes a real paradigm shift and the end of a period of stagnation in nuclear disarmament for more than 20 years, namely the adoption of the Treaty on the prohibiting of nuclear weapons (TPNW). After biological (1972) and chemical weapons (1993), the remaining type of weapons of mass destruction will therefore be banned contractually.

Even though there is considerable disagreement on the practical impact of the treaty for nuclear disarmament and international security, its humanitarian significance has been confirmed by the fact that the International Campaign to Abolish Nuclear Weapons (ICAN), the coalition that was instrumental in the negotiations and adoption of the treaty, has been awarded the Nobel Peace Prize in 2017.

The treaty entered into force on 22 January 2021, 90 days after the ratification by the 50th State, Honduras, on 24 October 2020, in accordance with its Article 15 § 1. At the moment of completing the update of the present commentary, 86 States have signed the treaty and 59 have ratified it.<sup>1</sup>

The treaty reinforces the norm against nuclear weapons, and relevant existing international (treaty or customary) law. It creates new momentum for nuclear disarmament, gives civil society a new tool in its fight for a world free from nuclear weapons, and puts more pressure on Nuclear Weapons States (NWS) and their allies.

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<sup>1</sup> Antigua and Barbuda, Austria, Bangladesh, Belize, Benin, Bolivia, Botswana, Cambodia, Chile, Comoros, Cook Islands, Costa Rica, Cuba, Dominica, Ecuador, El Salvador, Fiji, The Gambia, Guinea-Bissau, Guyana, Holy See, Honduras, Ireland, Jamaica, Kazakhstan, Kiribati, Laos, Lesotho, Malaysia, Maldives, Malta, Mexico, Mongolia, Namibia, Nauru, New Zealand, Nicaragua, Nigeria, Niue, Palau, Palestine, Panama, Paraguay, Peru, Philippines, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and Grenadines, Samoa, San Marino, Seychelles, South Africa, Thailand, Trinidad and Tobago, Tuvalu, Uruguay, Vanuatu, Venezuela, and Vietnam (26 January 2022).

The new instrument is a “treaty” in the sense of the 1969 Vienna Convention on the Law of Treaties (VCLT), namely an “international agreement concluded between States in written form and governed by international law (...)”.<sup>2</sup> As such, it is quite a complex construction that will certainly raise many questions of interpretation during its hopefully long life. The starting point of treaty interpretation is the following “general rule of interpretation”, enshrined in Article 31 § 1 VCLT:

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

Article 31 §§ 2 to 4, as well as Articles 32 and 33 provide for additional and supplementary means of treaty interpretation. They are listed in the annex to the present commentary.

The present short commentary article by article is intended to facilitate the reading and understanding of the new treaty, without going into all the legal details. It is destined to a broad readership, including persons not possessing deep knowledge in international law.

We hope it will stimulate the debate around this new instrument, inform representatives of civil society, teach young people and students and assist diplomats and State agents in their work towards ratification of the treaty.

*Dr. iur. Daniel Rietiker, Prof. Manfred Mohr, and Prof. Toshinori Yamada  
(February 2022)*

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<sup>2</sup> Article 2 § 1 a) VCLT.

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## **Preamble:**

### Treaty text:

*The States Parties to this Treaty,*

*Determined* to contribute to the realization of the purposes and principles of the Charter of the United Nations [§ 1]

*Deeply concerned* about the catastrophic humanitarian consequences that would result from any use of nuclear weapons, and recognizing the consequent need to completely eliminate such weapons, which remains the only way to guarantee that nuclear weapons are never used again under any circumstances [§ 2]

*Mindful* of the risks posed by the continued existence of nuclear weapons, including from any nuclear-weapon detonation by accident, miscalculation or design, and emphasizing that these risks concern the security of all humanity, and that all States share the responsibility to prevent any use of nuclear weapons [§ 3]

*Cognizant* that the catastrophic consequences of nuclear weapons cannot be adequately addressed, transcend national borders, pose grave implications for human survival, the environment, socioeconomic development, the global economy, food security and the health of current and future generations, and have a disproportionate impact on women and girls, including as a result of ionizing radiation [§ 4]

*Acknowledging* 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, serving both national and collective security interests [§ 5]

*Mindful* of the unacceptable suffering of and harm caused to the victims of the use of nuclear weapons (hibakusha), as well as of those affected by the testing of nuclear weapons [§ 6]

*Recognizing* the disproportionate impact of nuclear-weapon activities on indigenous peoples [§ 7]

*Reaffirming* the need for all States at all times to comply with applicable international law, including international humanitarian law and international human rights law [§ 8]

*Basing themselves* on the principles and rules of international humanitarian law, in particular the principle that the right of parties to an armed conflict to choose methods or means of warfare is not unlimited, the rule of distinction, the prohibition against indiscriminate attacks, the rules on proportionality and precautions in attack, the prohibition on the use of weapons of a nature to cause superfluous injury or unnecessary suffering, and the rules for the protection of the natural environment [§ 9]

*Considering* 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 [§ 10]

*Reaffirming* that any use of nuclear weapons would also be abhorrent to the principles of humanity and the dictates of public conscience [§ 11]

*Recalling* that, in accordance with the Charter of the United Nations, States must refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations, and that the establishment and maintenance of international peace and security are to be promoted with the least diversion for armaments of the world's human and economic resources [§ 12]

*Recalling* also the first resolution of the General Assembly of the United Nations, adopted on 24 January 1946, and subsequent resolutions which call for the elimination of nuclear weapons [§ 13]

*Concerned* by the slow pace of nuclear disarmament, the continued reliance on nuclear weapons in military and security concepts, doctrines and policies, and the waste of economic and human resources on programs for the production, maintenance and modernization of nuclear weapons [§ 14]

*Recognizing* that a legally binding prohibition of nuclear weapons constitutes an important contribution towards the achievement and maintenance of a world free of nuclear weapons, including the irreversible, verifiable and transparent elimination of nuclear weapons, and determined to act towards that end [§ 15]

*Determined* to act with a view to achieving effective progress towards general and complete disarmament under strict and effective international control [§ 16]

*Reaffirming* that there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control [§ 17]

*Reaffirming* also 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 [§ 18]

*Recognizing* the vital importance of the Comprehensive Nuclear-Test-Ban Treaty and its verification regime as a core element of the nuclear disarmament and non-proliferation regime [§ 19]

*Reaffirming* the conviction that the establishment of the internationally recognized nuclear-weapon-free zones on the basis of arrangements freely arrived at among the States of the region concerned enhances global and regional peace and security, strengthens the nuclear non-proliferation regime and contributes towards realizing the objective of nuclear disarmament [§ 20]

*Emphasizing* that nothing in this Treaty shall be interpreted as affecting the inalienable right of its States Parties to develop research, production and use of nuclear energy for peaceful purposes without discrimination [§ 21]

*Recognizing* that the equal, full and effective participation of both women and men is an essential factor for the promotion and attainment of sustainable peace and security, and committed to supporting and strengthening the effective participation of women in nuclear disarmament [§ 22]

*Recognizing* also the importance of peace and disarmament education in all its aspects and of raising awareness of the risks and consequences of nuclear weapons for current and future generations, and committed to the dissemination of the principles and norms of this Treaty [§ 23]

*Stressing* the role of public conscience in the furthering of the principles of humanity as evidenced by the call for the total elimination of nuclear weapons, and recognizing the efforts to that end undertaken by the United Nations, the International Red Cross and Red Crescent Movement, other international and

regional organizations, non-governmental organizations, religious leaders, parliamentarians, academics and the hibakusha [§ 24]

*Have agreed as follows (...).*

Commentary:

The preamble of a treaty does not as such contain legally binding obligations but constitutes nevertheless an important tool for the interpretation of the instrument, in particular to define its “object and purpose” within the meaning of Article 31 § 1 VCLT, as mentioned in the introduction. In addition, the preamble is also included in the context to which it shall be referred in treaty interpretation.<sup>3</sup>

As far as the TPNW is concerned, it is obvious that the drafters put a lot of energy in the preamble, which, with its 24 paragraphs, is long, detailed, useful and quite accurately formulated. It underlines the humanitarian nature of the treaty and is, as such, inspired by similar language having been used in the preamble of the Ottawa Convention on the prohibition of anti-personnel mines (the “Ottawa Convention”) and the Oslo Convention on cluster munitions (the “Oslo Convention”).<sup>4</sup>

First of all, it is reiterated in the preamble that the new treaty is meant to contribute to the purposes and principles of the Charter of the United Nations,<sup>5</sup> in particular to the duty of States to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State.<sup>6</sup> The preamble also recalls the principle that the establishment and maintenance of international peace and security are to be promoted with the least diversion for armaments of the world’s human and

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<sup>3</sup> According to Article 31 (2) of VCLT, “[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes...”.

<sup>4</sup> See, regarding the humanitarian and victim-centered nature of the treaty, Daniel Rietiker, “The Treaty on the Prohibition of Nuclear Weapons: A Further Confirmation on the Human- and Victim-Centered Trend in Arms Control Law”, in: J.L. Black-Branch and D. Fleck (eds.), *Nuclear Non-Proliferation in International Law*, Vol. IV, The Hague, 2019, pp. 325-353.

<sup>5</sup> Preambular paragraph 1.

<sup>6</sup> Preambular paragraph 12; that duty is enshrined in Article 2 § 4 of the UN Charter.

economic resources.<sup>7</sup> This principle derives from Article 26 of the UN Charter, which conveys certain powers to the UNSC.<sup>8</sup> Those have nevertheless never been used. The positive influence that appropriate disarmament measures could have on human development has been studied and recognized for many years.<sup>9</sup>

The preamble furthermore refers to the catastrophic humanitarian consequences that would result from any use of nuclear weapons.<sup>10</sup> These consequences might have been obvious since the nuclear bomb droppings at Hiroshima and Nagasaki. But only rather recently, the global treatment of the nuclear weapon subject received a new impetus – resulting in the conference process of Oslo, Nayarit and Vienna (2013 – 2014) leading to the “Vienna Pledge”, and, finally, to the treaty.<sup>11</sup> It is also important to remind of risks linked to possible nuclear weapons detonations by accident or miscalculation as the history of last decades is full of almost catastrophes based on such constellations. Thus, the continued mere existence of nuclear weapons is most problematic, and the solution can only be to completely eliminating such weapons, achieving a nuclear–weapon–free world.<sup>12</sup>

Paragraphs 6 and 7 draw the attention to the victims – both of the use (hibakusha) and of the testing of nuclear weapons, with indigenous peoples being especially affected by nuclear– weapons activities.<sup>13</sup> In addition,

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<sup>7</sup> Preambular paragraph 12.

<sup>8</sup> In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.

See for more information: [www.reachingcriticalwill.org/resources/fact-sheets/critical-issues/4565-article-26-of-the-un-charter](http://www.reachingcriticalwill.org/resources/fact-sheets/critical-issues/4565-article-26-of-the-un-charter), accessed on 16/02/2022.

<sup>9</sup> See, for instance: [www.reachingcriticalwill.org/resources/fact-sheets/critical-issues/4646-disarmament-and-development](http://www.reachingcriticalwill.org/resources/fact-sheets/critical-issues/4646-disarmament-and-development), accessed on 16/02/2022.

<sup>10</sup> Preambular paragraphs 2 and 4.

<sup>11</sup> See, for more details on these developments, Daniel Rietiker, *Humanization of Arms Control: Paving the Way for a World Free of Nuclear Weapons*, Routledge, 2017, pp. 148-157.

<sup>12</sup> (See) Preambular paragraphs 3, 2 and 5.

<sup>13</sup> See, for the special vulnerability of indigenous peoples, Rietiker, *Humanization of Arms Control, op.cit.*, pp. 223-229.

paragraph 4 also refers to future generations as well as women and girls.<sup>14</sup> Mentioning the suffering and/or harm of victims is one of the hallmarks of Humanitarian Disarmament Treaties.<sup>15</sup>

Paragraph 8 recalls the need of all States to comply with applicable international law, including international humanitarian law and human rights law. The reference to human rights is a reflection of the humanitarian and victim-centred nature of the treaty; here, it is, among others, the right to life which matters.<sup>16</sup> In its General Comment No. 14, the Human Rights Committee, implementing the International Covenant on Civil and Political Rights (ICCPR) resumed: „It is evident that the designing, testing, manufacture, possessing and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today.”<sup>17</sup> In its General comment No. 36 which replaced General Comment No. 14, the Committee stated: “[t]he threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and are of a nature to cause destruction of human life on a catastrophic scale, is incompatible with respect for the right to life and may amount to a crime under international law.”<sup>18</sup>

The principles and rules of international humanitarian law explicitly mentioned in paragraph 9 are among the most fundamental norms of this branch of international law. They are ranging from the not unlimited right to choose methods or means of warfare to the rules for the protection of the natural environment. *Any* use of nuclear weapons would be contrary to the rules of international law applicable in armed conflict, in particular the principles and

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<sup>14</sup> See in this regard Gabriella Venturini, “Gender Perspective on Nuclear Weapons and Human Rights”, in: J.L. Black-Branch and D. Fleck (eds.), *Nuclear Non-Proliferation in International Law*, Vol. IV, The Hague, 2019, pp. 99-115.

<sup>15</sup> Preamble paragraph 1 of Ottawa Convention and preamble paragraphs 2 and 17 of Oslo Convention.

<sup>16</sup> Regarding the right to life and other human rights affected by the use or testing of nuclear weapons see Rietiker, *Humanization of Arms Control*, *op.cit.*, pp. 173-222.

<sup>17</sup> CCPR General Comment No. 14: Article 6 (Right to life). Nuclear Weapons and the Right to Life. Adopted at the Twenty-third Session of the Human Rights Committee on 9 November 1984, § 4.

<sup>18</sup> Paragraph 66 of CCPR General Comment No. 36: Article 6 (right to life), Adopted at the 124th session of the Human Rights Committee on 30 October 2018.

rules of international humanitarian law (preamble paragraph 10) and would also be abhorrent to the principles of humanity and the dictates of public conscience (preamble paragraph 11). It is important that all states, whether or not State Parties of TPNW, are bound by the principles and rules in preamble paragraph 9. Preamble paragraph 10, which considers – without any exception - illegality of the use of nuclear weapons based on the universal principles and rules mentioned, overcomes the 1996 ICJ Advisory Opinion that proceeded from the general illegality but could not “conclude definitively” (il)legality of the use of nuclear weapons “in an extreme circumstance of self-defence, in which the very survival of a State would be at stake”.<sup>19</sup> The statement in preamble paragraph 11 is an expression of the so called “Martens Clause”, which represents a classical principle of the laws of war to cover situations beyond written international law. In the same logic, the clause functions as a kind of safety net, while, in the context of the treaty, it may also be conceived as a sign of openness and flexibility.<sup>20</sup> Ottawa and Oslo Conventions also refer to the Martens Clause in their preambles. Preamble Paragraph 11 of the new treaty is unique in that it not only refers to the Martens clause, but also reaffirms that any use of nuclear weapons would be abhorrent to that clause.

Several paragraphs of the preamble are devoted to the existing non-proliferation and arms control regime and the unfulfilled promises in the field of nuclear disarmament. It is reiterated that the very first resolution of the UNGA, adopted on 24 January 1946, was devoted to nuclear disarmament, but that more recently, no significant progress has been made in this field.<sup>21</sup> On the contrary, nuclear weapons are still part of the military and security concepts, doctrines and policies, and the NWS are investing huge amounts of money in the modernization of their arsenals.<sup>22</sup> In this connection, the preamble recalls the obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control, as provided for by Article VI of the Non-Proliferation Treaty (NPT)

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<sup>19</sup> ICJ Reports 1996, conclusion E (see also below).

<sup>20</sup> For a contemporary version of the Martens Clause see Article 1 § 2 of the 1977 Protocol I to the 1949 Geneva Conventions.

<sup>21</sup> Preambular paragraphs 13 and 14.

<sup>22</sup> Preambular paragraph 14.

and as has been confirmed by the ICJ in its 1996 Advisory Opinion.<sup>23</sup> It is important to recall that all States are bound by this duty, whether or not they are Parties to the NPT.

In this regard, the preamble furthermore stresses that the NPT remains the cornerstone of the nuclear disarmament and non-proliferation regime,<sup>24</sup> emphasizes the vital role of the Comprehensive Nuclear-Test-Ban Treaty (CTBT) in the field and underlines the importance of the establishment of regional nuclear Weapon free zones (NWFZ) for peace and security and for a world free of nuclear weapons.<sup>25</sup> Finally, the drafters found it relevant to include a reminder of the inalienable right of States to develop research, production and use of nuclear energy for peaceful purposes without discrimination, the so-called 3<sup>rd</sup> pillar of the NPT, deriving from its Article IV.<sup>26</sup>

Moreover, two preambular paragraphs are devoted to the need to strengthen the effective participation of women in nuclear disarmament and the importance of disarmament education and awareness raising of the provision of the new treaty and of the risks and consequences of nuclear weapons for current and future generations.<sup>27</sup>

Finally, in the last preambular paragraph, the important efforts made by the United Nations, the International Red Cross and Red Crescent Movement, other international and regional organizations, non-governmental organizations, religious leaders, parliamentarians, academics and the hibakusha, is recognized. Very similar language has already been used in the Ottawa and the Oslo Conventions,<sup>28</sup> but without including explicitly religious leaders, parliamentarians, and academics. It derives from the *travaux préparatoires* of all three treaties that the main driving force behind the new treaties was civil society, backed up by some like-minded governments. In the case of the TPNW,

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<sup>23</sup> ICJ Reports 1996, conclusion F.

<sup>24</sup> See also the commentary on Article 18, below.

<sup>25</sup> Preambular paragraphs 18-20. For the relationship between the new treaty and the NPT and the CTBT, see below, “Relationship with other agreements” (Article 18).

<sup>26</sup> The other two pillars are the non-proliferation obligations (Article I and II NPT) and the disarmament duties (Article VI NPT).

<sup>27</sup> Preambular paragraphs 22-23.

<sup>28</sup> Ottawa Convention, preambular paragraph 8, and Oslo Convention, preambular paragraph 17.

the interplay or coercion between civil society and States has nevertheless reached a new quality. Civil society actors like those of ICAN or IALANA have been directly involved in the negotiation process, presenting own drafts and suggestions. This may also be seen as a sign of democratization of the United Nations, which eventually returned to be a forum of nuclear disarmament. This is even more valuable considering the stalemate of the Conference on Disarmament for many years due to its consensus principle. In addition, the role of public conscience stressed in Preamble § 24, when read in conjunction with Preamble § 11, may be said to serve the function of transforming the democratized call for the total elimination of nuclear weapons into a norm against nuclear weapons.

### **Prohibitions (Article 1):**

#### *Treaty text:*

1. Each State Party undertakes never under any circumstances to:
  - (a) Develop, test, produce, manufacture, otherwise acquire, possess or stockpile nuclear weapons or other nuclear explosive devices;
  - (b) Transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly or indirectly;
  - (c) Receive the transfer of or control over nuclear weapons or other nuclear explosive devices directly or indirectly;
  - (d) Use or threaten to use nuclear weapons or other nuclear explosive devices;
  - (e) Assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Treaty;
  - (f) Seek or receive any assistance, in any way, from anyone to engage in any activity prohibited to a State Party under this Treaty;
  - (g) Allow any stationing, installation or deployment of any nuclear weapons or other nuclear explosive devices in its territory or at any place under its jurisdiction or control.

Commentary:

Neither nuclear weapons, nor other nuclear explosive devices are defined in the Treaty and while the term “nuclear weapons” refers to devices designed to release energy in an explosive manner as a result of nuclear fission, nuclear fusion, or a combination of the two processes<sup>29</sup>, the term “other nuclear explosive devices” is deprived of such common definition. There is, though, a settled understanding among states, that a nuclear explosive device means a device, that has (yet) not been weaponized, meaning that it is not contained in and delivered by, for example, a missile, rocket, or bomb.<sup>30</sup> A broad understanding of this generic term makes a wider scope of application of the treaty possible.

Like the Ottawa and Oslo Conventions, Article 1 of the new treaty imposes a set of prohibitions with a view to eliminating an entire category of weapons.<sup>31</sup> The prohibitions in Article 1 are more comprehensive than clauses inserted in preceding nuclear disarmament treaties in that it prohibits a wide range of nuclear weapons-related activities, including the development, testing, production, and manufacture of nuclear weapons (letter a)), and is non-discriminatory in that, unlike the NPT, it does not discriminate between NWS and NNWS parties.

From our point of view, the most important prohibition is the ban on use contained in Article 1 § 1(d). Quite surprisingly, the use of nuclear weapons has not been explicitly prohibited in an earlier treaty,<sup>32</sup> contrary to many other weapons, less destructive ones.<sup>33</sup> It is noteworthy to underline that, in

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<sup>29</sup> Norris, R. S. and Cochran, Thomas B. (2021), Nuclear weapon, in: Encyclopedia Britannica.

<sup>30</sup> Singh, Nidhi (2020), Victim Assistance under the Treaty on the Prohibition of Nuclear Weapons: An Analysis, In: Journal for Peace and Nuclear Disarmament, 3:2, pp. 265-282, 270.

<sup>31</sup> See, for an overview, John Burroughs, Key Issues in Negotiations for a Nuclear Weapons Prohibition Treaty, *Arms Control Today*, Vol. 47, June 2017, pp. 6-13.

<sup>32</sup> In exceptional cases, negative security assurances are provided for in protocols to which Nuclear Weapons States are parties in nuclear-weapon-free zones. In addition, many of the nuclear weapons States that are parties to these protocols have reservations about their use of nuclear weapons in certain cases.

<sup>33</sup> See, in particular, the 1925 Geneva Gas Protocol, Article 1 § 1 b) of the 1993 Chemical Weapons Convention, and Article 1 § 1 a) of the Ottawa and Oslo Conventions.

accordance with Article 1, the States parties undertake “never under any circumstances” to engage in the activities prohibited by the treaty. In other words, those acts are forbidden not only vis-à-vis other States parties, but also with regards non-Parties and even non-State actors, such as rebel groups or terrorists. In addition, belligerent reprisals are also prohibited.<sup>34</sup>

The treaty ban on use or threatening to use nuclear weapons formulated in the TPNW depicts a clear confirmation of the ICJ’s statement in the 1996 Advisory Opinion according to which “the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law” However, the Court continued, that it “cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake”<sup>35</sup> This “escape hatch” is in contradiction to the Court’s pronouncement on the general illegality of the use of nuclear weapons, based on the principles of proportionality and of international humanitarian law. These principles are also valid in a situation of self-defence, even in an extreme form. The Court itself declared earlier that, in view of the unique characteristics of nuclear weapons, their use in fact seems “scarcely reconcilable” with respect for humanitarian law requirements.<sup>36</sup>

The TPNW, not containing such “exceptions” and not allowing reservations,<sup>37</sup> is removing those ambiguities and contradictions. Once ratified by many States it will establish or confirm an “absolute” prohibition of use. Moreover, if the treaty will be ratified by many States, its provisions might be doubled by a customary norm prohibiting nuclear weapons even for States not acceding to the treaty because of the “fundamentally norm-creating character” of the

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<sup>34</sup> See Stuart Casey-Maslen, *The Treaty on the Prohibition of Nuclear Weapons: A Commentary (Oxford Commentaries on International Law)*, 2019, pp. 134-135, para. 1.09.

<sup>35</sup> Advisory Opinion, *op.cit.*, § 105 § 2 E.

<sup>36</sup> *Ibid*, paragraph 95.

<sup>37</sup> See below; “Reservations” (Article 16).

treaty.<sup>38</sup> Customary law is another source of international law - not less important than treaties - and defined as “evidence of a general practice accepted as law.”<sup>39</sup> Nuclear-weapon states and their allies, however, have denied that the new treaty becomes customary law. Some states and commentators have however suggested that these objections do not prevent the formation of customary law, relying on the rule of persistent objector.<sup>40</sup>

Most importantly, Article 1 also prohibits to threaten to use nuclear weapons. Seen together with the ban on possession of nuclear weapons, nuclear policies based on deterrence have become ever more questionable by the treaty producing effects of delegitimization in this regard. This prohibition raises the question whether deterrence-based nuclear policies are prohibited by the TPNW. The preparatory work to the treaty, and in particular the negotiations held in New York did not reach a final conclusion on this point but it is undisputed that it was one of the main goals of civil society and the States working towards the adoption of the new treaty to delegitimize decades-old policies relying on nuclear weapons.<sup>41</sup> Following the adoption of the treaty, on July 7, 2017, the Chairperson Ambassador Whyte made the following declaration during a press conference:

“It is true that there was an important discussion about the inclusion of the issue of threat of use. So, it was finally agreed by the conference that Article 1 should include a prohibition to use or to threaten to use nuclear weapons, in the understanding that the threat of use lies at the heart of deterrence and the current security paradigms that the world started after 1945 when the bomb, the nuclear power, was created.”

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<sup>38</sup> North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. Netherlands), Judgment, 1969 I.C.J. Rep. 3 (February 20), § 72; *see also* Asylum Case (Colombia v. Peru), Judgment, 1950 I.C.J. Rep. 6, at 277–78 (November 20).

<sup>39</sup> Statute of the International Court of Justice, Article 38 § 1. *See also* below, “Universality” (Article 12).

<sup>40</sup> For example, Mexico, Report of the Secretary-General, A/75/138, p. 10; Gro Nystuen, Kjølvs Egeland, and Torbjørn Graff Hugo, *The TPNW: Setting the record straight*, NORWEGIAN ACADEMY OF INTERNATIONAL LAW, OCTOBER 2018, pp. 32-33.

<sup>41</sup> *See*: [www.youtube.com/watch?v=IwTeX1jixSE](https://www.youtube.com/watch?v=IwTeX1jixSE), (time stamp 15:02 onwards), accessed on 16/02/2022.

Noteworthy is also letter g) of Article 1 which prohibits allowing any stationing, installation or deployment of any nuclear weapons or other nuclear explosive devices in its territory or at any place under its jurisdiction or control. This clause prohibits, for instance, NATO members to host their allies' nuclear weapons on their territory. Otherwise, the treaty does not address the question of inter-operability between NWS and their allies, contrary for example to the Oslo Convention on Cluster Munitions.<sup>42</sup>

In this connection, letter e) of Article 1 is also noteworthy. Indeed, NATO members have questioned the prohibition of assisting, encouraging, and inducing anyone's prohibited activities (letter e) as incompatible with the membership of NATO. Moreover, a certain disappointment was felt among civil society and certain States about the fact that financing or transition of nuclear weapons is not explicitly forbidden by the new treaty. On the other hand, it is argued here that such activities are covered, implicitly by letter e).<sup>43</sup>

## **Declarations and safeguards (Article 2 and 3):**

### Treaty text:

#### **Article 2: Declarations**

1. Each State Party shall submit to the Secretary-General of the United Nations, not later than 30 days after this Treaty enters into force for that State Party, a declaration in which it shall:

(a) Declare whether it owned, possessed or controlled nuclear weapons or nuclear explosive devices and eliminated its nuclear-weapon programme, including the elimination or irreversible conversion of all nuclear-weapons-related facilities, prior to the entry into force of this Treaty for that State Party;

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<sup>42</sup> See, in particular, Article 21 of the Oslo Convention. See also: <https://safna.org/2017/06/06/nuclear-coalitions-and-the-ban-treaty-a-reaction-to-the-first-draft-treaty-text/>, accessed on 16/02/2022.

<sup>43</sup> See also Declaration on 30 January 2018 by Cuba upon ratification.

(b) Notwithstanding Article 1 (a), declare whether it owns, possesses or controls any nuclear weapons or other nuclear explosive devices;

(c) Notwithstanding Article 1 (g), declare whether there are any nuclear weapons or other nuclear explosive devices in its territory or in any place under its jurisdiction or control that are owned, possessed or controlled by another State.

2. The Secretary-General of the United Nations shall transmit all such declarations received to the States Parties.

### **Article 3: Safeguards**

1. Each State Party to which Article 4, paragraph 1 or 2, does not apply shall, at a minimum, maintain its International Atomic Energy Agency safeguards obligations in force at the time of entry into force of this Treaty, without prejudice to any additional relevant instruments that it may adopt in the future.

2. Each State Party to which Article 4, paragraph 1 or 2, does not apply that has not yet done so shall conclude with the International Atomic Energy Agency and bring into force a comprehensive safeguard agreement (INFCIRC/153 (Corrected)). Negotiation of such agreement shall commence within 180 days from the entry into force of this Treaty for that State Party. The agreement shall enter into force no later than 18 months from the entry into force of this Treaty for that State Party. Each State Party shall thereafter maintain such obligations, without prejudice to any additional relevant instruments that it may adopt in the future.

#### Commentary:

Past experience, in particular the long preparatory work to the 1993 Chemical Weapons Convention (CWC) and the CTBT, has shown that verification clauses always tend to complicate the negotiation of a new arms control treaty – therefore, the States negotiating the TPNW, eager to adopt a potential treaty in a short period of time, have opted for straightforward, simple clauses. In this regard, it follows the examples of the Ottawa and Oslo Conventions too. In fact, under Article 2 (Declarations), States Parties have to submit to the Secretary-General of the United Nations, within 30 days after the entry into force of the treaty, a declaration in which they (a) declare whether it owned, possessed or controlled nuclear weapons or nuclear explosive devices and eliminated its nuclear-weapon programme, including the elimination or irreversible

conversion of all nuclear-weapons-related facilities, prior to the entry into force of the treaty; (b) declare whether they own, possess or control any nuclear weapons or other nuclear explosive devices, and (c) declare whether there are any nuclear weapons or other nuclear explosive devices in its territory or in any place under its jurisdiction or control that are owned, possessed or controlled by another State.<sup>44</sup> On these basis, Casey-Maslen stated that “Article 2 concerns the minimal reporting obligations applied to every state adhering to the 2017 Treaty”.<sup>45</sup> However, it is important to note that the TPNW does not oblige State Parties to submit a general or annual report explaining a situation of the implementation that has already established under another disarmament treaty.<sup>46</sup> These three scenarios actually correspond to the three options open to – former or current – NWS and their allies under Article 4 dealing with nuclear disarmament.<sup>47</sup>

In terms of safeguards, it was the intention of the negotiating delegations that the new treaty should rely on existing safeguard mechanisms. Therefore, Article 3 imposes for States not possessing or controlling nuclear weapons in the sense of Article 4 §§ 1 and 2 the duty, at a minimum, to maintain their International Atomic Energy Agency (IAEA) safeguards obligations in force at the time of the entry into force of the treaty, without prejudice to any additional instruments that they may adopt in the future (Article 3 § 1).

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<sup>44</sup> 55 states submitted their declarations to the UN Office. See [www.un.org/disarmament/wmd/nuclear/tpnw/article-2-of-the-tpnw/](http://www.un.org/disarmament/wmd/nuclear/tpnw/article-2-of-the-tpnw/), accessed on 16/02/2022; Furthermore, the ICRC elaborated a model declaration for states, available at [www.icrc.org/en/document/model-declarations-under-article-2-treaty-prohibition-nuclear-weapons](http://www.icrc.org/en/document/model-declarations-under-article-2-treaty-prohibition-nuclear-weapons), accessed on 16/02/2022.

<sup>45</sup> Casey-Maslen, S. (2019), *The Treaty on The Prohibition of Nuclear Weapons*, Oxford University Press, p.174; See also Nuclear Weapons Ban Monitor, “The obligation to submit declarations and reports”, available at <https://banmonitor.org/positive-obligations-1/the-obligation-to-submit-declarations-and-reports>, accessed on 16/02/2022.

<sup>46</sup> See Casey-Maslen, S. (2019), *The Treaty on The Prohibition of Nuclear Weapons*, Oxford University Press, p. 174 and p. 177.

<sup>47</sup> See below, “Towards the total elimination of nuclear weapons” (Article 4).

States not yet having concluded a comprehensive safeguard agreement (INFCIRC/153 (corrected)<sup>48</sup>) with the IAEA shall do so within a certain period of time in accordance with Article 3 § 2.<sup>49</sup>

## **Towards the total elimination of nuclear weapons (Article 4)**

### *Treaty text:*

1. Each State Party that after 7 July 2017 owned, possessed or controlled nuclear weapons or other nuclear explosive devices and eliminated its nuclear-weapon programme, including the elimination or irreversible conversion of all nuclear-weapons-related facilities, prior to the entry into force of this Treaty for it, shall cooperate with the competent international authority designated pursuant to paragraph 6 of this Article for the purpose of verifying the irreversible elimination of its nuclear-weapon programme. The competent international authority shall report to the States Parties. Such a State Party shall conclude a safeguards agreement with the International Atomic Energy Agency sufficient to provide credible assurance of the non-diversion of declared nuclear material from peaceful nuclear activities and of the absence of undeclared nuclear material or activities in that State Party as a whole. Negotiation of such agreement shall commence within 180 days from the entry into force of this Treaty for that State Party. The agreement shall enter into force no later than 18 months from the entry into force of this Treaty for that State Party. That State Party shall thereafter, at a minimum, maintain these safeguards obligations, without prejudice to any additional relevant instruments that it may adopt in the future.

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<sup>48</sup> IAEA, *The Structure and Content of Agreements Between the Agency and States Required in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons*, INFCIRC/153/Corr., available at [www.iaea.org/publications/documents/infcircs/structure-and-content-agreements-between-agency-and-states-required-connection-treaty-non-proliferation-nuclear-weapons](http://www.iaea.org/publications/documents/infcircs/structure-and-content-agreements-between-agency-and-states-required-connection-treaty-non-proliferation-nuclear-weapons), accessed on 16/02/2022; See also Nuclear Weapons Ban Monitor, “The obligation to have Safeguards Agreements and Additional Protocols with the IAEA”, available at <https://banmonitor.org/positive-obligations-1/the-obligation-to-have-safeguards-agreements-and-additional-protocols-with-the-iaea>, accessed on 16/02/2022.

<sup>49</sup> More deeper analysis of safeguard provision, see Giorgou, E. (2018), “Safeguards Provisions in the Treaty on the Prohibition of Nuclear Weapons”, Arms Control Law, published on 11 April 2018, available at [https://armscontrollaw.com/2018/04/11/safeguards-provisions-in-the-treaty-on-the-prohibition-of-nuclear-weapons/#\\_ftn1](https://armscontrollaw.com/2018/04/11/safeguards-provisions-in-the-treaty-on-the-prohibition-of-nuclear-weapons/#_ftn1), accessed on 16/02/2022.

2. Notwithstanding Article 1 (a), each State Party that owns, possesses or controls nuclear weapons or other nuclear explosive devices shall immediately remove them from operational status, and destroy them as soon as possible but not later than a deadline to be determined by the first meeting of States Parties, in accordance with a legally binding, time-bound plan for the verified and irreversible elimination of that State Party's nuclear-weapon programme, including the elimination or irreversible conversion of all nuclear-weapons-related facilities. The State Party, no later than 60 days after the entry into force of this Treaty for that State Party, shall submit this plan to the States Parties or to a competent international authority designated by the States Parties. The plan shall then be negotiated with the competent international authority, which shall submit it to the subsequent meeting of States Parties or review conference, whichever comes first, for approval in accordance with its rules of procedure.

3. A State Party to which paragraph 2 above applies shall conclude a safeguards agreement with the International Atomic Energy Agency sufficient to provide credible assurance of the non-diversion of declared nuclear material from peaceful nuclear activities and of the absence of undeclared nuclear material or activities in the State as a whole. Negotiation of such agreement shall commence no later than the date upon which implementation of the plan referred to in paragraph 2 is completed. The agreement shall enter into force no later than 18 months after the date of initiation of negotiations. That State Party shall thereafter, at a minimum, maintain these safeguards obligations, without prejudice to any additional relevant instruments that it may adopt in the future. Following the entry into force of the agreement referred to in this paragraph, the State Party shall submit to the Secretary-General of the United Nations a final declaration that it has fulfilled its obligations under this Article.

4. Notwithstanding Article 1 (b) and (g), each State Party that has any nuclear weapons or other nuclear explosive devices in its territory or in any place under its jurisdiction or control that are owned, possessed or controlled by another State shall ensure the prompt removal of such weapons, as soon as possible but not later than a deadline to be determined by the first meeting of States Parties. Upon the removal of such weapons or other explosive devices, that State Party shall submit to the Secretary-General of the United Nations a declaration that it has fulfilled its obligations under this Article.

5. Each State Party to which this Article applies shall submit a report to each meeting of States Parties and each review conference on the progress made towards

the implementation of its obligations under this Article, until such time as they are fulfilled.

6. The States Parties shall designate a competent international authority or authorities to negotiate and verify the irreversible elimination of nuclear-weapons programmes, including the elimination or irreversible conversion of all nuclear-weapons-related facilities in accordance with paragraphs 1, 2 and 3 of this Article. In the event that such a designation has not been made prior to the entry into force of this Treaty for a State Party to which paragraph 1 or 2 of this Article applies, the Secretary-General of the United Nations shall convene an extraordinary meeting of States Parties to take any decisions that may be required.

Commentary:

It was always the conviction of the negotiations States that a ban treaty would only constitute a first step towards the end goal of a world free of nuclear weapons. Therefore, it was felt necessary to allow and encourage the NWS to join the treaty. The result of this is reflected in its – rather complex and lengthy – Article 4, entitled “Towards the total elimination of nuclear weapons”. Closely linked to declarations and safeguards, this provision has to be read together with Articles 2 and 3.

Casey-Maslen classified three different categories of State Parties under Article 4: (1) “those that had owned, possessed, or controlled nuclear weapons or other nuclear explosive devices the day after the date of adoption of the Treaty but had destroyed them by the time they became party to it” (former nuclear-armed state parties) (Article 4 § 1); (2) “those that still own, possess, or control nuclear weapons or other nuclear explosive devices on the date they become party to the Treaty” (nuclear-armed state parties) (Article 4 § 2); and (3) “those that have nuclear weapons or other nuclear explosive devices belonging to a foreign state located on any territory under their jurisdiction or control on the date they become a state party” (state parties hosting a foreign state’s nuclear weapons) (Article 4 § 4).<sup>50</sup> In the following, each paragraph will be briefly explained.

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<sup>50</sup> Casey-Maslen, S. (2019), *The Treaty on The Prohibition of Nuclear Weapons*, Oxford University Press, p. 193.

According to its paragraph 1, a State Party that, after 7 July 2017, owned, possessed or controlled nuclear weapons or other nuclear explosive devices but eliminated its nuclear-weapon programme and relevant facilities prior to the entry into force of the treaty for it, shall cooperate with the international authority, to be designated later, in charge of verifying the irreversible elimination of its nuclear-weapon programme, with a view to concluding a safeguard agreement with the IAEA. In other words, this first scenario is provided for NWS that prefer doing their homework first by getting rid of their nuclear weapons before joining the treaty.

Paragraph 2 stipulates that a State Party that owns, possesses or controls nuclear weapons when it becomes Party to the treaty shall immediately remove them from operational status and destroy them as soon as possible but not later than a deadline to be determined by the first meeting of States Parties,<sup>51</sup> in accordance with a legally binding, time-bound plan for the verified and irreversible elimination of its nuclear-weapon programme and related facilities. Such a plan has to be submitted to the States Parties or the mentioned international authority. The State must furthermore conclude a safeguards agreement with the IAEA.<sup>52</sup> This second option allows NWS to join the treaty before destroying their nuclear weapons and, as a result, to benefit from the disarmament regime proposed by the treaty.<sup>53</sup>

Finally, paragraph 4 addresses States that have nuclear weapons in their territory that are owned, possessed or controlled by another State. Such States must ensure the prompt removal of those weapons. This scenario is directed, in particular, at NATO member States hosting US nuclear weapons, such as Belgium, Germany, Italy and Turkey.<sup>54</sup>

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<sup>51</sup> Article 8.

<sup>52</sup> Article 4 § 3.

<sup>53</sup> See Nuclear Weapons Ban Monitor, “The obligation to eliminate nuclear weapons”, available at <https://banmonitor.org/positive-obligations-1/the-obligation-to-eliminate-nuclear-weapons>, accessed on 16/02/2022.

<sup>54</sup> Casey-Maslen, S. (2019), *The Treaty on The Prohibition of Nuclear Weapons*, Oxford University Press, p.200.

Altogether the treaty schemes on safeguards, institutional structures and disarmament are an indication of the openness and flexibility of the treaty. Thus, the treaty itself can be developed into an instrument providing for the complete (contractual) ban on nuclear weapons. How such an instrument, in an ideal case, can look like, is demonstrated by the Draft Model Convention on Nuclear Weapons.<sup>55</sup>

It is not certain that NWS will accept, in the near future, a text that they have not agreed upon and in whose negotiations they have not even participated. On the contrary, it has to be recalled that while 122 States voted in favour of the adoption of the treaty, none of the NWS was present. Moreover, not only have they completely absent before and during the negotiations in New York, but the US, UK and France were even issuing a statement on the same day which reads as follows:

“France, the United Kingdom and the United States have not taken part in the negotiation of the treaty on the prohibition of nuclear weapons. *We do not intend to sign, ratify or ever become party to it.*<sup>56</sup> Therefore, there will be no change in the legal obligations on our countries with respect to nuclear weapons. For example, we would not accept any claim that this treaty reflects or in any way contributes to the development of customary international law. Importantly, other States possessing nuclear weapons and almost all other States relying on nuclear deterrence have also not taken part in the negotiations.

This initiative clearly disregards the realities of the international security environment. Accession to the ban treaty is incompatible with the policy of nuclear deterrence, which has been essential to keeping the peace in Europe and North Asia for over 70 years. A purported ban on nuclear weapons that does not address the security concerns that continue to make nuclear deterrence necessary cannot result in the elimination of a single nuclear weapon and will not enhance any country’s security, nor international peace and security. It will do the exact opposite by creating even more divisions at a time when the world needs to remain united in the face of growing threats, including those from the DPRK’s ongoing

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<sup>55</sup> UN-Doc. A/62/650, 18 January 2008.

<sup>56</sup> Emphasis added.

proliferation efforts. This treaty offers no solution to the grave threat posed by North Korea's nuclear program, nor does it address other security challenges that make nuclear deterrence necessary. A ban treaty also risks undermining the existing international security architecture which contributes to the maintenance of international peace and security.

We reiterate in this regard our continued commitment to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and reaffirm our determination to safeguard and further promote its authority, universality and effectiveness. Working towards the shared goal of nuclear disarmament and general and complete disarmament must be done in a way that promotes international peace and security, and strategic stability, based on the principle of increased and undiminished security for all.

We all share a common responsibility to protect and strengthen our collective security system in order to further promote international peace, stability and security.”<sup>57</sup>

These and similar (NWS and NATO) statements prove to the fact that their policy of nuclear deterrence is touched upon by the TPNW. From our point of view, it is not the treaty itself but the constant behaviour and unfulfilled disarmament promises of NWS which are undermining the existing security and disarmament architecture. The complete absence of the NWS during the preparatory phase and the negotiations towards the new treaty, combined with this kind of statement, seriously raises the question of “good faith” of those States in the sense of Article VI NPT, imposing on all States the duty to negotiate in good faith in view of general and complete disarmament.<sup>58</sup>

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<sup>57</sup> <https://usun.usmission.gov/joint-press-statement-from-the-permanent-representatives-to-the-United-Nations-of-the-United-States-United-Kingdom-and-France-following-the-adoption/>

<sup>58</sup> Rietiker, D. (2017), “New hope for Nuclear Disarmament or “Much Ado About Nothing?”: Legal Assessment of the New “Treaty on the Prohibition of Nuclear Weapons” and the Joint Statement by the USA, UK, and France Following its Adoption”, *Harvard International Law Journal*, Volume 59, Fall 2017, p. 29., available at <https://harvardilj.org/2017/12/new-hope-for-nuclear-disarmament-or-much-ado-about-nothing-legal-assessment-of-the-new-treaty-on-the-prohibition-of-nuclear-weapons-and-the-joint-statement-by-the/>, accessed on 16/02/2022.

## National implementation (Article 5)

### Treaty text:

1. Each State Party shall adopt the necessary measures to implement its obligations under this Treaty.
2. Each State Party shall take all appropriate legal, administrative, and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Treaty undertaken by persons or on territory under its jurisdiction or control.

### Commentary:

Article 5 imposes on State Parties the ‘general duty’ or ‘positive obligation’ to implement legal obligations required by the TPNW at national level.<sup>59</sup> This provision can be considered as a standard clause that was, almost identically, already included *inter alia* in the Ottawa and the Oslo Conventions.<sup>60</sup> Such a clause is necessary since the treaty is of so-called “non-self-executing” character. In other words, it imposes legal obligations on private and legal person or creates rights in their favour only once it has been introduced in national law.<sup>61</sup>

By the inclusion of the words “undertaken by persons or on territory under its jurisdiction or control”, Article 5 specifies that the drafters did not want to establish a universal criminal jurisdiction with the possibility of States Parties to prosecute individuals who have no link with that State. Considering the transboundary harm that nuclear testing and use cause, such universal criminal jurisdiction would have been preferable. Nothing prevents the States Parties, however, to go further than Article 5 and confer universal jurisdiction to its national tribunals. This can be deduced, *inter alia*, from common Article 1 of the 1949 Geneva Conventions which lays down the duty “to respect and ensure respect” those conventions; it is our understanding that the principles and key provisions of those conventions would be applicable and relevant in the case of

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<sup>59</sup> See Casey-Maslen, S. (2019), *The Treaty on The Prohibition of Nuclear Weapons*, Oxford University Press, pp. 202-206.

<sup>60</sup> Article 9 of both Conventions.

<sup>61</sup> See, for an example, the ICJ in the case of *LaGrand* (Germany v. United States), ICJ Reports 2004, § 77.

use of nuclear weapons. Moreover, the Geneva Conventions and the 1977 Protocol No. 1 request the States parties to prosecute or extradite (*aut dedere aut judicare*) persons allegedly having committed grave breaches of those instruments.<sup>62</sup> It is from our point of view likely that the use of nuclear weapons in an inhabited area would be constitutive of such grave breaches.<sup>63</sup>

The International Committee of the Red Cross (ICRC) published a model law for the treaty on the prohibition of nuclear weapons to provide for state parties an incentive for enacting national legislation which reflects the provisions of the TPNW.<sup>64</sup> This model law is composed of the following six parts: (1) Introductory provisions; (2) Implementation of the treaty; (3) Inspection and verification; (4) Safeguards; (5) Victim assistance and environmental remediation, and (6) Final Provisions. In particular, if a person violates Section 7 of the ICRC Model Law, Section 8 of the same instrument imposes penalties, including imprisonment or fine, on the person. Furthermore, Sections 17 and 18 of the ICRC Model Law clarifies the obligations of national authority to provide adequate assistance for individuals who are affected by the use or testing of nuclear weapons within the jurisdiction<sup>65</sup> and to take ‘all necessary and appropriate measures towards the environmental remediation of areas so contaminated, for the purpose of repairing, reducing or mitigating environmental damage’.<sup>66</sup>

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<sup>62</sup> See, for instance, Articles 146 and 147 of the Geneva Convention No. IV relative to the Protection of Civilian Persons in Time of War, or Article 85 § 3 of Protocol No. 1.

<sup>63</sup> See, in this regard, in particular, Article 85 § 3 of Protocol No. 1: 3. “In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed willfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health: (a) making the civilian population or individual civilians the object of attack; (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii) (...).”

<sup>64</sup> ICRC, *Model Law for the Treaty on the Prohibition of Nuclear Weapons*, March 2019, available at <https://www.icrc.org/en/document/model-law-treaty-prohibition-nuclear-weapons-0>, accessed on 16/02/2022.

<sup>65</sup> Section 17(1) of the ICRC Model Law.

<sup>66</sup> Section 18(1) of the ICRC Model Law.

## **Victim assistance and environmental remediation (Article 6), interpreted combined with international cooperation and assistance (Article 7)**

### *Treaty text:*

#### **Article 6:**

1. Each State Party shall, with respect to individuals under its jurisdiction who are affected by the use or testing of nuclear weapons, in accordance with applicable international humanitarian and human rights law, adequately provide age- and gender-sensitive assistance, without discrimination, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion.
2. Each State Party, with respect to areas under its jurisdiction or control contaminated as a result of activities related to the testing or use of nuclear weapons or other nuclear explosive devices, shall take necessary and appropriate measures towards the environmental remediation of areas so contaminated.
3. The obligations under paragraphs 1 and 2 above shall be without prejudice to the duties and obligations of any other States under international law or bilateral agreements.

#### **Article 7:**

1. Each State Party shall cooperate with other States Parties to facilitate the implementation of this Treaty.
2. In fulfilling its obligations under this Treaty, each State Party shall have the right to seek and receive assistance, where feasible, from other States Parties.
3. Each State Party in a position to do so shall provide technical, material and financial assistance to States Parties affected by nuclear-weapons use or testing, to further the implementation of this Treaty.
4. Each State Party in a position to do so shall provide assistance for the victims of the use or testing of nuclear weapons or other nuclear explosive devices.
5. Assistance under this Article may be provided, inter alia, through the United Nations system, international, regional or national organizations or institutions,

non-governmental organizations or institutions, the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies, or national Red Cross and Red Crescent Societies, or on a bilateral basis.

6. Without prejudice to any other duty or obligation that it may have under international law, a State Party that has used or tested nuclear weapons or any other nuclear explosive devices shall have a responsibility to provide adequate assistance to affected States Parties, for the purpose of victim assistance and environmental remediation.

Commentary:

One of the striking features of the Treaty being of practical, political and, also, legal significance is without doubt the fact that it contains clauses on victim assistance and environmental remediation. These provisions (Arts. 6 and 7) express the deeply humanitarian nature and the victim-centred approach of the Treaty and have to be read in light of the long and detailed preamble.<sup>67</sup>

Articles 6 and 7 contain *positive* obligations which are of specific relevance, as distinct from negative, or banning, stipulations contained in the Treaty. Implementing these obligations is a priority and has immediate practical effects for victims and the natural environment affected by the (past) use or testing of nuclear weapons. Those commitments are of relevance even without the joining of Nuclear Weapon States (NWS) to the Treaty – thus underlining the great, overall importance of the instrument. According to Article 6, the point of departure for victim assistance and environmental remediation lies with the jurisdiction of affected States Parties, which may not be NWS.

The commitments echo the concept of humanitarian disarmament<sup>68</sup> which is at the cornerstones of the Ottawa and Oslo Conventions as well as of Protocol V

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<sup>67</sup> For a comprehensive commentary on the Treaty and its backgrounds see Casey-Maslen, Stuart (2019), *The Treaty on the Prohibition of Nuclear Weapons: A Commentary*; on arts. 6 and 7 pp. 207-224.

<sup>68</sup> See, among many others, Rapillard, Pascal (2011), *Humanitarian Disarmament*, In: *The Journal of ERW and Mine Action*, 151, <http://www.jmu.edu/cisr/journal/15.1/specialrpt/rapillard/rapillard.shtml> (7.10.2017); Docherty, Bonnie (2013), *Ending Civilian Suffering: The Purpose, Provisions, and Promise of Humanitarian*

of the UN Convention on Certain Conventional Weapons. Its essence lies with pursuing a victim-centred approach which is concentrating on practical, or pragmatic solutions and help for the people negatively affected by nuclear weapons – human security complementing national security. This is, as para. 6 of the Treaty’s preamble has put it, being “...*Mindful* of the unacceptable suffering of and harm caused to the victims of the use of nuclear weapons (hibakusha) as well as those affected by the testing of nuclear weapons...”

The environment-related rules of the Treaty are an indication of the general tendency to deal with the subject of the destruction of the environment through war and military activities. Standards taken from the three legal branches mentioned above, namely human rights, humanitarian and environmental law, are relevant to these scenarios. This tendency is indicated by various international endeavours and documents. For example, the International Law Commission (ILC) has drafted principles on the protection of the environment in relation to armed conflict (PERAC), which are based on a broadly structured approach.<sup>69</sup> Other bodies and institutions also are looking into the issue from a more complex angle: the Harvard Law School International Human Rights Clinic and the Conflict and Environment Observatory (CEOS) set out a framework of rules covering responsibilities under humanitarian law and make multiple references to victim assistance in the context of human rights in their 2020 paper on conflict pollution.<sup>70</sup> Furthermore, such an approach can be found in the Guidelines of the International Committee of the Red Cross<sup>71</sup>, which deal

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Disarmament Law, In: Austrian Review of International and European Law, 15(2013), pp.7-44.; Dunworth, Treasa (2020), Humanitarian Disarmament: An Historical Enquiry.

<sup>69</sup> ILC (2019), Protection of the environment in relation to armed conflicts, A/74/10. Other examples and indications of this tendency: UNEA (2016), UNEP/EA.2/Res.15; UNEA (2017), UNEP/EA.3/Res.1.

<sup>70</sup> Harvard Law School International Human Rights Clinic & CEOS (2020), Confronting Conflict Pollution: Principles for Assisting Victims of Toxic Remnants of War, available at <http://hrp.law.harvard.edu/wp-content/uploads/2020/09/Confronting-Conflict-Pollution.pdf>, accessed on 16/02/2022; see a detailed presentation and commentary in Docherty, Bonnie (2021), A Singular Opportunity: Setting Standards for Victim Assistance under the Treaty on the Prohibition of Nuclear Weapons, in: Global Policy, Vol. 12/1, pp. 126–130.

<sup>71</sup> ICRC (2020), Guidelines on the Protection of the Natural Environment in Armed Conflict, available at

fundamentally with environment-related issues in the context of armed conflict and stipulate indications of the precautionary principle.

Apart from IHL, another emphasis is on human rights, as Article 6 para. 1 contains the following formulation “accordance with applicable international humanitarian and human rights law” They form the basis for victim assistance as well as for environmental remediation, their framework, principles and substance. Some of the most relevant human rights in the context of nuclear weapons are:

- the right to life;<sup>72</sup>
- the right to human dignity (reflected, *inter alia*, in the prohibition of torture and inhuman or degrading treatment);<sup>73</sup>
- the right to information and to a remedy;
- the right to health and a decent standard of living,<sup>74</sup> including the right to food and water,<sup>75</sup> and
- the right to a healthy environment (emerging).<sup>76</sup>

Whereas the right to life, the right to human dignity, and the right to information and to a remedy are generally considered “civil” rights, the rest of the mentioned rights belong to “social and economic” rights, that are equally important in modern times. It is therefore appropriate and relevant that the TPNW refers in para. 1 of Article 6 to “social and economic inclusion”.

One should not underestimate the importance of the right to information and to a remedy. Exactly in the case of nuclear weapons victims and damage,

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[https://www.icrc.org/en/download/file/141079/guidelines\\_on\\_the\\_protection\\_of\\_the\\_natural\\_environment\\_in\\_armed\\_conflict\\_advance-copy.pdf](https://www.icrc.org/en/download/file/141079/guidelines_on_the_protection_of_the_natural_environment_in_armed_conflict_advance-copy.pdf), accessed on 16/02/2022.

<sup>72</sup> Rietiker, *Humanization of Arms Control*, cited above, pp. 184-190.

<sup>73</sup> *Ibidem.*, pp. 191-195.

<sup>74</sup> *Ibidem.*, pp. 216-222.

<sup>75</sup> See, for instance, Rietiker, *The Treaty on the Prohibition of Nuclear Weapons*, cited above, pp. 342-345, Lady Justice Arden, “Water for All?” Developing a Human Right to Water in National and International Law, *International and Comparative Law Quarterly*, Vol. 65(4), 2016, pp. 771-789, and Murillo Chavarro, *The Human Right to Water: A Legal Comparative Perspective at the International, Regional and Domestic Level*, Cambridge University Press, 2015.

<sup>76</sup> Rietiker, *Humanization of Arms Control*, cited above, pp. 212-216.

information about the real extent of the actual harm to the environment and health of the affected population, as well as the imminent or potential risks of environmental pollution and degradation in future, and access to remedies are of paramount importance. Risk education and public information campaigns are, as a result, coming into play, as well as dissemination work comparable to what is done within the IHL/Red Cross.

Article 6 § 1 of the Treaty obliges States Parties to provide to individuals under their jurisdiction who are affected by the use or testing of nuclear weapons adequate age- and gender-sensitive assistance (including medical care, rehabilitation, and psychological support). The stipulation is practically identical with Art. 5 § 1 of the Oslo Convention. Paragraph 2 of Article 6 imposes, again on the territorial State, the duty to take necessary and appropriate measures towards the environmental remediation of areas contaminated as a result of activities related to the testing or use of nuclear weapons or other nuclear explosive devices.

One might raise the question whether the phrase “activities related to the testing or use of nuclear weapons”, used in paragraph 2 of Article 6, is broad enough to embrace activities such as uranium mining and milling, necessary for the production of nuclear weapons, as well as practices employed in order to get rid of the waste caused by the production or testing of nuclear weapons, such as dumping into the sea. Experience shows to what great extent those activities have a disastrous impact on the environment and the local population, in particular on indigenous peoples.<sup>77</sup>

Another principle relevant for implementing Articles 6 and 7 commitments is worth being mentioned, namely the presumption of causation. Principle 3 of the

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<sup>77</sup> For an overview see: Nuclear Free Future Foundation et al. (2020), *Uranium Atlas*, especially pp. 26–29 dealing with uranium mining and production as well as pp. 42–45 dealing with nuclear waste issues. See also Daniel Rietiker, *Indigenous Peoples’ Human Right to Water in the Nuclear Age: An Assessment of the Protection Under International Law*, in: J.L. Black-Branch and D. Fleck, *Nuclear Non-Proliferation in International Law*, Vol. VI, The Hague, 2021, pp.155-177, as well as Katja Göcke, *Indigenous Peoples in the Nuclear Age: Uranium Mining on Indigenous’ Lands*, in: J.L. Black-Branch and D. Fleck, *Nuclear Non-Proliferation in International Law*, Vol. I, The Hague, 2014, pp. 199-223.

Harvard/CEOBS paper is defining victims, and states: "...Where a certain amount and duration of exposure to a toxic or radiological substance is strongly associated with a particular harm, that exposure should be presumed to be a cause of the harm."

It derives from Article 6 §§ 1 and 2 that the main responsibility for victim assistance and environmental remediation lies upon the territorial or affected States – seeing to be in the best position to do so - thus the States where the testing or use of nuclear weapons has taken place. This primary burden is however tempered in several ways. First of all, paragraph 3 recalls that the obligations of any other State under international law or bilateral agreements shall remain unaffected. In other words, and to mention just one example, the Treaty would be without prejudice to the reparation that the USA owes to the Marshall Islands based on the "Compact of Free Association" Agreement between the USA and the Marshall Islands concluded in 1983.<sup>78</sup> So here, especially via the general clause of "international law", (again) reference is made to existing legal obligations outside the Treaty and Treaty membership.

The Marshall Islands case is a predominant example of the relevance of human rights law and procedure as the UN Special Rapporteur on human rights and hazardous waste conducted a fact-finding mission there in 2012,<sup>79</sup> while the case failed against NWS at the ICJ in 2016.<sup>80</sup>

Article 6 of the TPNW has to be read in conjunction with Article 7: the burden imposed on the States on whose territory the use or testing of nuclear weapons

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<sup>78</sup> The Compact of Free Association, US-Marsh. Is., June 25, 1983, 99 Stat. 1770 (1986).

<sup>79</sup> UN OHCHR (2012), A/HRC/21/48/Add.1, especially paras. 19 – 35, referring to the impact on the enjoyment of human rights, esp. the right to health.

<sup>80</sup> For a case overview see: Marshall Islands v. United Kingdom (2014), available at <https://www.icj-cij.org/en/case/160>, accessed on 16/02/2022; for (critical) comments: IALANA (2016), Statement on the Dismissal of the Marshall Islands' Nuclear Disarmament Case, available at [www.ialana.de/arbeitsfelder/abc-waffen/atomwaffen-sperrvertrag/abruestung-atomwaffen/klagen-der-marshall-inseln-vor-dem-igh/1807-the-international-association-of-lawyers-against-nuclear-arms-ialana-on-the-dismissal-of-the-marshall-islands-nuclear-disarmament-cases](http://www.ialana.de/arbeitsfelder/abc-waffen/atomwaffen-sperrvertrag/abruestung-atomwaffen/klagen-der-marshall-inseln-vor-dem-igh/1807-the-international-association-of-lawyers-against-nuclear-arms-ialana-on-the-dismissal-of-the-marshall-islands-nuclear-disarmament-cases), accessed on 16/02/2022.; de Souza Schmitz, Maite (2016), Decision of the International Court of Justice in the Nuclear Arms Race Case, In: Harvard International Law Journal Online, available at <https://harvardilj.org/2016/11/decision-of-the-international-court-of-justice-in-the-nuclear-arms-race-case/>, accessed on 16/02/2022.

has taken place is tempered by clauses on international cooperation and assistance. Paragraphs 1 and 2 of Article 7 represent general cooperation and assistance measures, not limited to victim assistance and environmental remediation. The duty to cooperate, as a legal obligation, is a well-recognized principle of international law, as enshrined in Article 1 para. 3 of the UN Charter.

Article 7 paragraph 3 is tailored to victim assistance and environmental remediation, imposing on “each State Party in a position to do so” the duty to provide technical, material and financial assistance to States Parties affected by the use or testing of nuclear weapons. Paragraph 4 is even more specific in the sense as it imposes the duty on “each State Party in a position to do so” to provide assistance for the victims of the use or testing of nuclear weapons. These rules correspond to similar rules contained in other instruments of humanitarian disarmament which sometimes are more detailed but, again, it matters to have them in the nuclear weapons context. This also applies to the mentioning of organizational schemes of assistance (including the UN and the Red Cross) in paragraph 5.

In one respect, the new treaty even goes further insofar as paragraph 6 of Article 7 recalls that a State Party that has used or tested nuclear weapons or any other nuclear explosive devices shall have a responsibility to provide adequate assistance to affected States Parties, for the purpose of victim assistance and environmental remediation without affecting any other duty or obligation that it may have under international law.<sup>81</sup> The first half sentence refers back to the multifaceted framework of international legal rules and standards in existence independent of the Treaty.

Such a responsibility, in essence, is of a legal not only a moral, nature. It emanates both from prevailing international law and the Treaty itself, under which it – operationally – may be replaced by the cooperation schemes of other

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<sup>81</sup> See (also) Singh, *op. cit.*, pp. 271, 278. On (assumed) drawbacks of para. 6 see Casey-Maslen, *op.cit.*, p. 224.

States Parties, in line with Article 7. Consequently, again, the Treaty may be functioning even without NWS membership.

It is interesting to note that in General Comment no. 36 of the Human Rights Committee on the right to life, the Committee overseeing the implementation of the International Covenant on Civil and Political Rights (ICCPR) demands States Parties “...to afford adequate reparation to victims whose right to life has been or is being adversely affected by the testing or use of weapons of mass destruction”, in particular nuclear weapons (Para. 66). This has to be done “in accordance with principles of international responsibility”.<sup>82</sup>

It is worth mentioning, in this regard, that all States that are recognized as possessing nuclear weapons under the NPT are Parties to the ICCPR, with the exception of China, that has at least signed it.

The meeting of States Parties prescribed in Article 8 may further specify what victim assistance and environmental remediation under the Treaty really means – possibly following the example of a list of concrete measures as contained in Art. 5 § 2 of the Oslo Convention. Also, Harvard Principle 5 on “Types of Victim Assistance” is of an instructive nature. At any rate, Docherty is right in stressing that the needs of victims should be at the centre thus their human rights.<sup>83</sup>

There still has to be developed a fully-fledged implementation system under the Treaty. This might centre around a reporting procedure, for which an abundance of examples exists within international treaty law, in particular the area of human rights law. On the other hand, implementation and reporting systems of existing international law branches, especially those of human rights, remain relevant and should be used in parallel to secure the implementation and application of the Treaty’s commitments. The new treaty mechanism has to be

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<sup>82</sup> UN OHCHR Human Rights Committee (2018), CCPR/C/GC/36, para. 66.

<sup>83</sup> Docherty, A Singular Opportunity, *op. cit.*, p. 127. For an overview of possible steps and regulations to be taken by the States Parties Meeting on Arts. 6 and 7, including an action plan, see Docherty, Bonnie (2020), From Obligation to Action: Advancing Victim Assistance and Environmental Remediation at the First Meeting of States Parties to the Treaty on the Prohibition of Nuclear Weapons, In: Journal for Peace and Nuclear Disarmament 2020, Vol. 3, No. 2, pp. 253-264.

considered complementary to existing human rights procedures and bodies, and not contradictory or exclusive.

## **Meeting of States Parties (Article 8)**

### Treaty text:

1. The States Parties shall meet regularly in order to consider and, where necessary, take decisions in respect of any matter with regard to the application or implementation of this Treaty, in accordance with its relevant provisions, and on further measures for nuclear disarmament, including:

- (a) The implementation and status of this Treaty;
- (b) Measures for the verified, time-bound and irreversible elimination of nuclear-weapon programmes, including additional protocols to this Treaty;
- (c) Any other matters pursuant to and consistent with the provisions of this Treaty.

2. The first meeting of States Parties shall be convened by the Secretary-General of the United Nations within one year of the entry into force of this Treaty. Further meetings of States Parties shall be convened by the Secretary-General of the United Nations on a biennial basis, unless otherwise agreed by the States Parties. The meeting of States Parties shall adopt its rules of procedure at its first session. Pending their adoption, the rules of procedure of the United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons, leading towards their total elimination, shall apply.

3. Extraordinary meetings of States Parties shall be convened, as may be deemed necessary, by the Secretary-General of the United Nations, at the written request of any State Party provided that this request is supported by at least one third of the States Parties.

4. After a period of five years following the entry into force of this Treaty, the Secretary-General of the United Nations shall convene a conference to review the operation of the Treaty and the progress in achieving the purposes of the Treaty. The Secretary-General of the United Nations shall convene further review conferences at intervals of six years with the same objective, unless otherwise agreed by the States Parties.

5. States not party to this Treaty, as well as the relevant entities of the United Nations system, other relevant international organizations or institutions, regional organizations, the International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies and relevant non-governmental organizations, shall be invited to attend the meetings of States Parties and the review conferences as observers.

Commentary:

As mentioned above,<sup>84</sup> the TPNW also resembles much the Ottawa and the Oslo Conventions regarding the institutional framework, which have not established a permanent body verifying the implementing of the duties deriving from the instrument, contrary, in particular to the CWC and the CTBT, which are both supported by international organizations, namely the Organization for the Prohibition of Chemical Weapons (OPCW) and the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization.

Article 8 establishes Meetings of States Parties that shall be held on a regular basis, as in the case of the Ottawa and Oslo Conventions.<sup>85</sup> The first meeting shall be convened by the UN Secretary General within one year of the entry into force of the treaty, followed by further meetings convened on a biennial basis.<sup>86</sup> The aim of those meetings is to discuss and, where necessary, to take decisions in respect of any matter with regard to the application or implementation of the treaty, including measures for the verified, time-bound and irreversible elimination of nuclear-weapon programmes in accordance with Article 4 of the treaty.<sup>87</sup> The assembly of States Parties is the right and competent forum to further shape the details of the treaty's substance – just in view of its flexibility and openness.

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<sup>84</sup> See above, « Declarations » (Article 2) and « Safeguards » (Article 3).

<sup>85</sup> Article 11 of both Conventions; See Casey-Maslen, S. (2019), *The Treaty on The Prohibition of Nuclear Weapons*, Oxford University Press, pp. 227-230.

<sup>86</sup> Article 8 § 2; The First meeting will be held on 21 to 23 June 2022 in Vienna, Austria. See <https://meetings.unoda.org/meeting/tpnw-msp-1-2022/>, accessed on 03/05/2022. Two NATO countries (Germany and Norway) attend the Meeting as observers possibly indicating a shift towards a more positive and constructive attitude to the Treaty.

<sup>87</sup> Article 8 § 1.

Paragraph 2 of Article 8 stipulates that the Meeting of States Parties will adopt its own rules of procedure and, pending their adoption, the rules of procedure applicable to the conference leading to the adoption of the new treaty will remain applicable *mutatis mutandis*.

Article 8 of the treaty also addresses the possibility of extraordinary meetings of States Parties and establishes Review Conferences convened by the UN Secretary General at intervals of six years (Art 8(4)) with a view to assess the operation of the treaty and progress in achieving the purposes of the new instrument.<sup>88</sup> The latter mechanism is inspired by Article VIII § 3 of the NPT, as well as by the Ottawa and Oslo Conventions which hold Review Conferences at the same intervals.<sup>89</sup>

Finally, paragraph 5 mentions the actors that will be authorized to participate in those meetings as observers, including relevant non-governmental organizations, which confirms the democratic, open and transparent nature of the future meetings.<sup>90</sup>

## **Costs (Article 9)**

### *Treaty text:*

1. The costs of the meetings of States Parties, the review conferences and the extraordinary meetings of States Parties shall be borne by the States Parties and States not party to this Treaty participating therein as observers, in accordance with the United Nations scale of assessment adjusted appropriately.
2. The costs incurred by the Secretary-General of the United Nations in the circulation of declarations under Article 2, reports under Article 4 and proposed amendments under Article 10 of this Treaty shall be borne by the States Parties in accordance with the United Nations scale of assessment adjusted appropriately.

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<sup>88</sup> Article 8 §§ 2 and 3.

<sup>89</sup> Article 12 of the Ottawa and Oslo Conventions.

<sup>90</sup> See already Article 11 § 4 and 12 § 3 of the Ottawa Convention and Article 11 § 3 and 12 § 3 of the Oslo Convention; Regarding the information on the TPNW meeting for civil society, see [www.icanw.org/tpnw\\_first\\_meeting\\_of\\_states\\_parties](http://www.icanw.org/tpnw_first_meeting_of_states_parties), accessed on 16/02/2022.

3. The cost related to the implementation of verification measures required under Article 4 as well as the costs related to the destruction of nuclear weapons or other nuclear explosive devices, and the elimination of nuclear-weapon programmes, including the elimination or conversion of all nuclear-weapons-related facilities, should be borne by the States Parties to which they apply.

*Commentary:*

Article 9 addresses the question of whom shall bear the costs incurred by the different meetings and certain tasks undertaken by the UN Secretary General.<sup>91</sup> Its paragraph 3 clarifies that the costs related to destruction of nuclear weapons and the elimination of nuclear weapons programmes, including the verification measures required under Article 4, have to be borne by the States Parties concerned.

## **Amendments (Article 10)**

*Treaty text:*

1. At any time after the entry into force of this Treaty, any State Party may propose amendments to the Treaty. The text of a proposed amendment shall be communicated to the Secretary-General of the United Nations, who shall circulate it to all States Parties and shall seek their views on whether to consider the proposal. If a majority of the States Parties notify the Secretary-General of the United Nations no later than 90 days after its circulation that they support further consideration of the proposal, the proposal shall be considered at the next meeting of States Parties or review conference, whichever comes first.

2. A meeting of States Parties or a review conference may agree upon amendments which shall be adopted by a positive vote of a majority of two thirds of the States Parties. The Depositary shall communicate any adopted amendment to all States Parties.

3. The amendment shall enter into force for each State Party that deposits its instrument of ratification or acceptance of the amendment 90 days following the

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<sup>91</sup> See also Article 14 of the Ottawa and Oslo Conventions.

deposit of such instruments of ratification or acceptance by a majority of the States Parties at the time of adoption. Thereafter, it shall enter into force for any other State Party 90 days following the deposit of its instrument of ratification or acceptance of the amendment.

Commentary:

Article 10 addresses the question whether and under what conditions the treaty can be amended after its entry into force. Even though most of the arms control treaties contain such clauses, formal amendments based on these clauses have remained very rare, most probably due to practical and legal problems that the adoption of an amendment could raise. In fact, since no State Party can be forced to accept an amendment, even if a large majority has voted in its favour, there would be two parallel legal regimes applicable, namely the modified treaty binding the States having accepted the amendment, on the one hand, and the original treaty applying to the States not having accepted the amendment, on the other hand. Even though this is the solution proposed by general international law, namely Article 40 § 4 of the VCLT, it might lead to similar difficulties encountered with reservations to a treaty and would be likely to undermine legal certainty.

Article 10 of the new treaty is inspired by Article 13 of the Ottawa and Oslo Conventions, with the difference that an amendment of the TPNW could be voted upon within a Meeting of States Parties or Review Conference while the Ottawa and Oslo Conventions would have to be amended within a special Amendment Conference.

## **Settlement of disputes (Article 11)**

Treaty text:

1. When a dispute arises between two or more States Parties relating to the interpretation or application of this Treaty, the parties concerned shall consult together with a view to the settlement of the dispute by negotiation or by other

peaceful means of the parties' choice in accordance with Article 33 of the Charter of the United Nations.

2. The meeting of States Parties may contribute to the settlement of the dispute, including by offering its good offices, calling upon the States Parties concerned to start the settlement procedure of their choice and recommending a time limit for any agreed procedure, in accordance with the relevant provisions of this Treaty and the Charter of the United Nations.

*Commentary:*

The peaceful settlement of international disputes is the corollary of the prohibition of use or threat of force in international relations and, as such, enshrined as a principle of the UN Charter.<sup>92</sup> Whereas Chapter VII of the Charter applies to situations where peace is threatened or already breached, including acts of aggression, and allows certain exceptions to the prohibition of use and threat of force, Chapter VI suggests a series of means how to settle a dispute peacefully before military action can be taken.

Most of the arms control treaties, relating to nuclear weapons or not, include a clause on how to proceed in a situation where a dispute about the interpretation or application of the treaty occurs between States Parties. Paragraph 1 of Article 11 is classical and follows international law in the sense that, first of all, it reiterates the principle that the Parties to a dispute have the choice by what means they want to settle it; second it mentions negotiations as primary means of dispute settlement and, third, it refers to Article 33 of the UN Charter that enumerates the most common means of dispute settlement.<sup>93</sup>

Article 11 is inspired by Article 10 of the Ottawa and Oslo Conventions, with the exception that the ICJ is not mentioned explicitly as a possible means of dispute resolution in paragraph 1. Resort to the ICJ is nevertheless possible if the States Parties agree spontaneously to submit a dispute to this court in

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<sup>92</sup> Article 2 § 3 of the UN Charter.

<sup>93</sup> Article 33 § 1 reads as follows: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

accordance with its statute or in case those States Parties have already accepted the jurisdiction of the ICJ *in abstracto* for future cases.<sup>94</sup>

Noteworthy is also paragraph 2 of Article 11, following the relevant provisions of the Ottawa and Oslo Conventions,<sup>95</sup> proposing the Meeting of the States Parties to play an active role in the friendly settlement of a dispute, in particular, by offering its good offices.

## **Universality (Article 12)**

### Treaty text:

Each State Party shall encourage States not party to this Treaty to sign, ratify, accept, approve or accede to the Treaty, with the goal of universal adherence of all States to the Treaty.

### Commentary:

A useful and uncontroversial clause is Article 12, containing the duty of States Parties to encourage States not party to this treaty to sign and join the treaty, with the goal of universal adherence of all States to the treaty. Such a clause was already inserted in the Oslo Convention.<sup>96</sup> From our point of view, it shows that the norms embedded in the treaty are of common interest to humanity and thus, of *erga omnes* nature.<sup>97</sup> It is obvious that, considering the norm-building

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<sup>94</sup> Article 36 §§ 1 and 2 of the Statute of the ICJ. The Marshall Island Case against UK decided by the Court in 2016 is an illustration of the latter provision (*Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, ICJ Report 2016).

<sup>95</sup> Article 10 § 2 of the Ottawa and Oslo Conventions.

<sup>96</sup> Article 21 § 1 of the Oslo Convention.

<sup>97</sup> See the case of *Barcelona Traction* (Second Phase), Belgium v. Spain, ICJ Reports 1970, §§ 33 and 34: “In particular, an essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. 34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of human person, including protection from slavery and racial discrimination.”

nature, the more States will ratify and comply with the treaty, the more likely the prohibitions deriving from the treaty will have a customary nature too.<sup>98</sup> At the moment of completing the update of the present commentary, 59 States have ratified the TPNW – in other words, we are still far from universal adherence to the treaty.<sup>99</sup>

On the other hand, the norm-building effect of the treaty does not necessarily depend on the number of ratifications, according to the International Court of Justice (ICJ), the “States whose interests are specially affected”<sup>100</sup> must participate in the practice to create such a norm. From our point of view, it would be too easy to argue that the particularly interested States are necessarily the States possessing nuclear weapons.<sup>101</sup> On the contrary, it may be argued that States not possessing nuclear weapons have a particular interest in creating the rule because their populations have been facing the risk and threat of nuclear weapons for decades to date.<sup>102</sup> In addition, it is also interesting to mention that the draft conclusions adopted by the International Law Commission (ILA) concerning the identification of customary international law, which was welcomed and taken note by the UN General Assembly afterward, do not refer to the requirement of “States whose interests are specifically affected,”<sup>103</sup>

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<sup>98</sup> See also above, “Prohibitions” (Article 1).

<sup>99</sup> See the list of States in the introduction, above.

<sup>100</sup> North Sea Continental Shelf Cases (*Germany v. Denmark; Germany v. Netherlands*), Judgment, 1969 I.C.J. Rep. 3 (Feb. 20, 1969), § 74.

<sup>101</sup> Rietiker, *New hope for Nuclear Disarmament or “Much Ado About Nothing”?* cited above.

<sup>102</sup> Ibidem. See in this sense the dissenting opinion of Judge Shahabuddeen in the 1996 Advisory Opinion of the ICJ on the *Legality of the Threat or Use of Nuclear Weapons*: “Where what is in issue is the lawfulness of the use of a weapon which could annihilate mankind and so destroy all States, the test of which States are specially affected turns not on the ownership of the weapon, but on the consequences of its use. From this point of view, all states are equally affected, for, like the people who inhabit them, they all have an equal right to exist” (ICJ Reports 1996, p. 226, at ¶ 414). See also Maya Brehm, *Whose Security is it Anyway? Towards a Treaty Prohibition of Nuclear Weapons*, EUR. J. INT’L L. BLOG (May 31, 2016), available at [www.ejiltalk.org/whose-security-is-it-anyway-towards-a-treaty-prohibition-of-nuclear-weapons/](http://www.ejiltalk.org/whose-security-is-it-anyway-towards-a-treaty-prohibition-of-nuclear-weapons/), accessed on 16/02/2022.

<sup>103</sup> See UNGA resolution 73/203 and Annex, adopted on 20 December 2018 .

contrary to what had initially been proposed by the Special Rapporteur, Michael Wood.<sup>104</sup>

Already the ICJ in its 1996 Advisory Opinion came across the issue whether the prohibition of the use or threat of use of nuclear weapons forms part of international customary law. The Court just stated a “*nascent opinio juris*” in this regard – which, of course is further developed by the adoption of the TPNW, in particular by more and more States acceding to it. The Court then (and therefore) turned to the issue of illegality of the use of nuclear weapons under international humanitarian law. A great part of rules of international humanitarian law, which are also repeated in the treaty,<sup>105</sup> can be characterized as customary law, mirroring “...the most *universally* recognized humanitarian principles”.<sup>106</sup>

### **Signature (Article 13)**

#### Treaty text:

This Treaty shall be open for signature to all States at United Nations Headquarters in New York as from 20 September 2017.

#### Commentary:

According to Article 13, the TPNW was open to signature by all States, from 20 September 2017. This is more a symbolic choice and less a pragmatic one. In fact, each year, on that date the day of the total elimination of nuclear weapons is celebrated.

Interestingly, and contrary to prior arms control treaties, including the Ottawa and Oslo Convention or the ATT,<sup>107</sup> the signature seems not to be limited until

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<sup>104</sup> See Int'l Law Comm'n Rep. on the Work of its Sixty-Sixth Session, U.N. Doc. A/CN.4/672, at §§ 54-59 (2014).

<sup>105</sup> See in particular preamble, § 9.

<sup>106</sup> (See) Advisory Opinion, *op. cit.*, §§ 73, 74, 82. Emphasis added.

<sup>107</sup> Article 21 § 1 ATT.

the entry into force of the treaty. In the new treaty, once the treaty has gathered the necessary ratifications for entry into force (50), States not yet Party to the treaty will either be able to accede directly to the treaty, or, if they are hesitant or have to go through a national approbation procedure, still be able to sign the treaty first, followed by ratification. That latter choice is not possible in treaties not providing for signature after entry into force of the treaty. At the time of writing this commentary, there are 86 signatories and 56 ratifications of the TPNW and, thus, it entered into force from 22 January 2021.<sup>108</sup>

Moreover, it is appropriate to recall that signature of the treaty does not mean that the State is already bound by the provisions of the treaty, but a signatory State is already prevented from running counter the object and purpose of the treaty (“refrain from acts which would defeat the object and purpose of a treaty”) until it shall have made its intention clear not to become a party to the treaty in accordance with Article 18 a) VCLT. A State that has expressed its consent to be bound by the treaty by means other than signature plus ratification is also under the same obligation, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed, in accordance with Article 18 b) VCLT.

The question deserves being raised which categories of States, apart from States not possessing nuclear weapons, could sign the treaty without violating its object and purpose? For instance, what about a State not possessing its own nuclear weapons but cooperating militarily with NWS, for instance within NATO, or hosting nuclear weapons on its territory? Could it sign the treaty without running counter to its object and purpose within the meaning of Article 18 VCLT? For practical reasons, it is not the intention of the authors to reply exhaustively to this complex question here, but it seems to us that such a scenario is not *per se* excluded from a legal point of view, in particular considering, first of all, that the concept of “object and purpose” is flexible and narrower than the general obligations deriving from a treaty; second, that the terms “refrain from acts” suggests positive acts and not a mere membership of a military coalition or tolerance of the presence of nuclear weapons in its

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<sup>108</sup> See <https://treaties.unoda.org/tpnw>, accessed on 16/02/2022.

territory; third, that the treaty itself promotes universality (Article 12); fourth, that the treaty itself allows States hosting foreign nuclear weapons to join the treaty (Article 4 § 4), and finally, that the ultimate goal of the treaty lies in the total elimination of nuclear weapons and, as a result, the impossibility of their use. All these points might suggest that NATO members should not only be allowed and encouraged to sign the treaty but, once having done their homework in compliance with the treaty and ratified it, could even play an important role as “ice-breakers” or mediators in nuclear disarmament matters vis-à-vis NWS.

### **Ratification, acceptance, approval or accession (Article 14)**

#### *Treaty text:*

This Treaty shall be subject to ratification, acceptance or approval by signatory States. The Treaty shall be open for accession.

#### *Commentary:*

Article 14 contains a clause that is typical for arms control treaties, according to which signatory States can ratify, accept and approve the treaty before entry into force of the treaty, and after its entry into force, other States can accede to the treaty. Those are all different forms of the expression of the consent of States to be bound by the treaty.<sup>109</sup> This clause follows what it is suggested by general international law.<sup>110</sup>

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<sup>109</sup> Article 2 § 1 b) VCLT defines those expressions as “international acts so named whereby a State established on the international plane its consent to be bound by a treaty”.

<sup>110</sup> See, in particular, Article 14 VCLT.

## **Entry into force (Article 15)**

### *Treaty text:*

1. This Treaty shall enter into force 90 days after the fiftieth instrument of ratification, acceptance, approval or accession has been deposited.

2. For any State that deposits its instrument of ratification, acceptance, approval or accession after the date of the deposit of the fiftieth instrument of ratification, acceptance, approval or accession, this Treaty shall enter into force 90 days after the date on which that State has deposited its instrument of ratification, acceptance, approval or accession.

### *Commentary:*

The entry into force is the moment where a treaty unfolds its legal effects and, to a certain extent and where the treaty is self-executing, on individuals and legal entities.<sup>111</sup> The 90 days period contained in paragraph 1 of Article 15 is usual and aims at allowing the States having ratified the treaty to prepare for its actual entry into force.

As mentioned above, the TPNW entered into force on 22 January 2021, 90 days after the ratification by the 50th State, Honduras, on 24 October 2020, in accordance with its Article 15 § 1.

Regarding the required number of ratifications, there are differences among arms control treaties, but the objective is always to strike a balance between a certain number required in order to reach the norm-building aim of the treaty, on the one hand, and a number that would not render the entry into force too difficult and illusionary, on the other hand. From the outset, the number of 50 ratifications required in the new treaty seems appropriate and, having regard to the broad support of the treaty, fairly easy to reach. It is noteworthy to stress that the negotiating States did not commit the same mistake as in the CTBT, where a very complex and demanding entry-into-force clause has been inserted

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<sup>111</sup> See above, “National implementation” (Article 5).

allowing a certain group of States to prevent entry into force, after more than 20 years after its adoption and in spite of more than 180 ratifications.<sup>112</sup>

## **Reservations (Article 16)**

### Treaty text:

The Articles of this Treaty shall not be subject to reservations.

### Commentary:

Reservations are defined by the VCLT as “unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby its purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”<sup>113</sup> Their aim is to allow a certain flexibility and to increase the number of ratifications, in the sense that certain States might more easily join a treaty if they are allowed to exclude or modify certain clauses on their behalf.

In spite of these advantages, reservations to multilateral treaties raise very complex questions and can impact negatively on the integrality of treaties and legal certainty, similar to amendments to treaties, as explained above.<sup>114</sup> Therefore, Article 16 seems to be an appropriate solution, in particular for a norm-building instrument aiming at banning nuclear weapons for always, insofar as it categorically excludes all types of reservations, and is clearly in line with the recent trend in arms control treaties, with the exception of the ATT, which follows general international law, allowing reservations as long as they are not contrary to the object and purpose of the treaty.<sup>115</sup>

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<sup>112</sup> Article XIV § 1 of the CTBT, which gives a “right to veto” to the States listed in Annex 2 to the Treaty. Several States listed there, including the USA, have not yet ratified the CTBT.

<sup>113</sup> Article 2 § 1 d) VCLT.

<sup>114</sup> The subsidiary regime proposed by Articles 19-23 of the VCLT is not considered a satisfactory answer to this difficult topic.

<sup>115</sup> Article 25 § 1 ATT, embracing the solution proposed in Article 19 c) of the VCLT.

## **Duration and withdrawal (Article 17)**

### *Treaty text:*

1. This Treaty shall be of unlimited duration.
2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of the Treaty have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to the Depositary. Such notice shall include a statement of the extraordinary events that it regards as having jeopardized its supreme interests.
3. Such withdrawal shall only take effect 12 months after the date of the receipt of the notification of withdrawal by the Depositary. If, however, on the expiry of that 12-month period, the withdrawing State Party is a party to an armed conflict, the State Party shall continue to be bound by the obligations of this Treaty and of any additional protocols until it is no longer party to an armed conflict.

### *Commentary:*

An important and controversial provision is contained in Article 17, namely the clause on duration and withdrawal. While civil society and certain States were against the inclusion of a clause permitting withdrawal or were in favour of a clause simply referring to the rules of the 1969 VCLT, the majority view favoured a clause that represents a compromise between arms control treaties and humanitarian law treaties.

While paragraph 1 of Article 17, stating that the treaty is concluded for an indefinite period of time, is well-established and not controversial, paragraph 2 reflects a typical clause inserted in arms control treaties, allowing a State to withdraw from the treaty under certain conditions, namely “if it decides that extraordinary events related to the subject matter of the Treaty have jeopardized the supreme interests of its country.” Even if this clause seems very broad, it has been invoked only very rarely within other treaties.<sup>116</sup>

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<sup>116</sup> See also: <https://safna.org/2017/03/22/withdrawal-clauses-in-arms-control-treaties-some-reflections-about-a-future-treaty-prohibiting-nuclear-weapons/>, accessed on 16/02/2022.

Paragraph 3, on the other hand, reflects the logic of humanitarian law of the treaty by ensuring that a withdrawal does not take effect until the end of hostilities if the State intending to withdraw is engaged in an armed conflict.<sup>117</sup>

Moreover, we are of the opinion that it would have been appropriate to insert a clause such as Article XVI, § 3 CWC, recalling that

“the withdrawal of a State Party from this Convention shall not any way affect the duty of States to continue fulfilling the obligations assumed under any relevant rules of international law, particularly the Geneva Protocol of 1925.”

In spite of the fact that this principle follows already from international law, in particular Article 43 of the VCLT, such a reminder would have had some added value. Assuming that the use of nuclear weapons is today already prohibited by customary international law or at least will be prohibited after the ratification and implementation by many States, such use would remain prohibited to a State even if it decides to withdraw from the treaty.

## **Relationship with other agreements (Article 18)**

### *Treaty text:*

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.

### *Commentary:*

This clause is inspired by Article 26 of the Arms Trade Treaty (ATT) and gives priority of the new treaty over existing treaties in case they are conflicting, what derives from its controversial first sub-paragraph.<sup>118</sup> For this reason, certain delegations were opposed to the inclusion of this Article and had difficulties to

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<sup>117</sup> See, for instance, Article 63 § 3 of Geneva Convention No. 1.

<sup>118</sup> See Casey-Maslen, S. (2019), *The Treaty on The Prohibition of Nuclear Weapons*, Oxford University Press, pp. 257-258.

vote in favour of the treaty altogether.<sup>119</sup> This solution seems nevertheless compatible with general international law, in particular Article 30 §§ 3 and 4 of the VCLT.<sup>120</sup>

From the outset, and judging from the negotiations in New York, potential conflicts could arise, in particular, between the new treaty and the CTBT or the NPT.<sup>121</sup> For practical reasons, the present commentary will only mention one example of a potential interpretation issue: whereas the new treaty refers to nuclear “test” very generally, without defining this expression, the CTBT prohibits “any nuclear weapon test explosion or any other nuclear explosion” in its Article 1 § 1. In other words, nuclear weapon tests not involving an explosion, such as sub-critical tests and computer-simulated tests, would fall under the new treaty but not under the CTBT.

This controversy raises the question whether it would not have been worth to define the most important expressions, as has been done in earlier arms control treaties,<sup>122</sup> at least by referring to already existing treaties.

## **Depository (Article 19)**

### Treaty text:

The Secretary-General of the United Nations is hereby designated as the Depository of this Treaty.

### Commentary:

It is usual for arms control treaties to designate the UN Secretary General as depository of the instruments. Its functions are defined by the States Parties and,

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<sup>119</sup> See, in particular, Switzerland.

<sup>120</sup> Article 30 §§ 3 and 4 a) VCLT enshrine the principle *lex posterior derogat legi priori*.

<sup>121</sup> See, for an author who does not see a necessary conflict between the new treaty and the NPT, Stuart Maslen, *The Relationship of the 2017 Treaty on the Prohibition of Nuclear Weapons with other Agreements: Ambiguity, Complementarity, or Conflict?* EUR. J. INT’L L. BLOG (August 1, 2017).

<sup>122</sup> See, for instance, Article 2 of the Ottawa and Oslo Conventions.

subsidiary, by Article 77 of the VCLT. Depositories are typically responsible, *inter alia*, for keeping custody of the original text of the treaty, receiving any signature or instruments of ratification by States and forwarding them to the other States Parties.

### **Authentic texts (Article 20)**

#### Treaty text:

The Arabic, Chinese, English, French, Russian and Spanish texts of this Treaty shall be equally authentic.

#### Commentary:

Article 20 defines the authentic texts, which are the six official languages of the United Nations. This has above all one main legal significance, even though rare in practice, namely that, in case of a difference between the different authentic texts, Article 33 of the VCLT applies that proposes a set of rules aiming at resolving a problem arising out of a treaty authenticated in different languages.

## **Annex: 1969 Vienna Convention on the Law of Treaties (Articles 31-33)**

### **Article 31: General rule of interpretation**

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

### **Article 32: Supplementary means of interpretation**

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order

to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

### **Article 33: Interpretation of treaties authenticated in two or more languages**

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

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