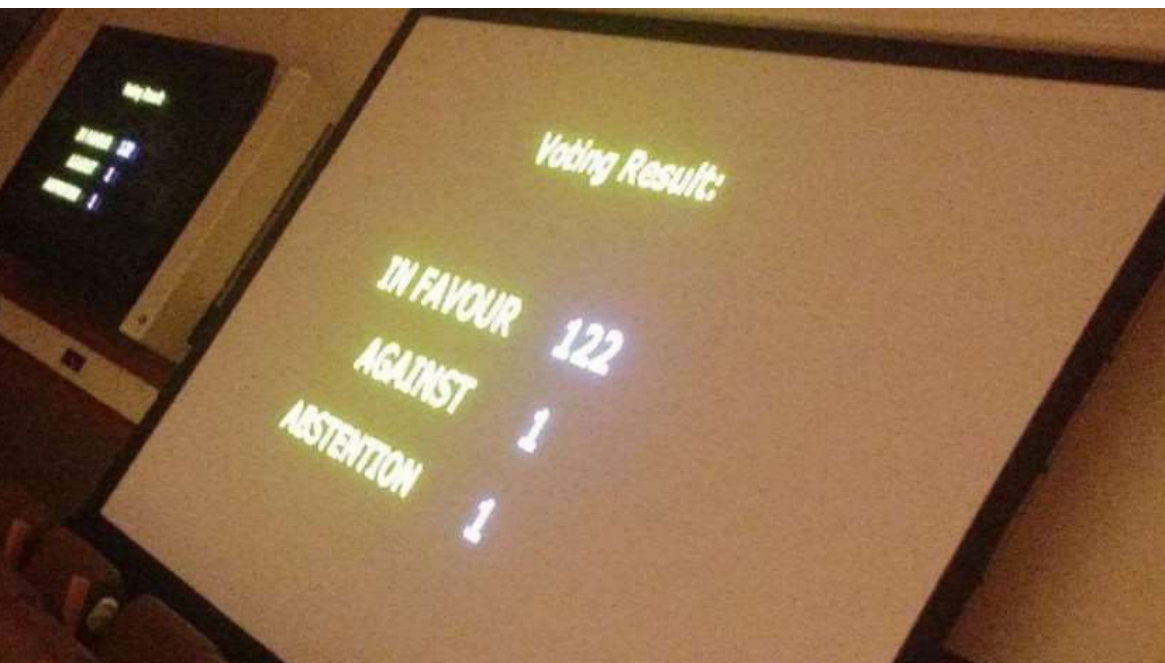


Treaty on the Prohibition of Nuclear Weapons



A short commentary article by article

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General Introduction

The events of July 7, 2017 at the United Nations in New York deserve our attention. The Treaty on the Prohibition of Nuclear Weapons (TPNW) constitutes a real paradigm shift, and the end of a period of stagnation in nuclear disarmament of more than 20 years. After biological (1972) and chemical weapons (1993), the remaining type of weapons of mass destruction will be banned once the treaty enters into force.

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

End of March 2018, 57 States have signed the TPNW and 7 have ratified it so far. 50 ratifications will be necessary for the treaty to enter into force. Once in force, it will reinforce the norm against nuclear weapons, create new momentum for nuclear disarmament, give civil society a new tool in its fight for a world free from nuclear weapons, and put more pressure on Nuclear Weapons States (NWS) and their allies.

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 (...)”.¹ As such, it is quite a complex construction that will certainly raise many questions of interpretation during its hopefully long life. The present short article-by-article commentary is intended to facilitate understanding of the new treaty, without going into great legal detail. It is intended for a general audience, including persons not possessing deep knowledge of international law. We hope it will stimulate debate about 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.

¹ Article 2 § 1 a) VCLT.

1. 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 programmes 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”.²

As far as the new treaty is concerned, it is obvious that the drafters put a lot of energy into the preamble, which, with its 24 paragraphs, is long, detailed, useful, and quite precisely formulated. It underlines the humanitarian nature of the treaty and is, as such, inspired by similar language 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”).

First and foremost, the preamble states that the new treaty is meant to contribute to the purposes and principles of the Charter of the United Nations, and in particular reiterates 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.³ 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 economic resources.⁴ This principle derives from Article 26 of the UN Charter, which conveys certain powers to the UNSC.⁵ Those powers,

² According to Article 31 § 1 of the Vienna Convention on the Law of Treaties, which is regarded as the general rule of treaty interpretation, 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.”

³ Preambular paragraph 1; that principle is enshrined in Article 2 § 4 of the UN Charter.

⁴ Preambular paragraph 12.

⁵ 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

however, have never been exercised. The positive influence that appropriate disarmament measures could have on human development has been studied and recognized for many years.⁶

The preamble refers specifically to the catastrophic humanitarian consequences that would result from any use of nuclear weapons.⁷ These consequences should have been obvious since the atomic bombings of Hiroshima and Nagasaki. Humanitarian impacts have returned to the forefront of discussion about nuclear weapons only recently, providing the impetus for the conference process of Oslo, Nayarit and Vienna (2013 – 2014), leading to the “Vienna Pledge”, and, finally, to the treaty.⁸ It is also important to emphasize the risks that nuclear weapons may be detonated by accident or miscalculation; in the seven decades of the nuclear age, there have been many near-disasters. Thus, the mere existence of nuclear weapons remains extremely problematic. The solution can only be to completely eliminate such weapons, achieving a nuclear–weapon–free world.⁹

Paragraphs 6 and 7 draw 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.¹⁰

Paragraph 8 outlines the broader legal context, beginning with 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 nature of the treaty; here, it is, among others,

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: <http://www.reachingcriticalwill.org/resources/fact-sheets/critical-issues/4565-article-26-of-the-un-charter>

⁶ See, for instance: <http://www.reachingcriticalwill.org/resources/fact-sheets/critical-issues/4646-disarmament-and-development>

⁷ Preambular paragraphs 2 and 4

⁸ 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.

⁹ See Preambular paragraphs 3, 2 and 5.

¹⁰ See, regarding the particular vulnerability of indigenous peoples, Rietiker, *Humanization of Arms Control*, *op.cit.*, pp. 223-229.

the right to life that nuclear weapons directly affect.¹¹ In its General Comment No. 14, the International Committee on Civil and Political Rights stated: „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.”¹²

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 range from the not unlimited right to choose methods or means of warfare to the rules for the protection of the natural environment. The preamble states that *any* use of nuclear weapons would be contrary to the principles and rules of international humanitarian law, and would also be abhorrent to the principles of humanity and the dictates of public conscience.¹³ The latter formulation is an expression of the so-called Martens Clause, which represents a classical principle of the laws of war governing situations not covered by written international law. In the broader humanitarian law context, 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.¹⁴

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. The preamble notes that although the very first resolution of the UNGA, adopted on 24 January 1946, was devoted to nuclear disarmament, more recently no significant progress has been made in the field.¹⁵ On the contrary, nuclear weapons are still part of military and security concepts, doctrines and policies, and the NWS are investing huge amounts of

¹¹ 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.

¹² 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. The Human Rights Committee is currently drafting General Comment 36, also dedicated to the right to life.

¹³ Preambular paragraphs 10 and 11.

¹⁴ For a contemporary version of the Martens Clause see Article 1 § 2 of the 1977 Protocol I to the 1949 Geneva Conventions.

¹⁵ Preambular paragraphs 13 and 14.

money in the modernization of their arsenals.¹⁶ 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) and as has been confirmed by the ICJ in its 1996 Advisory Opinion.¹⁷ 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 also stresses that the NPT remains the cornerstone of the nuclear disarmament and non-proliferation regime,¹⁸ emphasizes the vital role of the Comprehensive Nuclear-Test-Ban Treaty (CTBT) and underscores the importance of the establishment of regional nuclear weapon free zones (NWFZ) for peace and security and for a world free of nuclear weapons.¹⁹ Finally, the drafters found it relevant to include a reminder of the inalienable right of States to develop research, produce and use nuclear energy for peaceful purposes without discrimination, the so-called 3rd pillar of the NPT, deriving from NPT Article IV.²⁰

Two preambular paragraphs are devoted to the need to strengthen the participation of women in nuclear disarmament and the importance of disarmament education and awareness raising about the provisions of the new treaty and the risks and consequences of nuclear weapons for current and future generations.²¹

Finally, in the last preambular paragraph, the important efforts of 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, are recognized. Very similar language already has been included in the Ottawa

¹⁶ Preambular paragraph 14.

¹⁷ ICJ Reports 1996, conclusion F.

¹⁸ See also the commentary on Article 18, below.

¹⁹ 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).

²⁰ The other two pillars are the non-proliferation obligations (Article I and II NPT) and the disarmament duties (Article VI NPT).

²¹ Preambular paragraphs 22-23.

and the Oslo Conventions,²² but without including explicitly religious leaders, parliamentarians, academics and the hibakusha. It is apparent from the *travaux préparatoires* of all three treaties that the main driving force behind the new treaty was civil society, supported by some like-minded governments. In the case of the new treaty, the interaction between civil society and States nevertheless has reached an unprecedented level. Civil society actors such as ICAN and IALANA have been directly involved in the negotiation process, presenting their own drafts and suggestions. This may also be seen as a sign of democratization of the United Nations, which has resumed its status as a forum for nuclear disarmament. This is even more valuable considering the stalemate in the Conference on Disarmament for many years due to its consensus principle.

2. 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;

²² Ottawa Convention, preambular paragraph 8, and Oslo Convention, preambular paragraph 17.

(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:

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.²³ From our point of view, the most important provision is the ban on use contained in Article 1 § 1(d). It is surprising that the use of nuclear weapons has not yet been explicitly prohibited by treaty, unlike many other less destructive weapons.²⁴ It should be emphasized that, in 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-States actors, such as rebel groups or terrorists.

The treaty ban on using or threatening to use nuclear weapons represents 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 continues, 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...”²⁵ This “escape hatch” stands 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 instances of self-defence, even in extreme circumstances. The Court itself declared earlier that, in view of the unique characteristics of

²³ 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.

²⁴ 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.

²⁵ Advisory Opinion, *op.cit.* § 105 § 2 E.

nuclear weapons, their use in fact seems “scarcely reconcilable” with respect for humanitarian law requirements.²⁶

The new treaty, which does not include such “exceptions” and does not allow reservations,²⁷ removes those ambiguities and contradictions. Once ratified by many States it will establish or confirm an “absolute” prohibition on use. Moreover, if the treaty is ratified by many States, its provisions might be reinforced by a customary norm prohibiting nuclear weapons even for States not acceding to the treaty, due to the “fundamentally norm-creating character” of the treaty.²⁸ Customary law is another source of international law, no less important than treaties, and defined as “evidence of a general practice accepted as law.”²⁹

Most importantly, Article 1 also prohibits threats to use nuclear weapons. Taken together with the ban on possession of nuclear weapons, nuclear policies based on deterrence are further brought into question and delegitimized (at least politically) by the new treaty. This prohibition raises the question of whether deterrence-based nuclear policies are prohibited by the new treaty. 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 one of the main goals of civil society and the States working towards the adoption of the new treaty was to delegitimize decades-old policies relying on nuclear weapons.³⁰ Following the adoption of the treaty, on July 7, 2017, the Chairperson, Ambassador Whyte, made the following declaration during a press conference:

²⁶ *Ibid*, paragraph 95.

²⁷ See below; “Reservations” (Article 16).

²⁸ 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).

²⁹ Statute of the International Court of Justice, Article 38 § 1. See also below, “Universality” (Article 12). See also Daniel Rietiker, 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*, 8 December 2017,

<http://www.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/>

³⁰ See <https://www.youtube.com/watch?v=lwTExljixSE>, (time stamp 15:02 onwards)

“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.”

Also noteworthy is Article 1(g), which prohibits any state party from allowing any stationing, installation or deployment of nuclear weapons or other nuclear explosive devices in its territory or at any place under its jurisdiction or control. This clause would, for instance, prohibit NATO members from hosting 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.³¹

A certain disappointment was felt among civil society and certain States about the fact that financing of nuclear weapons activities is not explicitly forbidden by the new treaty. On the other hand, we would argue that such financing is covered implicitly by the prohibition on assisting, encouraging and inducing (letter (e) of Article 1).

³¹ 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/>

3. 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;

(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 safeguards 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 for 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. States negotiating the new treaty, therefore, eager to adopt a potential treaty in a reasonable period of time, have opted for straightforward, simple clauses. In this regard as well, the TPNW follows the examples of the Ottawa and Oslo Conventions. 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 they owned, possessed or controlled nuclear weapons or nuclear explosive devices and eliminated their 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 their territory or in any place under their jurisdiction or control that are owned, possessed or controlled by another State. These three scenarios correspond to the three options open to former or current NWS and their allies under Article 4, dealing with nuclear disarmament.³²

It was the intention of the negotiating delegations that the new treaty should rely on existing safeguard mechanisms. Article 3 requires States not possessing or controlling nuclear weapons as defined in Article 4 §§ 1 and 2 at minimum to maintain their International Atomic Energy Agency (IAEA) safeguards obligations that are in effect at the time of the entry into force of the treaty, without prejudice to any additional instruments that they may later adopt (Article 3 § 1). States not yet having concluded a comprehensive

³² See below, “Towards the total elimination of nuclear weapons” (Article 4).

safeguard agreement (INFCIRC/153 (corrected)) with the IAEA shall do so within a specified period of time in accordance with Article 3 § 2.

4. Towards the total elimination of nuclear weapons (Art. 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.

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 negotiating States that a ban treaty would only constitute a first step towards the final goal of a world free of nuclear weapons.³³ Therefore, it was felt necessary to allow and encourage the NWS to join the treaty. This intention is embodied in the rather complex and lengthy Article 4, titled “Towards the total elimination of nuclear weapons”. As its subject matter is closely linked to declarations and safeguards, this provision must be read together with Articles 2 and 3.

According to Article 4 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 that state, 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 International Atomic Energy Agency (IAEA). Essentially, 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,³⁴ 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 must be submitted to the States Parties or the aforementioned international authority. The State must furthermore conclude a safeguards agreement with the IAEA.³⁵ 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.

³³ See Rietiker, *New Hope for Nuclear Disarmament?*, *op.cit.*

³⁴ Article 8.

³⁵ Article 4 § 3.

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 or Turkey.

Altogether, the approaches to 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 a complete (contractual) ban on nuclear weapons. An example of what such an instrument might look like in the ideal case is the Draft Model Convention on Nuclear Weapons³⁶, which includes model treaty provisions covering issues ranging from weapons dismantling to social verification.

It is not certain that NWS will accept, in the near future, a text that they have not agreed to, arrived at by negotiations in which they have not even participated. On the contrary, it must be remembered that while 122 States voted for adoption of the treaty, none of the NWS was present. Moreover, not only were they completely absent before and during the negotiations in New York, but the US, UK and France issued a statement highly critical of the new treaty on the day the negotiations concluded:

“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.*³⁷ 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

³⁶ UN-Doc. A/62/650, 18 January 2008.

³⁷ Emphasis added.

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 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.”³⁸

These and similar (NWS and NATO) statements attest to the fact that their policy of nuclear deterrence is affected by the new treaty. From our point of view, it is not the treaty itself but the conduct and unfulfilled disarmament promises of NWS that are undermining the existing security and disarmament architecture. The complete absence of the NWS during the preparatory phase and the treaty negotiations, together with statements of this kind, calls into question the “good faith” required of those States by the NPT. NPT article VI states that “Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.” It may be difficult for the NWS to continue to ignore the existence of the TPNW,

³⁸ See <https://usun.state.gov/remarks/7892>

For a discussion of the legal effects of this declaration see Rietiker, *New Hope for Nuclear Disarmament?*, *op.cit.*

since civil society and States Parties to the new treaty likely will bring it up in other fora, in particular in the NPT Review cycles.

5. 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 is a standard clause almost identical to language appearing, *inter alia*, in the Ottawa and Oslo Conventions.³⁹ Such a clause is necessary since the treaty is of a so-called “non-self-executing” character. In other words, it imposes legal obligations on private and legal persons or creates rights in their favour only once it has been implemented by national law.⁴⁰

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 universal criminal jurisdiction, which would allow States Parties to prosecute individuals who have no relationship 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, from going further than Article 5 and conferring universal jurisdiction on their national tribunals in cases where no other State is willing or able to prosecute the responsible individuals. 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” for those conventions. It is our

³⁹ Article 9 of both Conventions.

⁴⁰ See, for an example, the ICJ in the case of *LaGrand* (Germany v. United States), ICJ Reports 2004, § 77.

contention that the principles and key provisions of those conventions would be applicable and relevant in the case of use of nuclear weapons.⁴¹ Moreover, the Geneva Conventions and the 1977 Protocol No. 1 request the States parties to prosecute or extradite (*aut dedere aut judicare*) persons who allegedly have committed grave breaches of those instruments.⁴² From our point of view, it is likely that the use of nuclear weapons in an inhabited area would constitute a grave breach.⁴³

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

Treaty text:

Article 6: Victim assistance and environmental remediation

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.

⁴¹ See Rietiker, *Humanization of Arms Control*, *op.cit.*, in particular pp. 272-274.

⁴² See, for instance, Articles 146 and 147 of the Geneva Convention No. IV regarding the Protection of Civilian Persons in Time of War, or Article 85 § 3 of Protocol No. 1.

⁴³ 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) (...).”

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: International cooperation and assistance

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:

Without a doubt, one of the surprising features of the new treaty is that it contains clauses on victim assistance and environmental remediation. These provisions express the deeply humanitarian nature and the victim-centred approach of the new treaty. Article 6 must be read in light of the long and detailed preamble and in conjunction with Article 7. It is important to stress that the duties deriving from Article 6 apply to past, present, and future testing and use of nuclear weapons. These provisions also echo the concept of

humanitarian disarmament⁴⁴ that is a cornerstone of the Ottawa and Oslo Conventions, as well as of Protocol V of the UN Convention on Certain Conventional Weapons. Its essence lies with focusing on pragmatic and humanitarian solutions rather than striving for the ideal, comprehensive political and disarmament outcome. It is deeply rooted in international humanitarian law as well as the protection of human rights and the environment. Having such rules established in the treaty, in the politically sensitive context of nuclear weapons, is of paramount importance. These are rules which may become effective even without the treaty membership of NWS.

Article 6 § 1 obligates 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). 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.

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 resulting from war and military activities. Standards taken from the branches of doctrine mentioned above, namely human rights, humanitarian, and environmental law, are relevant to these scenarios. Res. 2/15 adopted on 3 August 2016 by the UN Environment Assembly of The United Nations Environment Program (UNEP) “...[c]alls on all Member States to implement applicable international law related to the protection of the environment in situations of armed conflict...”.⁴⁵

⁴⁴ 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 Disarmament Law, In: Austrian Review of International and European Law, 15 (2013), pp.7-44.

⁴⁵ “Protection of the environment in areas affected by armed conflict”, § 4.

Moreover, one might raise the question whether the terms “related to the testing or use of nuclear weapons”, used in paragraph 2 of Article 6 is broad enough to encompass activities such as uranium mining and milling, necessary for the production of nuclear weapons, as well as past practices for disposal of waste from the production or testing of nuclear weapons, such as ocean dumping. Experience has shown the extent to which those activities have a disastrous impact on local populations and the environment.

It follows from Article 6 § 1 and 2 that the main responsibility for victim assistance and environmental remediation lies with the territorial States where the testing or use of nuclear weapons has taken place. This can be criticized, but it is fair to stress that this primary burden is nevertheless 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 new treaty would be without prejudice to the reparations 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 1983,⁴⁶ and in particular its subsidiary Section 177 Agreement establishing a \$150 million Nuclear Fund as “a means to address past, present and future consequences of the Nuclear Testing Program”.⁴⁷

The burden imposed on the States on whose territory the use or testing of nuclear weapons has taken place is further tempered by Article 7, which contains a clause on international cooperation and assistance. Paragraphs 1 and 2 provide for general cooperation and assistance measures, not limited to victim assistance and environmental remediation. Paragraph 3, however, 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, imposing a duty on “each

⁴⁶ The Compact of Free Association, US-Marsh. Is., June 25, 1983, 99 Stat. 1770 (1986). The agreement was amended on April 30, 2003, but Section 177 and its subsidiary agreement remained unchanged.

⁴⁷ Agreement between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact of Free Association pmb1.

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. Some of those other instances are more comprehensive, but, again, it is significant for them to appear in the nuclear weapons context. 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 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. We hope that certain of the handful of States that have tested or used nuclear weapons will join the Treaty. Otherwise, this provision will remain dead letter.

7. 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,⁴⁸ the new treaty much resembles the Ottawa and the Oslo Conventions in its institutional framework. Neither those conventions nor the TPNW established a permanent body to verify implementation of the duties deriving from the instrument. In contrast, the CWC and the CTBT both are supported by international organizations, 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.⁴⁹ The first meeting shall be convened by the UNSG within one year of the entry into force of the treaty, followed by further meetings convened on a biennial basis.⁵⁰ The aim

⁴⁸ See above, « Declarations » (Article 2) and « Safeguards » (Article 3).

⁴⁹ Article 11 of both Conventions.

⁵⁰ Article 8 § 2.

of those meetings is to discuss and, where necessary, to take decisions concerning 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.⁵¹

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. It establishes Review Conferences convened by the UNSG at five-year intervals, with a view to assessing the operation of the treaty and progress in achieving the purposes of the new instrument.⁵² 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.⁵³

Finally, paragraph 5 lists the classes of actors that will be authorized to participate in those meetings as observers. These include relevant non-governmental organizations, confirming the democratic, open and transparent character envisioned for future meetings.⁵⁴

⁵¹ Article 8 § 1.

⁵² Article 8 §§ 2 and 3.

⁵³ Article 12 of the Ottawa and Oslo Conventions.

⁵⁴ See already Article 11 § 4 and 12 § 3 of the Ottawa Convention and Article 11 § 3 and 12 § 3 of the Oslo Convention.

8. 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.

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 who shall bear meeting costs and the costs incurred in certain tasks undertaken by the UNSG.⁵⁵ 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, must be borne by the States Parties concerned.

⁵⁵ See also Article 14 of the Ottawa and Oslo Conventions.

9. 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 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 arms control treaties contain such clauses, formal amendments based on these clauses have remained rare, probably due to practical and legal problems that the adoption of an amendment could raise. No State Party can be forced to accept an amendment, even if a large majority has voted in its favour. Hence, an amendment would give rise to two parallel legal regimes: 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 (see Article 40 § 4 of the VCLT), it might lead to the kinds

of difficulties that result from reservations to a treaty, and likely would 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 to the TPNW could be voted on at a Meeting of States Parties or at a Review Conference, while the Ottawa and Oslo Conventions require a special Amendment Conference.

10. 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 on the use or threat of force in international relations and, as such, is enshrined as a principle in the UN Charter.⁵⁶ 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 on the use and threat of force, while Chapter VI suggests a series of means for the peaceful settlement of disputes before military action can be taken.

⁵⁶ Article 2 § 3 of the UN Charter.

Most arms control treaties, whether concerning nuclear weapons or not, include a clause providing procedures to address disputes between States regarding the treaty's interpretation or application. Paragraph 1 of Article 11 is in the usual mold for such clauses. It reflects general international law principles in that, 1) it reiterates the principle that the Parties to a dispute have the choice by what means they want to settle it; 2) it mentions negotiations as primary means of dispute settlement, and 3) it refers to Article 33 of the UN Charter, which enumerates the most common means of dispute settlement.⁵⁷

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 nonetheless is possible if the States Parties agree of their own accord to submit a dispute to the court in accordance with its statute, or if those States Parties have already accepted the jurisdiction of the ICJ *in abstracto* for future cases.⁵⁸

Also noteworthy is paragraph 2 of Article 11. Following the relevant provisions of the Ottawa and Oslo Conventions,⁵⁹ it empowers the Meeting of the States Parties to play an active role in the amicable settlement of disputes, in particular by offering its good offices.

11. 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.

⁵⁷ 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."

⁵⁸ 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*).

⁵⁹ Article 10 § 2 of the Ottawa and Oslo Conventions.

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. The Oslo Convention has a similar clause.⁶⁰ 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, e.g. obligations owed towards all States.⁶¹ It is obvious that, considering its norm-building nature, the more States that ratify and comply with the treaty, the more likely the customary nature of the prohibitions deriving from the treaty will be reinforced.⁶²

Two decades ago in its 1996 Advisory Opinion, the ICJ was faced with the issue of whether the prohibition of the use or threat of use of nuclear weapons forms part of international customary law. The Court at that time stated only a “*nascent opinio juris*” on this point. That element of customary law, however, has been further developed by the adoption of the new treaty, and will be further reinforced as more States accede 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 the rules of international humanitarian law, which are also reiterated by the TPNW,⁶³ can be characterized as customary law, mirroring “...the most *universally* recognized humanitarian principles”.⁶⁴

⁶⁰ Article 21 § 1 of the Oslo Convention.

⁶¹ 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.”

⁶² See also above, “Prohibitions” (Article 1).

⁶³ See in particular preamble, § 9.

⁶⁴ See Advisory Opinion, *op. cit.*, §§ 73, 74, 82. Emphasis added.

12. 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 new treaty was opened to signature by all States, on 20 September 2017.

Interestingly, and contrary to prior arms control treaties such as the Ottawa and Oslo Conventions or the Arms Trade Treaty,⁶⁵ signature seems not to be limited to the period prior to the treaty's entry into force. Once the TPNW has gathered the necessary ratifications for entry into force (50), States still will be able to commence accession either directly or by signature. If a state is hesitant or is required to go through a national approbation procedure, it still will be able to sign the treaty first, followed by accession. That path is not available in treaties not providing for signature after entry into force.

It is important to note that although signing a treaty does not mean that the State is immediately bound by its provisions, a signatory State must “refrain from acts which would defeat the object and purpose of a treaty” until it has ratified or otherwise expressed its consent to be bound by the treaty, in accordance with Article 18 b) VCLT.

This raises the following question: 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 b) VCLT? For practical reasons, it is not the intention of the authors

⁶⁵ Article 21 § 1 ATT.

to reply exhaustively to this complex question here. It seems to us, however, 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 term “refrain from acts” suggests positive acts and not a mere membership of a military coalition or tolerance of the presence of nuclear weapons on its 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. Once having done their homework in compliance with the treaty and having ratified it, they could even play an important role as “ice-breakers” or mediators in nuclear disarmament matters vis-à-vis NWS.

13. 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 its initial entry into force, and after its entry into force, other States can accede to the treaty. Those are all different forms for the expression of the consent of States to be bound by the treaty.⁶⁶ This clause follows what it is suggested by general international law.⁶⁷

⁶⁶ VCLT Article 2 § 1 b) defines those expressions as “international acts so named whereby a State established on the international plane its consent to be bound by a treaty”.

⁶⁷ See, in particular, Article 14 VCLT.

It should be recalled that, if a State has ratified the new treaty, it is only entirely bound by its provisions once the instrument enters into force. Even though such a scenario is not anticipated for the TPNW, should a long time elapse between initial ratifications and entry into force following the 50th ratification as required by Article 15, the States having ratified already are prohibited from acting contrary to the object and purpose of the treaty, unless entry into force is unduly delayed.⁶⁸ This duty corresponds to what has been explained above concerning the period between signature and ratification.⁶⁹

14. 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 takes legal effect on States Parties and, to a certain extent and where the treaty is self-executing, on individuals and legal entities.⁷⁰ The 90-day period specified in paragraph 1 of Article 15 is common practice, and aims at allowing the States having ratified the treaty to prepare for its actual entry into force.

Arms control treaties vary regarding the required number of ratifications, but the objective always is to strike a balance between a certain number required in order to accomplish 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

⁶⁸ Article 18 b) VCLT.

⁶⁹ See above, signature (Article 13).

⁷⁰ See above, “National implementation” (Article 5).

illusionary, on the other hand. At the outset, the requirement of 50 ratifications set by the new treaty seems appropriate and, in light of the broad support for the treaty, fairly easy to reach. It worth emphasizing that the negotiating States did not make the same mistake as in the CTBT, where a very complex and demanding entry-into-force clause has allowed a certain group of States to prevent its entry into force more than 20 years after its adoption, and in spite of more than 180 ratifications.⁷¹

15. Reservations (Article 16)

Treaty text:

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

Commentary:

A reservation is defined by the VCLT as a “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.”⁷² The role of reservations 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 have a negative effect on the legal certainty and integral character of treaties, in a manner similar to treaty amendments, as discussed above.⁷³ Article 16 therefore seems an appropriate solution, particularly for a norm-building instrument aiming at banning nuclear weapons permanently. A provision excluding all reservations clearly is in line

⁷¹ 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.

⁷² Article 2 § 1 d) VCLT.

⁷³ The subsidiary regime proposed by Articles 19-23 of the VCLT is not considered a satisfactory answer to this difficult topic.

with the recent trend in arms control treaties. An exception is the ATT, which follows general international law, allowing reservations as long as they are not contrary to the object and purpose of the treaty.⁷⁴

16. 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 Article 17, the clause on duration and withdrawal. While civil society and certain States opposed inclusion of a clause permitting withdrawal or favored a clause simply referring to the rules of the 1969 VCLT, the majority view preferred a clause that represents a compromise between arms control treaties and humanitarian law treaties.

Article 17 paragraph 1, stating that the treaty is concluded for an indefinite period of time, reflects established practice and is not controversial. Paragraph 2 typical of withdrawal clauses 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.” Although this clause seems

⁷⁴ Article 25 § 1 ATT, embracing the solution proposed in Article 19 c) of the VCLT.

very broad, it has been invoked only very rarely in other treaties, namely by the DPRK concerning the NPT and by the United States in respect of the ABM Treaty.⁷⁵

Paragraph 3, on the other hand, reflects the humanitarian law logic 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.⁷⁶

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 in 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 already is well established in 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 for a State even if it decides to withdraw from the treaty.

17. 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.

⁷⁵ See also: <https://safna.org/2017/03/22/withdrawal-clauses-in-arms-control-treaties-some-reflections-about-a-future-treaty-prohibiting-nuclear-weapons/>

⁷⁶ See, for instance, Article 63 § 2 of Geneva Convention No. 1.

Commentary:

This clause is inspired by Article 26 of the Arms Trade Treaty (ATT). It gives the new treaty priority over existing treaties where they conflict. For this reason, certain delegations were so opposed to the inclusion of this Article that they had difficulties voting in favour of the treaty.⁷⁷ This solution seems nevertheless compatible with general international law, in particular Article 30 §§ 3 and 4 of the VCLT.⁷⁸

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.⁷⁹ For practical reasons, the present commentary will address only one example of a potential interpretation issue. While the new treaty refers to nuclear “test” very generally, without defining the term, 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 be prohibited by the new treaty, but not by the CTBT.

This raises the question of whether it would not have been worthwhile to define the most important terms, as has been done in previous arms control treaties,⁸⁰ at least by referring to already existing treaties.

⁷⁷ See, in particular, Switzerland.

⁷⁸ Article 30 §§ 3 and 4 a) VCLT enshrine the principle *lex posterior derogat legi priori*.

⁷⁹ 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).

⁸⁰ See, for instance, Article 2 of the Ottawa and Oslo Conventions.

18. 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 UNSG as depository for the instruments. Its functions are defined by the States Parties and, subsidiarily, by Article 77 of the VCLT. Depositories are typically responsible, *inter alia*, for keeping custody of the original text of the treaty, and for receiving any signatures or instruments of ratification by States and forwarding them to the other States Parties.

19. 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. In the event of a difference between the various authentic texts, Article 33 of the VCLT proposes a set of rules for resolving problems arising out of a treaty authenticated in different languages.

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