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## UNDERMINING THE NON- PROLIFERATION TREATY (NPT): A LEGAL ANALYSIS OF THE TREATY ON THE PROHIBITION OF NUCLEAR WEAPONS (TPNW)

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### INTRODUCTION

*“The release of atom power has changed everything except our way of thinking.”*

-Albert Einstein

In the summer of 1945, Albert Einstein’s work on the atom led to the creation of the first atomic bomb. Its use in Hiroshima and Nagasaki in 1945 demonstrated that nuclear weapons have both immediate and long-term consequences due to the heat, blast, and radiation generated by a nuclear explosion. Seventy-two years later, the Treaty on the Prohibition of Nuclear Weapons (TPNW) was adopted on July 7, 2017. The objective of this treaty is to create a legally-binding instrument to prohibit and ultimately abolish nuclear weapons. One hundred twenty-two United Nations member states voted for the TPNW, Singapore abstained, and the Netherlands voted against it. While the TPNW appears to be a huge success within the international community, few have examined how this treaty interacts with previous non-proliferation legal regimes, namely the

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Nuclear Non-Proliferation Treaty (NPT).

While eliminating nuclear weapons is a noble cause, the TPNW is an unfortunate reaction to the NPT's lack of momentum and the stagnation of arms control regimes more generally. In this paper, I examine how the NPT and TPNW intersect and add legal significance to the issue of nuclear weapons, while arguing that the TPNW undermines the NPT for three primary reasons: the TPNW diminishes the disarmament goal, fragments the non-proliferation legal regime, and if implemented, could hamper the deterrent value of nuclear weapons in the European theater and East Asia, leading to a more insecure global environment. Lastly, I identify four policy recommendations to strengthen non-proliferation and disarmament verification efforts.

## **LEGAL DEVELOPMENTS PRIOR TO THE TPNW: THE NON-PROLIFERATION TREATY (NPT)**

### **The Development and Obligations of the NPT**

At the third Nixon-Kennedy Presidential debate on October 13, 1960, John F. Kennedy stated:

There are indications because of new inventions, that 10, 15, or 20 nations will have a nuclear capacity, including Red China, by the end of the Presidential office in 1964. This is extremely serious...I think the fate not only of our own civilization, but I think the fate of the world and the future of the human race, is involved in preventing a nuclear war (Carnegie Endowment 2003).

This proliferation of nuclear weapons states was successfully averted by the 1968 Nuclear Non-Proliferation Treaty (NPT), which is widely regarded as a "cornerstone" of international nuclear security (Borrie, Caughley, and Ritchie 2015, 1). The NPT opened for signature on July 1, 1968 in Washington, London, and Moscow, and it entered into force on March 5, 1970 (Joyner 2011, 20). With 189 signatory states, the NPT has been the principal legal barrier against the spread of nuclear weapons for almost 50 years. The NPT calls for a conference to be convened every five years to review the efficacy of the treaty, which has resulted in nine NPT Review Conferences (RevCons) since the ratification of the treaty. Originally the NPT was given a 25-year limit with the opportunity to be renewed; however, the treaty's duration was extended indefinitely by consensus in the 1995 Review and Extension Conference. The NPT remains the only treaty that obligates the five nuclear weapons states (NWS)

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that are party to the treaty—China, France, Great Britain, Russia, and the United States (NPT5)—to pursue nuclear disarmament measures. The term NWS does not include the additional states that are believed to possess nuclear weapons: India, Israel, Pakistan, and North Korea. While North Korea was party to the NPT, it announced its withdrawal in 2003. In this article, “nuclear weapons-possessing states” refers to all nine states known or suspected to possess nuclear weapons.

The NPT establishes that it is not only concerned with regulating the proliferation of nuclear weapons. Instead, three principles underpin the NPT: peaceful use of nuclear energy, non-proliferation of nuclear weapons, and disarmament of nuclear weapons stockpiles (Joyner 2011, 20). These three pillars comprise the purpose of the NPT, and they should be understood as “presumptively juridically equal,” that is, none of the pillars should be prioritized over the others in legal interpretations (Joyner 2011, 34). Under Article II, states parties that did not conduct a nuclear test prior to 1968 are not permitted to “manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices” (Treaty on the Non-Proliferation of Nuclear Weapons 1970, Article II). Moreover, Article III states that each state party to the treaty undertakes to accept monitoring of its civilian nuclear program through safeguards administered by the International Atomic Energy Agency (IAEA) (Moxley Jr., Burroughs, and Granoff 2011, 680). Article IV then allows for “the fullest possible exchange of equipment, materials and scientific and technological information” for peaceful uses (Treaty on the Non-Proliferation of Nuclear Weapons 1970, Article IV (2)). This most notably includes nuclear reactor technology for the purpose of generating electricity. Article IV also recognizes the inalienable right “to develop research, production and use of nuclear energy for peaceful purposes” (Treaty on the Non-Proliferation of Nuclear Weapons 1970, Article IV (2)).

Despite some challenges, most would agree that the NPT has been widely successful as a legal and political barrier against proliferation. Instead of Kennedy’s fear of a dozen new nuclear weapons states in addition to the original NPT5, only four states—India, Pakistan, North Korea, and Israel—are now known or suspected to possess nuclear arsenals. While North Korea originally ratified the NPT in 1995, it became the first state to acquire nuclear weapons and withdraw from the NPT in 2003, demonstrating the fragility of the treaty (Moxley Jr., Burroughs, and Granoff 2011, 680). These criticisms of the NPT must be examined to understand how the TPNW was introduced and established. Three central critiques, the unequal burden between NWS and non-nuclear

weapon states (NNWS), the perceived slow pace of disarmament, and the lack of provisions prohibiting nuclear weapons, have led to questions about the viability of the NPT and ultimately acted as the main drivers of negotiations for the TPNW.

### **Unequal Burden: Inaccurate Interpretation**

One aspect of the NPT that has been criticized is the discriminatory character of the treaty. There is an emphasized distinction between the NPT5 and NNWS, where the former were permitted to have nuclear weapons while the latter were not. Some argue that this distinction between NWS and NNWS is outdated (Borrie and Caughley 2013, 59), while others judge that the NPT represents a status quo that suits nuclear-armed states and disempowers non-nuclear states (Borrie and Caughley 2013, 112). However, nuclear weapons remain a central component of each of the nuclear weapons states' military strategies by serving as a deterrent and ultimately provide security assurances for other NNWS through extended nuclear deterrence.

The NPT's diplomatic history highlights why states accepted an unequal status regarding the possession of nuclear weapons. Specifically, the NPT makes distinctions through a series of trade-offs, and the treaty would have never been established if the principle of peaceful use and disarmament had not been combined with the principle of non-proliferation (Dunn 2009, 158–160). The right of all states to peaceful uses of nuclear energy reduces the central inequality that divides states into nuclear-weapon-haves and have-nots. However, this peaceful underpinning is frequently misunderstood by legal commentators, leading to incorrect legal interpretations of the NPT. For example, many NWS have shared the view that the obligations of the peaceful use principles of Article IV are secondary in priority to the non-proliferation obligations under Article II and III (Joyner 2011, 48). This is a failure on the part of NWS to correctly interpret the provisions of the NPT in light of the treaty's original purpose. Interpreting the NPT as a means to attribute legitimacy to the NWS is highly controversial. Former IAEA Director Mohamed ElBaradei stated in 2006:

Under the NPT, there is no such thing as a “legitimate” or “illegitimate” nuclear weapons state. The fact that five states are recognized in the treaty as holders of nuclear weapons was regarded as a matter of transition; the treaty does not in any way confer permanent status on those states as weapons holders (Borrie and Caughley 2013, 49).

The NPT is an institution that manages the global nuclear order, halting the spread of nuclear warheads and countries that deploy them. This legal framework, as well as the possession of nuclear weapons by the NPT5, does not represent a crisis of “legitimacy,” but suffers from inaccurate interpretation. Nevertheless, many describe the unequal provisions of the treaty as jeopardizing the NPT’s effectiveness by generating widespread discontent (Cortright and Väyrynen 2010, 36).

### **Slow Disarmament**

When the NPT was negotiated and eventually signed and ratified, many parties felt that the treaty was an important step toward disarmament. They argued that the treaty could prompt more urgent action to reduce nuclear risk and promote disarmament (Sanders-Zakre 2017, 20–21). This commitment is most evident in Article VI of the NPT, which 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 (Treaty on the Non-Proliferation of Nuclear Weapons 1970, Article VI).

Thus, Article VI explicitly obligates states parties to disarm completely. This is in clear contrast to the rest of the treaty, which does not prohibit possession of nuclear weapons by the NWS (Joyner 2011, 19). This demonstrates on a normative level how many of the NPT’s parties viewed disarmament as an important goal for the entire international community. However, this commitment has come with several challenges. Namely, 20 years after the 1995 review and indefinite extension of the NPT, all of the NWS have still continued to modernize their nuclear arsenals (Borrie, Caughley, and Ritchie 2015, 3). Despite the robust development of the NPT regime at the 1995 and 2000 RevCons, the following decade spurred widespread concern that the NPT is deteriorating due to the slow disarmament. The NPT5, particularly the United States, have largely failed to implement the “13 Practical Steps for Disarmament,” which were adopted at the 2000 RevCon (Moxley Jr., Burroughs, and Granoff 2011, 681).

Nevertheless, the 2010 NPT RevCon demonstrated that the NPT states parties were moving toward disarmament. The NPT states parties unanimously expressed the humanitarian concerns surrounding nuclear weapons in the 2010 Action Plan. The 2010 RevCon:

Express[ed] its deep concern at the continued risk for human-

ity represented by the possibility that these weapons could be used and the catastrophic humanitarian consequences that would result from the use of nuclear weapons (Sanders-Zakre 2017, 20–21).

On April 5, 2009, U.S. President Barack Obama also pronounced the United States' commitment to a reduction in nuclear arms while speaking in Prague:

Today, I state clearly and with conviction America's commitment to seek peace and security of a world without nuclear weapons. I'm not naïve. This goal will not be reached quickly—perhaps not in my lifetime. It will take patience and persistence. But now we, too, must ignore the voices who tell us that the world cannot change. We have to insist, yes, we can (Pella 2016, 5–6).

The case for the United States' commitment to Article VI was further strengthened by the release of the 2010 Nuclear Posture Review (NPR), which called for a reduction in the number of nuclear weapons the United States possessed (U.S. Department of Defense 2010). Despite this progress and acknowledgement of humanitarian consequences, the subsequent 2015 Review Conference also had several challenges. Namely, the NPT5 had made little progress in implementing the disarmament steps agreed to in the 2010 Action Plan (Borrie, Caughley, and Ritchie 2015, 1). Because the Action Plan is political and not legal in its strength, a state's failure to implement these obligations does not conflict with its legal duties under the NPT and holds less weight. Therefore, many of the NNWS argue that the United States is not doing enough to fulfill its Article VI commitment. Many argue that there is a gap between the rhetoric and action of NWS, specifically the United States, in their reluctance to give up their nuclear arms. For example, according to the 2018 U.S. NPR, the U.S. Department of Defense (DoD) currently spends between 2 and 3 percent of its budget to maintain and operate its nuclear force; however, this is projected to increase to about 6.4 percent in order to modernize the United States' nuclear forces (Department of Defense 2018, 51).

These fiscal projections do not align with the statements regarding the United States' commitment to nuclear reduction and disarmament. However, verifiable disarmament is a complex challenge. Moreover, not only do some states not possess the technical means to disarm, but the full implementation of Article VI also poses the challenge of what to do with loose materials, such as uranium and plutonium. For the United States, the National Nuclear Security Administration (NNSA) is the governmental

body that oversees the dismantling process; however, nuclear weapons disassembly is still dangerous and difficult to achieve with these high explosive components. Despite the NPT's efforts, there is no international verification process for determining if a nuclear warhead is destroyed, leading to serious challenges for fully implementing Article VI.

### **Prohibition of Nuclear Weapons**

The objective to eliminate nuclear weapons is explicitly stated as the ultimate goal of the NPT. In connection with the decision to extend the treaty indefinitely, the 1995 NPT Review and Extension conference adopted procedures to strengthen the review process. These “Principles and Objectives on Nuclear Non-Proliferation and Disarmament” provide for “systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goal of eliminating those weapons” (Moxley Jr., Burroughs, and Granoff 2011, 681). The United States has historically supported the objective of eliminating nuclear weapons, and under Article VI of the NPT, the NPT5 are under a legal obligation 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.” However, due to the structure of the NPT, it is unable to delegitimize nuclear weapons and the practice of nuclear deterrence (Borrie and Caughley 2013, 59). Nuclear deterrence, mutually assured destruction, and “escalate to de-escalate” are all still deeply embedded in nuclear weapons-possessing states’ doctrines and nuclear policies. The NPT lacks the legal authority or structures to alter these national strategies. Judge Shigeru Oda echoed a similar sentiment in his dissenting opinion to the International Court of Justice’s Nuclear Weapons Advisory Opinion when he stated that since NWS continue to have nuclear weapons, threaten to use them, and show willingness to use them, an international custom prohibiting such use cannot be found (Moxley Jr. 2000, 201).

Therefore, the inaccurate interpretation of the NPT by NWS and NNWS, the slow disarmament due to the lack of states parties’ technical means to disarm in a verifiable way, and the lack of structure in the NPT that can delegitimize the practice of nuclear deterrence have all spurred the development of the TPNW.

## **THE TREATY ON THE PROHIBITION OF NUCLEAR WEAPONS (TPNW)**

### **Background**

The Treaty on the Prohibition of Nuclear Weapons (TPNW) originated

from the Humanitarian Initiative, a group of NNWS that have pushed for nuclear disarmament by focusing on the humanitarian consequences of a potential nuclear war (Nuclear Threat Initiative 2017). Humanitarian consequences were first addressed at the 2010 NPT RevCon, when a consensus final document provided a detailed Action Plan for implementing the NPT with a focus on nuclear disarmament (Borrie, Caughley, and Ritchie 2015, 1). The 2010 NPT Action Plan helped to catalyze the humanitarian approaches to the use of nuclear weapons and outlined potential ways to reframe the process of accountability for nuclear weapons states (Nystuen and Egeland 2016). These humanitarian concerns motivated a group of states, primarily Austria, Mexico, and Norway, to organize a series of three conferences in 2013 and 2014 to discuss the humanitarian consequences of nuclear weapons use (Sanders-Zakre 2017, 20–21). In 2015, this movement gained support among the international community, and the Humanitarian Initiative was hopeful that the 2015 NPT RevCon would achieve substantial progress toward nuclear disarmament. One hundred sixty states endorsed the Humanitarian Initiative at the 2015 NPT RevCon, but the conference failed to adopt a consensus final document (Nuclear Threat Initiative 2017)

Within the United Nations General Assembly (UNGA), efforts to advance the disarmament agenda led to an open-ended working group (OEWG) on nuclear disarmament in December 2015. Chaired by Thailand's Permanent Representative Thani Thongphakdi, the OEWG specified that a legally binding instrument would establish general legal obligations, prohibitions, and political commitments to achieve a nuclear weapon-free world. The group's mandate was to address effective legal measures, legal provisions, and norms that were necessary to realize a world without nuclear weapons (United Nations 2017). Over the course of the three OEWG meetings in February, May, and August 2016 in Geneva, participating states including Algeria, Brazil, Indonesia, and South Africa discussed strategies for opening negotiations for a full ban treaty. At the final session of the OEWG, 68 states voted in favor of adopting the final report, with 22 against and 13 abstaining. The final report recommended the UN General Assembly to convene a conference in 2017 to prohibit nuclear weapons (Nuclear Threat Initiative 2017). In an effort to establish a comprehensive and legally binding prohibition treaty, the OEWG recommended these multilateral disarmament negotiations in the UNGA Resolution 70/33.

The prohibition treaty and the vision of a nuclear-free world was led by Austria, Brazil, Mexico, South Africa, and New Zealand (Bendix 2017). As a result of UNGA Resolution 71/258, multilateral nuclear disarmament

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negotiations began, and the TPNW was negotiated by over 130 countries at the United Nations Headquarters in New York from March 27 to 31, 2017 and from June 15 to July 7, 2017. Adopted on July 7, 2017, the TPNW opened for signatures on September 20, 2017 and will enter into force 90 days after 50 states ratify it (United Nations 2017). As of May 2018, 58 states have signed the treaty, while 9 states have ratified it (ICAN 2018).

### **Basic Obligations of the TPNW**

The impetus to negotiate a new treaty grew from what many describe as the “deterioration of the NPT” and the renewed recognition of the humanitarian consequences of nuclear weapons use. The TPNW’s 24-paragraph preamble states:

[States parties are] 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 (Treaty on the Prohibition of Nuclear Weapons 2017, Preamble).

Article 1 is the cornerstone of the TPNW, which details a clear ban on nuclear weapons and declares them to be categorically illegal, similar to chemical and biological weapons, land mines, and cluster munitions. The TPNW prohibits states parties from developing, testing, producing, manufacturing, acquiring, possessing, stockpiling, or threatening the use of nuclear weapons or other nuclear explosive devices (Treaty on the Prohibition of Nuclear Weapons 2017, Article 1 (a) (d)). Signatories are also prohibited from transferring or receiving nuclear weapons and other nuclear explosive devices (Treaty on the Prohibition of Nuclear Weapons 2017, Article 1 (a–c)). States parties also cannot allow the stationing, installation, or deployment of nuclear weapons and other nuclear explosive devices in their territory (Treaty on the Prohibition of Nuclear Weapons 2017, Article 1 (g)).

When joining the treaty, a state party must declare whether it has eliminated a previous nuclear weapons program, currently has nuclear weapons, or holds another country’s nuclear weapons on its territory (Sanders-Zakre 2017, 20–21). The provisions call on states with nuclear weapons to “remove them from operational status and destroy them as soon as possible, but not later than a deadline agreed by the first meet-

ing of states parties” (Jenkins 2017). The treaty also requires states that possess nuclear weapons to report on their progress until disarmament is completed (Jenkins 2017). In addition, states parties are obligated to provide victim assistance and assist with environmental remediation efforts (Nuclear Threat Initiative 2017). Article 3 details safeguards for NNWS, which are required to have “a comprehensive safeguards agreement with the IAEA without prejudice to any future additional agreements” (Treaty on the Prohibition of Nuclear Weapons 2017, Article 3(1–2)).

## **HOW THE TPNW UNDERMINES THE NPT AND THE INTERNATIONAL SECURITY ENVIRONMENT**

Proponents of the TPNW claim that there are numerous provisions within the TPNW that reinforce the NPT, especially the Article VI requirement for nuclear disarmament. Supporters argue that the TPNW will close a “legal gap” with the NPT, which does not explicitly ban nuclear weapons. They also argue that it can even reduce the prominence of nuclear weapons by prompting more urgent action to promote disarmament. According to the UN, these provisions also mean that no state can benefit from leaving the NPT, and that participation in the TPNW cannot harm existing non-proliferation standards (United Nations 2017). However, I assess that the TPNW undermines the NPT for three reasons. First, the TPNW diminishes the disarmament goal and raises concerns similar to those surrounding the NPT regarding disarmament verification. Second, the TPNW has led to a fragmentation of the non-proliferation legal regime, which has led to legal inconsistencies. Lastly, the TPNW could weaken the value of deterrence, leading to a more unstable international security environment.

### **Disarmament Under the TPNW and Undermining the IAEA**

Proponents of the TPNW have highlighted the success of the International Campaign to Abolish Nuclear Weapons (ICAN) in advocacy as the TPNW shows that through the humanitarian initiative ordinary citizens can mobilize effectively on this issue. However, the agreement’s ultimate success will depend on how nuclear weapons states react to the treaty and whether they decide to take steps toward joining it. There are two ways for a NWS to accede to the TPNW: it can join the treaty and then destroy its nuclear weapons, or it can destroy its nuclear weapons and then sign on to the treaty. States that destroy first and then join the TPNW must cooperate with a “competent international authority” designated by the treaty to verify dismantlement (Treaty on the Prohibition of Nuclear Weapons 2017, Article 4 (2)). States that decide first to join and then destroy must

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remove nuclear weapons from operational status and submit a time-bound plan for their destruction within 60 days of joining the treaty (Sanders-Zakre 2017, 20–21).

However, the TPNW does not specify what “competent international authority” is responsible for verifying the disarmament of nuclear-armed states (Sanders-Zakre 2017, 20–21). Additionally, the state would become a party to the TPNW without knowing what “cooperation” on verification with the competent international authority would entail, since it is not detailed in the treaty. One of the main issues with the ambiguity of this provision of the TPNW is that it threatens to undermine the IAEA, since the treaty does not designate a competent international authority to verify the elimination of nuclear weapons. Facing scarce financial resources and challenges recruiting nuclear experts, the IAEA could find its authority further eroded by a competing “competent international authority.” Instead of writing real verification provisions in the treaty, the negotiators drafted a treaty that encourages states to work out verification later.

Therefore, the TPNW raises the same technical concerns for disarmament as elicited by the NPT—the same concerns that led to the creation of the TPNW in the first place. If Article VI of the NPT cannot be implemented, the disarmament provision in the TPNW will also fail due to the lack of technical means needed to disarm verifiably because it contains no system for verifying nuclear disarmament. As Christopher Ford, former U.S. special assistant to the president and National Security Council senior director for weapons of mass destruction and counter-proliferation, commented on the TPNW:

It is... appalling that negotiators, at the very least, did not see fit to also require adherence to an IAEA Additional Protocol—which does much more to address the challenge of detecting illicit activities that the host government does not actually choose to declare (Ford 2017).

Additionally, an anonymous senior U.S. DoD expert on countering weapons of mass destruction (CWMD) contends that the TPNW “dilutes the international community’s disarmament efforts (and particularly that of the NPT5 nations), adding complexity to step-by-step disarmament efforts” (2017). The DoD official goes on to explain how this is compounded by the fact that many nations have few diplomats who focus on non-proliferation or disarmament. In this context, many such diplomats are “already overtaxed individuals;” therefore, “setting priorities will be difficult” for many nations (2017). Thus the question of who regulates

disarmament and what happens with loose nuclear material, coupled with a nation's limited capacity within their diplomatic structures, proves to be incredibly difficult to address without established processes through the TPNW.

### **Regime Proliferation and Forum Shopping**

The nine nuclear weapons-possessing states—the United States, Russia, Britain, China, France, India, Pakistan, North Korea, and Israel—and most NATO countries boycotted the working group sessions and the 2017 TPNW negotiations. Specifically, the NWS asserted that the treaty would distract attention from negotiating a fissile material cutoff treaty or ratifying the Comprehensive Test-Ban Treaty (CTBT). They also expressed that the TPNW could undermine the extensive safeguard provisions by giving states the option to choose between the two treaties (Sanders-Zakre 2017, 20–21). Though supporters of the TPNW argue that it will close a “legal gap” that exists regarding nuclear weapons, I assess that the TPNW actually creates a legal gap—specifically, the conflicting requirements of the two treaties. Article VI of the NPT requires nuclear-armed states to “pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament,” whereas the TPNW prohibits nuclear weapons and “lead[s] towards their total elimination.” This demonstrates how the NPT and TPNW are distinct legal regimes that contain inconsistent elements, creating a lack of coherence in international law. Daniel Drezner terms this “regime proliferation,” or the existence of multiple and overlapping institutional orders (Drezner 2009, 5). The proliferation of international law can lead to conflicting legal obligations, which provides the opportunity for states to “forum shop,” or choose which treaty meets their needs. Once these conflicting obligations emerge, so does the problem of reconciling them (Drezner 2009, 5). Christopher Ford also asserts that the TPNW:

Harms the effective operation of the global non-proliferation regime by increasingly entangling and preoccupying vital non-proliferation institutions—e.g., the NPT review process and the IAEA—in sterile but contentious debates and disputes over disarmament policy, making it harder for them to do the job the international community needs them to do in preventing nuclear proliferation (Ford 2017).

Although the international humanitarian movement did not intend to create this conflict, the TPNW is an unfortunate example of how the establishment of a new international legal regime can “erode the *opinio juris* necessary for international law to function properly.” (Drezner 2009, 7).

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## **Weakening the International Security Environment: Operational and Strategic Risks**

Lastly, there are several strategic and operational concerns with the ratification of the TPNW. Prior to the adoption of the TPNW, the United States, which did not attend any of the OEWG sessions, rejected the OEWG's final report, calling its efforts to ban nuclear weapons "unrealistic" (Nuclear Threat Initiative 2017). The nine countries recognized as possessing nuclear weapons were also absent from the two rounds of negotiations of the TPNW, as were most members of NATO (Bendix 2017). The NWS opposed the TPNW's fast-track approach to disarmament and instead favored a "building-blocks" or step-by-step approach, which were originally reflected in the 2013 OEWG report A/68/514 (Nuclear Threat Initiative 2017). However, some nations wondered if this "progressive" approach was intended to maintain a nuclear-weapons-based international security system, while others felt that the NPT could serve as a valuable part of this "building blocks" approach toward nuclear disarmament. In a joint statement released after the treaty was adopted, the U.S., British, and French governments stated, "We do not intend to sign, ratify or ever become party to [the TPNW]" (Gladstone 2017). The UN ambassadors for the United States, Britain, and France also argued that the TPNW "clearly disregards the realities of the international security environment" (Bendix 2017).

Of particular concern is the fact that the treaty fails to address the growing threat of North Korea's nuclear and missile programs. Rather than ban nuclear weapons and risk vulnerability to a North Korean attack, the United States, Britain, and France hope to strengthen the NPT. The North Korea issue alone makes implementation of the TPNW not only unrealistic, but also dangerous as it ultimately weakens the international security environment by disregarding the value of extended deterrence. Article 1(g) may also have operational costs for NWS. The CWMD DoD expert further claims:

The legal impacts for nuclear-armed states (not to mention the complexities associated with "declared" versus "non-declared" nuclear powers) will be far-reaching. For example, states parties to the TPNW may not "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." That single clause will have serious legal, operational, strategic, and tactical implications for nuclear-armed states (2017).

While many supporters of the TPNW argue that the ambition of Article 1(g) was meant to compel compliance of other states through the stationing and installation provision in order to obtain NWS as signatories, it is still vital to examine the provision's operational effects on both NWS and NNWS. For example, under this provision, a state not party to the treaty would not be allowed to even refuel on the territory of a state party to the treaty if a nuclear weapon is present on a naval warship. This illustrates how this provision has the potential to endanger operations surrounding the Korean Peninsula, while jeopardizing security for NNWS in the region.

The provision also raises several other operational concerns in the European theater where U.S. nuclear weapons systems are based. NATO's nuclear command and control is located in Europe, where there has been an increase in Russian military exercises on the eastern flank, stressing the necessity of an extended nuclear deterrent for countries like Poland. If some NATO countries were to sign on to the TPNW, they would divide the nuclear alliance and decrease the credibility of the well-established nuclear deterrence. Jeopardizing the NATO alliance would dramatically alter the international strategic environment, as some NATO countries may feel the need to acquire their own nuclear weapons if the "nuclear umbrella" is weakened in the European theater. Christopher Ford echoes this argument by stating that the TPNW may create a more unstable and dangerous world by "seeking to delegitimize the 'extended deterrence' alliance relationship that the United States has with its allies in Europe and in the Asia-Pacific" (Ford 2017). The TPNW could not only degrade existing security relationships, but it could also lead to the proliferation of nuclear weapons if the credibility of the extended deterrence is undercut for the United States' allies in Europe and East Asia (Ford 2017).

These operational and strategic concerns are unfortunate examples of how the TPNW not only undermines the NPT, but also leads to a dangerous legal regime in the current context of North Korea and Europe. North Korea's recent nuclear tests and the advancement of its nuclear weapons program, as well as the strategic extended nuclear deterrence in Europe, highlight the current necessity of nuclear weapons.

## **POLICY RECOMMENDATIONS**

The security benefits the international community has derived from the NPT have been highly underappreciated. Multilateral approaches to disarmament and nuclear non-proliferation remain a critical feature of the international security architecture. However, previous efforts toward disarmament have highlighted key gaps in the non-proliferation legal

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regime. The following four policy recommendations address these gaps.

**Recommendation #1: Strengthen Collaboration within the International Partnership for Nuclear Disarmament Verification (IPNDV)**

One of the ways to strengthen the NPT's Article VI provision is through the development of technologies required to verify the dismantling of warheads and weapons production facilities. The International Partnership for Nuclear Disarmament Verification (IPNDV) is a group of 25 countries working with private organizations to address verification and disarmament challenges, including by developing these technologies. By combining the interests and expertise of nuclear and non-nuclear weapons states, the IPNDV addresses verification challenges in a collaborative manner. Strengthening this type of collaboration between countries, rather than excluding the nuclear weapons-possessing states via the TPNW, will help to bolster global non-proliferation efforts.

**Recommendation #2: Negotiate a Multilateral Agreement on Verification Between NWS**

It is unlikely that NWS will become states parties to the TPNW as the treaty does not incentivize these states to join. Therefore, a multilateral effort among NWS is required to promote disarmament where it matters most. States possessing nuclear weapons should negotiate an agreement that implements a mechanism to ensure verification of nuclear disarmament. An agreement could be modeled on the U.S.–Russia bilateral arms control agreements or the UK/Norway Initiative on nuclear warhead dismantlement verification. While proponents of the TPNW might respond that the treaty does not rule out this approach, the treaty ultimately does not serve as a means to verify disarmament. Therefore, a stronger multilateral agreement should be pursued to strengthen these verification efforts among states that actually possess nuclear weapons.

**Recommendation #3: Amend the IAEA's Statute**

The TPNW leaves all disarmament verification issues to be determined at a later time (Ford 2017). One of the main issues with this approach is that it threatens to undermine the IAEA, since the treaty does not designate a competent international authority to verify the elimination of nuclear weapons. This is an unfortunate provision since the IAEA is already financially strained and the TPNW's mandate could create a competing organization as a competent international authority. Instead, there is legal

space to amend the IAEA's mandate in its charter. The IAEA is the world's technical agency in charge of ensuring that countries maintain safeguards on their peaceful nuclear programs. If given the authority, the IAEA could also be the lead to verify and assess disarmament efforts, while coordinating the implementation of any actions that need to be taken. IAEA member states should task the Agency to be the designated competent international authority regarding disarmament and Article VI of the NPT. Expanding the IAEA's mandate would enable member states to pool resources, share expertise, and establish common standards to ensure global disarmament.

#### **Recommendation #4: Maintain the Policy of Extended Nuclear Deterrence**

The policy of deterrence has helped to maintain international peace and security in Europe and East Asia for more than 70 years. However, the TPNW is incompatible with this policy. Establishing a new legal regime that conflicts with current non-proliferation efforts and ignores the necessity of extended nuclear deterrence was not a constructive way to channel criticism of the NPT. Instead, the NWS, specifically the United States, should continue to maintain a policy of extended nuclear deterrence on the Korean Peninsula and in Europe. The United States should continue to reduce the role of nuclear weapons in its security strategy, while balancing reassurances for its allies by maintaining effective extended deterrence.

### **CONCLUSION**

By examining the historical development of the NPT, it is clear that disarmament was the goal of the NPT under Article VI. However, states did not muster the political will to strengthen the NPT and the disarmament verification process. Although the 2010 Action Plan reframed the way states thought about disarmament by addressing the humanitarian consequences of nuclear weapons use, states parties decided to establish a new legal regime, resulting in two conflicting treaties. As a legal document, the TPNW does not establish international legal norms or make a positive contribution to achieving nuclear disarmament. Instead, this new treaty undermines previous legal frameworks while posing several security concerns by weakening the deterrent value of existing nuclear weapons that remain critical to global peace and security. Despite the best efforts by the TPNW to create an international norm of non-use, the policy of extended nuclear deterrence remains necessary in our current international security setting.

Additionally, the TPNW does not set up the proper processes to imple-

ment disarmament verification, which further undermines the NPT. Instead, this regime proliferation incentivizes states to forum shop as conflicting legal obligations exist within the international community. From this perspective, it is necessary for NWS, such as the United States, to continue to pursue disarmament per their legal obligations in the NPT through a comprehensive whole-of-government approach. While the nuclear decision-making calculus is complex, NWS should continue to pursue their legal responsibilities under the NPT and all non-proliferation efforts should focus on an interagency process. This would ultimately prove to be more valuable than becoming a signatory to a newly established prohibition treaty that disregards the realities of the international security environment.

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