This article is part of the shadow report “I skuggan av makten” produced by Swedish Physicians Against Nuclear Weapons and WILPF Sweden.

THE TREATY ON THE PROHIBITION OF NUCLEAR WEAPONS: IMPLICATIONS FOR SWEDEN'S IMPORTS AND EXPORTS OF NUCLEAR MATERIAL AND ITEMS

■ **Stuart Casey-Maslen**
- Honorary Professor of International Law
- Faculty of Law
- University of Pretoria

This paper looks at the international legal implications for Sweden's import and export of nuclear material and dual-use goods if Sweden becomes a state party to the Treaty on the Prohibition of Nuclear Weapons (TPNW). It considers Sweden's existing obligations under the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and how these would remain, unaltered, by adherence to the TPNW. Consideration is given both to certain obligations under Article 1(1) of the TPNW and to its Article 18, whose interpretation is being most closely scrutinised.

The NPT

The NPT is the centrepiece of the global nuclear non-proliferation regime. In January 2018, this fact was emphasised by Sweden itself in its statement to the United Nations (UN) Security Council wherein it described the NPT as “the indispensable framework and the cornerstone of global disarmament and non-proliferation”.[1]

The NPT entered into force as binding international law on 5 March 1970. As at 31 May 2018, it had 190 states parties, with only India, Israel, Pakistan, and South Sudan outside the Treaty, along with the Democratic People's Republic of Korea (DPRK), which had acceded to the treaty in 1985, but then announced its withdrawal in controversial manner in 2003.[2]

Under Article I of the NPT, the five nuclear-weapon states parties (the P5) undertake “not to transfer to any recipient whatsoever” any nuclear explosive devices and “not in any way to assist, encourage, or induce” any non-nuclear-weapon state “to manufacture or otherwise acquire” any such devices. This is a very broad undertaking.

In accordance with Article II of the NPT, non-nuclear-weapon states parties, which of course include Sweden, undertake not to receive the transfer of nuclear weapons or other nuclear explosive devices from any transferor whatsoever, or of control over such weapons or devices directly, or indirectly. They further undertake not to manufacture or otherwise acquire such weapons or devices, and not to seek or receive any assistance in their manufacture.

Under Article III(1), each non-nuclear-weapon state party undertakes to accept safeguards in an agreement with the International Atomic Energy Agency (IAEA) “for the exclusive purpose of verification of the fulfilment” of its NPT treaty obligations. This is

required "with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices". It is further stipulated in paragraph 1 that the requisite safeguards "shall be applied on all source or special fissionable material in all peaceful nuclear activities within the territory of such State, under its jurisdiction, or carried out under its control anywhere". Under paragraph 3 of Article III, all states parties are obligated not to provide source or special fissionable material or related equipment or material unless it is subject to the IAEA safeguards.

Potentially, a major gap in the drafting of NPT is that an explicit prohibition on transferring nuclear material for the production of nuclear weapons or other nuclear explosive devices is imposed only with respect to any non-nuclear weapon state. A non-nuclear-weapon state party may therefore, it would appear, transfer such material to the P5, unless customary international law has since crystallised to prevent such a transfer.

Thus, under a generally accepted interpretation of the NPT, Sweden would not be prevented from supplying two nuclear-armed European Union (EU) allies — France and the United Kingdom — with source or special fissionable material, even where they have knowledge that the material would be used for such production.[3] It is not known whether Sweden is knowingly supplying either state with such material. Supplying source or special fissionable material for peaceful purposes, however, to any state party to the NPT remains lawful. Sweden may also lawfully procure so-called "dual-use" items as long as they are not intended for, nor used in, the manufacture of nuclear weapons or other nuclear explosive devices.

The TPNW

On 7 July 2017, the TPNW was adopted at the UN Diplomatic Conference by 122 votes (including that of Sweden) to 1 (the Netherlands), with 1 state abstaining (Singapore). The Treaty will enter into force once 50 states have adhered to it (as of writing, ten signatory states had ratified the treaty).

Under Article 1(1) of the TPNW, each state party undertakes never under any circumstances: to acquire nuclear weapons or other nuclear explosive devices; to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly or indirectly; and to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a state party under the TPNW.[4]

With respect to the prohibitions on assisting, encouraging, or inducing prohibited activities in Article 1(1)(e) of the TPNW, this is nothing new in disarmament law. Indeed, a prohibition on complicit action by states parties has been a standard clause in global disarmament treaties since the 1972 Biological Weapons Convention. It is found in Article I of the 1992 Chemical Weapons Convention, and in the respective Article 1 of both the 1997 Anti-Personnel Mine Ban Convention and the 2008 Convention on Cluster Munitions.

The notion of prohibited assistance by a state is well known under public international law as it pertains to state responsibility. Article 16 of the International Law Commission's 2001 draft articles on the Responsibility of States for Internationally Wrongful Acts provides that:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> **(a)** that State does so with knowledge of the circumstances of the internationally wrongful act; and
>
> **(b)** the act would be internationally wrongful if committed by that State.

In its judgment of 2007 in the case brought by Bos-

nia and Herzegovina against Serbia and Montenegro alleging responsibility for genocide, the International Court of Justice (ICJ) found that Article 16 represented customary international law, and is therefore binding upon every state.[5]

With respect to the prohibition on assistance, the question of intent inevitably arises. It is not necessary that the state providing assistance intend, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct. The wording of Article 16 refers to "knowledge of the circumstances of the internationally wrongful act". This threshold is further evidenced by the views of the ICJ on such assistance. In its 2007 judgment in the Genocide case, the Court declared that:

> there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide *unless at the least that organ or person acted knowingly*, that is to say, in particular, was aware of the specific intent … of the principal perpetrator.[6]

This is the correct test for complicity under international law: to be internationally responsible, a state assisting another party (the assistor) to commit an internationally wrongful act (the assistee), must at least be aware of the assistee's intent to engage in a prohibited activity. This is the same standard that applies in relation to activities prohibited under Article 1(1)(e) of the 2017 Treaty. Thus, for instance, providing technical or material or financial assistance for the enrichment of uranium-235 to weapons-grade purity or the equivalent reprocessing of plutonium, where the future use of this fissile material in nuclear weapons is known by the assistor, would certainly qualify as prohibited assistance.

Just as is the case with respect to its international legal obligations under the NPT, therefore, as a state party to the TPNW Sweden would be precluded from supplying or acquiring nuclear material for the production of nuclear weapons or other nuclear explosive devices. But the provision in Article 1(1)(e) also includes obligations not to supply nuclear-armed EU allies France and the United Kingdom (and, of course, China, Russia, and the United States) with nuclear material where it has knowledge that it would be used for the production of nuclear weapons. Supplying source or special fissionable material for peaceful purposes remains lawful under the TPNW.[7] Sweden may also procure so-called "dual-use" items as long as they are not intended for, nor used in, the manufacture of nuclear weapons or other nuclear explosive devices.

Under Article 18 of the TPNW, it is stipulated that the implementation of the 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". Article 18 is based on a corresponding provision in Article 26(1) of the 2013 Arms Trade Treaty (ATT) (to which Sweden is party), the intent of which was to ensure that states parties to that Treaty could adopt, or be party to, treaties and other agreements that govern trade in conventional arms and ammunition, but that they could not lawfully implement any provisions in these other agreements that were inconsistent with their obligations under the ATT.

Thus, for example, an ATT state party could not implement an obligation in any other treaty or agreement that absolutely required the export of conventional arms to an ally — potentially even where they would be used to commit war crimes — without assessing carefully the risks and where necessary refraining from authorising the export, as this would contravene its obligations under the ATT. This applies to Sweden, as it does to every other state party to the ATT that is a member of the European Union, notwithstanding the 2008 Lisbon Treaty.

Much has been made of Article 18, with one state (the Netherlands) going so far as to argue during the negotiations that it "weakens" the NPT.[8] This is legally

and politically incorrect. Indeed, the wording of Article 1(1)(b) and (c) of the TPNW is taken from Article I and Article II of the NPT, respectively. Hence, in both treaties there is an undertaking not to "Receive the transfer of or control over nuclear weapons or other nuclear explosive devices directly or indirectly".

With respect to the obligation never under any circumstances to transfer "to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly or indirectly", in the NPT this is an obligation only upon the five nuclear-weapons states, whereas Article 1(1)(b) of the TPNW applies to all its states parties. The same applies to the prohibitions imposed on assisting any prohibited activities in both the NPT and the TPNW. Thus, the TPNW fills in gaps in the NPT and strengthens the non-proliferation regime.

Article 18 of the TPNW does not prevent a state from adhering to any other treaty, including a bilateral accord, which existed prior to the adoption of the 2017 Treaty. The key words are "consistent with". What these words mean here is that obligations upon states parties to other treaties to which they are party, and that are less restrictive than the TPNW, cannot supersede those set out in the 2017 Treaty. In other words, a state party to another legally binding agreement on nuclear weapons cannot use its adherence to that agreement as an argument, much less a legal basis, to undercut the obligations it accepts by ratifying or acceding to the TPNW. Of course, "consistent with" does not imply "identical to". A state party to the TPNW could therefore ratify and respect the NPT, the 1963 Partial Test-Ban Treaty, and the 1996 Comprehensive Nuclear-Test-Ban Treaty (CTBT). None of these requires action that would contravene the 2017 Treaty.

In many ways, therefore, Article 18 is little more than a statement of common sense. A state party to 1996 Amended Protocol II to the UN Convention on Certain Conventional Weapons that was also party to the 1997 Anti-Personnel Mine Ban Convention could not sustain in law the argument that because the Protocol allows the use of certain anti-personnel mines in specific instances, this somehow modified the comprehensive prohibition on use under the 1997 Convention.

Article 26 of the 1969 Vienna Convention on the Law of Treaties (VCLT) stipulates that every treaty in force is binding upon the parties to it and must be performed by them in good faith. Thus, none of the five nuclear-weapon states under the NPT could lawfully retain their nuclear weapons if ever they adhere to the TPNW (reservations being prohibited by its Article 17). This is consistent with Article 30 of the VCLT, which concerns the application of successive treaties relating to the same subject matter. Sweden, however, could adhere to the TPNW and would not need to amend its conduct or policies, except insofar as it is knowingly supplying an NPT nuclear-weapon state with source or special fissionable material for the production of nuclear weapons, in order to comply with its provisions.

FOOTNOTES:

1 "Statement by Sweden at the UN Security Council Briefing on Non-proliferation of Weapons of Mass Destruction: Confidence Building Measures", National statement delivered by Ambassador Olof Skoog on behalf of Sweden at the UN Security Council Briefing on Non-proliferation of Weapons of Mass Destruction: Confidence Building Measures, 18 January 2018, New York, at: https://goo.gl/oypNwa.

2 The United Nations Office for Disarmament Affairs (UNODA) has observed that on 10 January 2003, the DPRK "announced its withdrawal from the Treaty in a public statement. States parties to the Treaty continue to express divergent views regarding the status of the DPRK under the NPT." UNODA, "Democratic People's Republic of Korea: Accession to Treaty on the Non-Proliferation of Nuclear Weapons (NPT)", at: https://goo.gl/HYyVQd.

3 Whether, though, this would allow a supplier state to comply with Article VI "in good faith" may be open to question.

4 Art. 1(1)(a), (b), and (e), TPNW, respectively.

5 *ICJ, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro*), Judgment, 26 February 2007, §420.

6 Ibid., §421 [added emphasis].

7 In the twenty-first preambular paragraph of the TPNW, states parties emphasize that "nothing" in the 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".

8 Remarks of the Netherlands in plenary, Second Session of the UN Diplomatic Conference, New York, 27 June 2017.