

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

MEMORANDUM ON THE TREATY ON THE PROHIBITION OF NUCLEAR WEAPONS

May 2018

■ **Treasa Dunworth**

- Associate Professor
- Faculty of Law
- University of Auckland



t.dunworth@auckland.ac.nz

This memorandum sets out my legal opinions regarding the relationship between the Treaty on the Prohibition of Nuclear Weapons (TPNW), the Nuclear Non Proliferation Treaty (NPT) and the Comprehensive Test Ban Treaty (CTBT). I understand that this relationship is being discussed in the context of Sweden joining the TPNW.

All three treaties form part of the same “nuclear weapons law” mosaic

The starting point is to understand that the three treaties, while separate and independent from each other, are all important parts of the overall mosaic of what we might call “nuclear weapons law”. The NPT was concerned with preventing the spread, or proliferation, of nuclear weapons. The CTBT was concerned with testing nuclear weapons. The newest of the treaties, and the most ambitious in scope, creates a legally binding prohibition on nuclear weapons, with the aim of contributing to a world free of nuclear weapons. You will see this stated in preambular paragraph 15 of the treaty. While the three treaties deal with different aspects of nuclear weapons, it is important to realise that they all point in the same essential direction – to manage the problem of nuclear weapons.

The legal seeds of the TPNW can be found in the NPT

The treaties are connected in a second way. Article VI of the NPT contains the legal seeds of the TPNW. It says:

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 control.

Over the years, the States Parties to the NPT have repeatedly affirmed this legal obligation to pursue nuclear disarmament obligations in good faith. Sweden has joined in all these affirmations.¹ The International Court of Justice has also expressed the view 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”²

The TPNW is the first meaningful step taken towards nuclear disarmament in that it puts in place a com-



prehensive prohibition against nuclear weapons and, in Article 4, provides pathways for nuclear possessor states to work towards nuclear disarmament. The TPNW then is a partial implementation of Article VI of the NPT.

The CTBT and the NPT have co-existed for twenty years without disrupting each other

It is a common feature of contemporary international law to have two or more treaties dealing with the same subject matter. For example, the right to life in the European Convention on Human Rights and in the International Covenant on Civil and Political Rights co-exist happily and in fact reinforce each other. The law of treaties is clear that where there are different parties to the two treaties (as it nearly always the case with a large multi-lateral treaty), the later treaty does not affect or disrupt the existing treaty relationships.

When the CTBT was negotiated and concluded, there was no suggestion that it disrupted or weakened the NPT and in fact, it did not. Rather, by putting in place a comprehensive ban on nuclear tests, it acted to strengthen the NPT which was concerned to prevent nuclear weapons proliferation. While the CTBT is not formally in force, there is in place a de facto monitoring system in operation around the world.³

The TPNW does not disrupt or weaken either the NPT or the CTBT

The relationship between the TPNW and the existing treaties on nuclear weapons was carefully discussed during the negotiations. General treaty law, as explained above, already provides that the TPNW cannot affect or disrupt existing treaty relationships unless all the states parties for each treaty are identical. Thus, had the treaty remained silent, the situation would be that the TPNW cannot change the legal obligations of states parties to the NPT or the CTBT (or any other treaty).

However, because of the importance of the point, there was agreement among the negotiating states to specifically address the issue in the new treaty text. The outcome was Article 18 which is entitled “Relationship with other agreements” and provides:

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.

This text was a negotiated compromise and the Swedish delegation took the position that it would have been preferable to have not included the final eight words of this text.⁴ To understand the point, it is necessary to look more closely at one of the fundamental disagreements among the states parties to the NPT.

At the time that the NPT was concluded, there were five states in the world which has successfully tested a nuclear weapon. These were the United States, the USSR, China, France and the United Kingdom (referred to as the Nuclear Weapons States or ‘NWS’). A key aim of the NPT was to stop any further states from acquiring nuclear weapons technology – in other words, and as its name suggests, it was a non-proliferation treaty. That is, states that were not already nuclear-capable foreswore the nuclear-weapons option (this is found in Article II of the NPT). However, in return for this obligation, they would have non-discriminatory access to trade and technology in the nuclear field for peaceful purposes (this is found in Article IV of the treaty). Finally, in Article VI, which I have mentioned above, all states (nuclear possessors and non-possessors) promised to negotiate in good faith towards, inter alia, nuclear disarmament. This arrangement is the defining feature of the NPT and is known today as its “grand bargain”.

Today, there are 191 States Parties to the NPT – still with the same five states acknowledged as possessing nuclear weapons.⁵ Because the NPT acknowledged



the *fact* of nuclear weapons' possession by the NWS, it is sometimes argued by those states that the treaty confers a *right* of possession. This is incorrect on the face of the treaty text itself, as well as on the intention of the vast majority of states joining the treaty which were giving up their sovereign right to develop nuclear weapons which they would otherwise have had at that time at least. As time has gone on, and there has been no progress on the disarmament pillar of the grand bargain, the non-possessor states have become increasingly concerned at what they perceive as the imbalance in the NPT. In large part, the move to negotiate the TPNW arose to address this imbalance.

This debate lies behind the formulation of Article 18. The last eight words were included as part of the compromise in the negotiations, as many states were concerned to ensure that the TPNW could not be read as bestowing any indefinite right of possession of nuclear weapons. Those states also wanted to ensure that this treaty was not to be treated as an inferior treaty to the NPT, but rather that it was complementary to the NPT. However, other states (including Sweden) expressed concerns that those eight words set this treaty higher than the NPT and that therefore there was a risk of undermining the NPT.

In my view, Article 18 as ultimately formulated does not pose a risk to the NPT (or any other nuclear weapons related treaty, including the CTBT) for several reasons. First, the treaty text as a whole can be seen as an effort to implement the NPT itself, in that it advances the law against nuclear weapons. This is explicitly mentioned in the preamble to the TPNW (preambular paragraph 18), which reaffirms the NPT as “the cornerstone of the nuclear disarmament and non-proliferation regime”. But it is also a point repeatedly made by negotiating states throughout the negotiation of the treaty. Thus, the text of the treaty and the clear intentions of the negotiating states is to strengthen and implement the NPT, not to disrupt or weaken it.

Second, the formulation of the last eight words is based on the earlier language of Article 26 of the Arms Trade Treaty 2013 (ATT) – a treaty that has attracted broad support (and Sweden is a State Party). The aim of Article 26 was to ensure that the ATT did not itself become undermined by any other agreements governing trade in conventional weapons. Its aim was not to disrupt or weaken other treaties, but simply to make it clear that the rules set out in the ATT should not be undermined by other treaties or agreements. Similarly, with the TPNW, Article 18 ensures that its absolute prohibition on nuclear weapons cannot be read down so as to condone or allow for any asserted right of possession of nuclear weapons arising from the NPT. It does not purport to weaken the NPT, it simply emphasises that its own provisions must not be read down.



FOOTNOTES:

1. See for example, Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document UN Doc. NPT/CONF.1995/32 (Part I), annex, Decision 3 (5 May 1995); Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, UN Doc. NPT/CONF.2000/28 (Parts I and II), 13-15 (19 May 2000); Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, UN Doc NPT-CONF.2010/50 (Vol I), 20 (18 June 2010).

2. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, para. 105(2)(f).

3. Although 183 states have signed the CTBT, and 166 of those have ratified the treaty, it is still not in force. This is because the treaty provides a list of 44 specific states which must ratify the treaty before it can legally enter into force. Eight of those states have not taken that step: China, North Korea, Egypt, India, Iran, Israel, Pakistan and the USA.

4. Sweden, Explanation of Vote, 7 July 2017.

5. It is also relevant to note here that the non-possessor states are subject to international verification procedures implemented by the International Atomic Energy Agency to ensure their compliance with their non-proliferation obligations. Today, four other states have nuclear weapons (Pakistan, India, Israel and North Korea).